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E. R. Hunt

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April 7, 1903





THE LAW GOVERNING PRIVATE CORPORATIONS IN OHIO

Including Commercial Corporations, Steam, Street and Traction Railroads, Fire, Life, Accident and Industrial Insurance, Trust Companies, Private Banking Companies, Savings, Loan and Building Associations, and every form of Private Corporation doing business in Ohio,

With Forms of Procedure for the Formation, Organization, Operation, Consolidation and Liquidation of Corporations.

By
EDWIN J. MARSHALL
(OF THE TOLEDO BAR)

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INTRODUCTION.

THE following pages are the result of an effort to present, in a concise and practical manner, all the law of Ohio relating to private corporations, and it is the hope of the writer that the book will be of use to the profession and others interested.

Notwithstanding the care given to this work and the desire to make it useful, it can not be assumed that it is free from faults and errors. It is a difficult matter to classify the cases bearing upon such conglomerate and illogical corporation laws as ours, especially when the work is destroyed by one or two sessions of the legislature.

The book is respectfully submitted to a profession that is inclined to be lenient and charitable toward anything that saves time.

E. J. MARSHALL.

TOLEDO, OHIO,

January 1st, 1903.

THE LAW GOVERNING PRIVATE CORPORATIONS IN OHIO.

PART I.

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§ 5. No assumption of debts by the state.
§ 6. Counties, cities, towns, or townships not authorized to become stockholders.
- Art. XIII, § 1. Corporate powers.
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Art. VIII. § 4. CREDIT OF STATE. THE STATE SHALL NOT BECOME JOINT OWNER OR STOCKHOLDER.—The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

See generally *Cincinnati, etc., R. R. Co. v. Commissioners*, 1 Oh. St. 77 (1852); *Stubeville, etc., R. R. Co. v. Trustees*, 1 Oh. St. 105 (1852); *Loomis v. Spencer*, 1 Oh. St. 153 (1853); *Cass v. Dillon*, 2 Oh. St. 607 (1853); *Thompson v. Kelly*, 2 Oh. St. 647 (1853); *State ex rel. v. Commissioners*, 6 Oh. St. 280 (1856); *State ex rel. v. Van Horne*, 7 Oh. St. 327 (1857); *State ex rel. v. Trustees*, 8 Oh. St. 394 (1858); *Weaver v. Cherry*, 8 Oh. St. 564 (1858); *State ex rel. v. Commissioners*, 11 Oh. St. 183 (1860); *State ex rel. v. Commissioners*, 12 Oh. St. 596 (1861); *Trustees v. Springfield, etc., R. R. Co.*, 12 Oh. St. 624 (1861); *Commissioners v. Nichols*, 14 Oh. St. 260 (1863); *Fosdick v. Perrysburg*, 14 Oh. St. 472 (1863); *Walker v. Cincinnati*, 21 Oh. St. 14 (1871).

§ 5. NO ASSUMPTION OF DEBTS BY THE STATE.—The state shall never assume the debts of any county, city, town, or township, or of any corporation whatever, unless such debt shall have been created to repel invasion, suppress insurrection, or defend the state in war.

See *Walker v. Cincinnati*, 21 Oh. St. 14. 52 (1871).

Corporations; Powers, formation, etc..

§ 6. COUNTIES, CITIES, TOWNS, OR TOWNSHIPS NOT AUTHORIZED TO BECOME STOCKHOLDERS. — The general assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association.

See generally *Taylor v. Commissioners*, 23 Oh. St. 22 (1872); *Walker v. Cincinnati*, 21 Oh. St. 14, 54, 55 (1871); *Cass v. Dillon*, 2 Oh. St. 608 (1853); *Fosdick v. Perrysburg*, 14 Oh. St. 472 (1863); *Thompson v. Kelly*, 2 Oh. St. 647 (1853); *Wyscaver v. Atkinson*, 37 Oh. St. 80 (1881); *Ætna Life Ins. Co. v. Pleasant Twp.*, 53 Fed. 214 (1893); *Pleasant Twp. v. Ætna Life Ins. Co.*, 138 U. S. 67 (1891).

Art. XIII. § 1. CORPORATE POWERS. — The general assembly shall pass no special act conferring corporate powers.

Scope of section.

No distinction can be made between private and municipal corporations, and the inhibition extends as well to the conferring of additional powers on an existing corporation as to the creation of a new one. — *State ex rel. v. Mitchell*, 31 Oh. St. 592, 607 (1877).

These sections are not retrospective.

The sections of the thirteenth article of the Constitution of 1851 are prospective, and not retrospective, in their intent and applications. — *Citizens' Bank v. Wright*, 6 Oh. St. 318 (1856); *State ex rel. v. Roosa*, 11 Oh. St. 16 (1860); *State ex rel. v. Trustees*, 8 Oh. St. 394 (1858).

Reorganization cannot be effected by special act.

See *Atkinson v. Marietta, etc.*, R. R. Co., 15 Oh. St. 21 (1864).

May authorize abandonment of power.

Permission to surrender powers does not come within the purview of this section. — *Pennsylvania, etc., Co. v. Commissioners*, 27 Oh. St. 14 (1875).

Ordinance authorizing an extension of a street-car line does not confer corporate authority.

Sims v. Street R. R. Co., 37 Oh. St. 556 (1882).

See generally *Vought v. Columbus, etc.*, R. R. Co., 58 Oh. St. 123 (1898); *State ex rel. v. Davis*, 23 Oh. St. 434 (1872); *State ex rel. v. Cincinnati*, 23 Oh. St. 445 (1872).

§ 2. CORPORATIONS — HOW FORMED. — Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.

Effect of article 1, § 2.

This section must be construed in connection with section 2, article 1, which provides that "no special privileges or immunities shall ever be granted that may not be altered or repealed." — *Shields v. State*, 26 Oh. St. 86, 94 (1875).

Exemption from control not presumed.

The rights of the public are never presumed to be surrendered. Where a corporation, incorporated before the adoption of the constitution of 1851, claims to be exempt from legislative control, this fact can never be presumed, but must appear affirmatively by the terms of the charter itself. — *Zanesville v. Zanesville Gas Light Co.*, 1 O. C. C. 123 (1885); *s. c.*, 1 C. D. 73.

What are general laws.

See *State ex rel. v. Sherman*, 22 Oh. St. 411 (1872).

Consolidated companies subject to this section.

Consolidated companies organized in pursuance of the general laws are subject to this section. — *Shields v. State*, 26 Oh. St. 86 (1875).

Power to regulate rates of fare.

Under this section the general assembly has power to alter and regulate rates of fare chargeable by common carrier companies. — *Shields v. State*, 26 Oh. St. 86 (1875).

See generally, as to power to alter or repeal, *Milan, etc., Road Co. v. Ilsted*, 3 Oh. St. 578, 583 (1854); *Bank of Toledo v. Bond*, 1 Oh. St. 622 (1853); *Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 30 Oh. St. 604 (1876); *State ex rel. v. Columbus Gas Co.*, 34 Oh. St. 572 (1878); *Zanesville v. Gas Light Co.*, 47 Oh. St. 1 (1889); *Harper v. Ampt*, 32 Oh. St. 291 (1877).

§ 3. DUES FROM CORPORATIONS. HOW SECURED. — Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock.

Corporations; Banking Powers.

Liability must be imposed in all cases.

The legislature has no power to create corporations without securing the individual liability of stockholders, at least to the minimum amount required by the constitution; and if the act of incorporation does not secure this, either by express provision or by requiring

from the corporation or stockholders such acts of organization or otherwise, as will subject them to the constitutional provision, the act will be unconstitutional and void.—*State ex rel. v. Sherman*, 22 Oh. St. 411 (1872).

See generally § 3258 et seq.

§ 4. CORPORATE PROPERTY SUBJECT TO TAXATION.—The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals.

See *Exchange Bank v. Hines*, 3 Oh. St. 1, 8 (1853); *Baker v. Cincinnati*, 11 Oh. St. 534, 540 (1860).

Power to surrender right to tax.

See *Milan, etc., Road Co. v. Husted*, 3 Oh. St. 578 (1854); *Debolt v. Ohio, etc., Trust Co.*, 1 Oh. St. 563 (1853); *Mechanics' Bank*

v. Debolt, 1 Oh. St. 591 (1853); *Knoup v. Piqua Bank*, 1 Oh. St. 603 (1853); *Bank of Toledo v. Bond*, 1 Oh. St. 622 (1853); *Matheny v. Golden*, 5 Oh. St. 361 (1856); *State ex rel. v. Moore*, 5 Oh. St. 444 (1856); *Ross County Bank v. Lewis*, 5 Oh. St. 447 (1856); *Piqua Bank v. Knoup*, 16 How. (U. S.) 369 (1854).

§ 5. RIGHT OF WAY.—No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

See § 3281 and § 6414 et seq.

§ 7. ASSOCIATIONS WITH BANKING POWERS.—No act of the general assembly, authorizing associations with banking powers, shall take effect until it shall be submitted to the people, at the general election next succeeding the passage thereof, and be approved by a majority of all the electors, voting at such election.

See generally *Forrest City, etc., Ass'n v. Gallagher*, 25 Oh. St. 208 (1874); *Dearborn v. Northwestern Savings Bank*, 42 Oh. St. 617

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§ 111. **BANKERS, ETC., NOT TO ACT AS NOTARIES.** — No banker, broker, cashier, director, teller, or clerk of any bank, banker or broker or other person holding any official relation to any bank, banker, or broker, shall be competent to act as notary public in any matter to which said bank, banker, or broker is in any way interested. (March 23, 1893, 90 v. 119; April 11, 1876, 73 v. 206.)

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See Bank v. Butler, 41 Oh. St. 519 (1885).

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§ 148a. FEES TO BE CHARGED BY SECRETARY OF STATE FOR OFFICIAL SERVICES. — The secretary of state shall hereafter charge and collect the following fees for official services:

1. For filing the articles of incorporation of any corporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one-tenth of one per cent. upon the authorized capital stock of such corporation.

2. For filing a certificate of increase of the capital stock of any corporation having a capital stock where the amount of the increase is ten thousand dollars or under, ten dollars; where the amount of increase is over ten thousand dollars, one-tenth of one per cent. upon the proposed amount of increased capital.

3. For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the secretary of state: Said articles of agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation, shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock, as is provided for by the articles or agreements of consolidation for the new consolidated corporation, created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation.

4. For filing the articles of incorporation of any mutual insurance corporation not having a capital stock, or of any other mutual corporation not organized strictly for benevolent or charitable purposes and having no capital stock, or of any corporation organized for any of the purposes mentioned in section three thousand six hundred and thirty of the Revised Statutes of Ohio, or in the sections supplementary thereto, twenty-five dollars, save and except as hereinafter provided.

5. For filing the articles of incorporation of corporations formed for religious, benevolent or literary purposes; or of such corporations as are not organized for profit, have no capital stock, and are not mutual in their character; or of religious or secret societies, or of societies or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, formed for the mutual protection and relief of the members thereof and their families exclusively, two dollars.

6. For filing the articles of incorporation of corporations formed for the purposes named in section three thousand eight hundred and thirty-three of the Revised Statutes, ten dollars; for filing a certificate of the increase of the capital stock of any such corporation, five dollars.

7. For filing a certificate of the reduction of the capital stock of any corporation, five dollars.

8. For filing a copy of the decree of court, changing the name of any corporation, five dollars.

9. For filing a certified copy of the acceptance by any corporation incorporated prior to the adoption of the present constitution, of any of the provisions of the Revised Statutes, five dollars.

10. For filing an amendment to the articles of incorporation of any corporation, twenty cents a hundred words, to be in no case less than five dollars.

11. For filing for a railroad company a certificate of extension of line, a certificate of change of termini, a certificate of the adoption or change of location, a certificate of the intention of the corporation to construct a branch line, or a certificate of change of route, twenty cents a hundred words, to be in no case less than five dollars.

12. For filing a certificate of the extension of purpose, or change of domicile, of any corporation, five dollars.

13. For filing other certificates not herein enumerated, except certificates of elec-

Foreign Corporations, § 148c.

tion, for filing which no charge shall be made, twenty cents a hundred words, to be in no case less than five dollars.

14. For filing the copy of papers evidencing the incorporation of any municipal corporation, the annexation of territory by any municipal corporation, or the advancement or reduction in grade of any municipal corporation, five dollars, to be paid by the corporation, the petitioners therefor, or their agent.

15. For filing the certificate of subscription required to be filed by section three thousand two hundred and forty-four of the Revised Statutes, two dollars.

16. For filing a name, or names or initials by manufacturers, bottlers and dealers in ginger ale, seltzer-water, soda-water, mineral water and other beverages, under the act of April 9, 1880 (77 O. L., 140), five dollars.

17. For making every certificate under the great seal of the state, one dollar.

18. For recording miscellaneous records, papers, or other documents, required by law to be recorded in the office of the secretary of state, twenty cents a hundred words.

19. For making copies of articles of incorporation, and for making copies in other cases, the fees provided for in original section one hundred and forty-eight of the Revised Statutes shall be charged; and all fees herein established shall be paid into the state treasury as provided in said original section; and the secretary of state shall neither file nor record any of the articles of incorporation, certificates or other papers hereinabove referred to, unless the fees for filing same are first duly paid. (February 12, 1889, 86 v. 33; March 14, 1888, 85 v. 80; May 15, 1886, 83 v. 165; March 18, 1884, 81 v. 52.)

Validity and application to consolidated companies.

Ashley v. Ryan, 49 Oh. St. 504 (1892); s. c., 153 U. S. 436.

§ 148c. FOREIGN CORPORATIONS.—Every foreign corporation, incorporated for purposes of profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, shall, within thirty days after the passage of this act, or, in case of a company hereafter coming into this state, then before it proceeds to do any business in this state, under the oath of the president, secretary, treasurer, superintendent or managing agent in this state of such corporation, make and file with the secretary of state, a statement, in such form as the secretary of state may prescribe, containing the following facts:

1. The number of shares of authorized capital stock of the company, and the par value of each share.

2. The name and location of the office or officers [offices] of the company in Ohio, and the name and address of the officers or agents of the company in charge of its business in Ohio.

3. The value of the property owned and used by the company in Ohio, where situate, and the value of the property of the company owned and used outside of Ohio.

4. The proportion of the capital stock of the company which is represented by property owned and used [and] by business transacted in Ohio.

From the facts thus reported, and any other facts coming to his knowledge bearing upon the question, the secretary of state shall determine the proportion of the capital stock of the company represented by its property and business in Ohio, and shall charge and collect from the company, for the privilege of exercising its franchises in Ohio, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation, represented by property owned and used and business transacted in Ohio, being the same fee required to be paid by corporations formed under the laws of Ohio. Upon the payment of the said amount, the secretary of state shall issue to the foreign corporation a certificate that such corporation has complied

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with the laws of Ohio, and is authorized to do business therein, stating the amount of its entire capital and the proportion of which is represented in Ohio. Provided, this section shall not apply to foreign insurance, banking, savings and loan, or building and loan companies, or to foreign, co-operative or investment companies organized to sell certificates or debentures on the installment or partial payment plan, or companies doing business on the service dividend plan, who have deposited with the treasurer of the state of Ohio security satisfactory to him of the value of not less than twenty-five thousand dollars, and who shall annually thereafter deposit securities equal in value to ten per cent. of the gross receipts on the amount of business done in Ohio for the preceding year, until the whole amount so deposited has reached the sum of one hundred thousand dollars, for the protection of the holders of said certificates or debentures, or to express, telegraph, telephone, railroad, sleeping car, transportation or other corporations engaged in Ohio in interstate commerce business; or to foreign corporations entirely non-resident, soliciting business, or making sales, in this state by correspondence or by traveling salesmen. Any foreign corporations shall have the right, on application, to be heard by the secretary of state, touching the matter of the determination of the proportion of its capital stock represented by property used and business done in Ohio. Any corporation aggrieved by the decision of the secretary of state, may, within ten days, appeal to the auditor of state, the treasurer of state and the attorney general, whose decision in the matter shall be final. Every foreign corporation subject to the provisions of this section which shall neglect or fail to comply with its requirements, shall be subject to a penalty of one thousand dollars, and an additional penalty of one thousand dollars [for] every month that it continues to transact any business in Ohio without complying with the requirements of this section, to be recovered by action in the name of the state, and on collection, paid into the state treasury to the credit of the general revenue fund. The attorney general, on the request of the secretary of state, shall institute such action in the court of common pleas of Franklin county, or in any county in which such corporation has an office or place of business, as he prefers. The governor and secretary of state, on good cause shown, may, in their discretion, remit the penalty, or any part thereof, prescribed in this section. No foreign corporations subject to the provisions of this section, shall maintain any action in this state upon any contract made by it in this state after the time fixed by this act for compliance by such corporation with its requirements, until it shall have complied with the requirements of this act, and procured the requisite certificate from the secretary of state. Every corporation which has filed its statement and paid the privilege tax under this section, and which thereafter shall increase the proportion of its capital stock, represented by property used and business done in Ohio, shall within thirty days after such increase, file an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent. upon the amount of its increase of its capital stock, represented by property owned or business done in Ohio. All fees collected by the secretary of state under this section shall be paid by him into the state treasury to the credit of the general revenue fund. Every corporation subject to the provisions of this section which complies with its requirements, shall not be subject to process of attachment under section 5521, Revised Statutes, or any law of Ohio, upon the ground that it is a foreign corporation or a non-resident of this state. "No person shall be required to list for taxation any share or shares of the capital stock of any corporation, whether domestic or foreign, the property of which is taxed in the name of such company in Ohio, nor shall any person be required to list

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for taxation any share or shares of the capital stock of any corporation, whether domestic or foreign, if satisfactory proof, when demanded, is furnished to the taxation authorities by the holder of such share or shares that two-thirds or more of the property of such corporation is taxed in Ohio and the remainder is taxed in some other state or states of the United States; provided, however, that this shall not apply to shares in any foreign corporation unless it shall, whether otherwise required by law to do so or not, pay annually for the privilege of exercising its franchise in Ohio, upon its entire authorized capital stock, the same percentage as is required by law on the subscribed or issued capital stock of domestic corporations for profit." (May 10, 1902, 95 v. 539; April 14, 1900, 94 v. 225; April 23, 1898, 93 v. 225; May 16, 1894, 91 v. 272.)

Exemption from attachment — constitutionality.

Puerring v. Carter-Crume Co., 16 O. C. C. 629 (1898); s. c., 9 C. D. 411.

§ 148d. **CERTIFICATE NECESSARY FOR FOREIGN STOCK CORPORATION, ETC.**—No foreign stock corporation, other than a banking or insurance corporation, or foreign building and loan associations, or foreign co-operative or investment companies, or foreign companies organized to sell certificates or debentures on the installment or partial payment plan, or foreign corporations doing business on the service dividend plan, who have deposited with treasurer of the state of Ohio securities satisfactory to him of the value of not less than twenty-five thousand dollars, and shall annually thereafter deposit securities to the satisfaction of said treasurer equal in value to ten per cent. of the gross receipts on the amount of business done in Ohio for the preceding year, until the whole amount so deposited has reached the sum of \$100,000, for the protection of the holders of such certificates or debentures, shall do business in this state without first having procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as can be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of the laws of this state. No such foreign stock corporations doing business in this state without such certificate, shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate. Before granting such certificate, the secretary of state shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal particularly setting forth the amount of capital stock, the business or objects of the corporation which it is engaged in carrying on, or which it proposes to engage in or carry on within the state, and a place within this state which is to be its principal place of business, and designating in the manner prescribed in the code of civil procedure in this state, a person upon whom process against such corporation may be served within this state. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within this state. Such designation shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against such corporation may be served in this state. Any agent so designated by such foreign corporation may, in the name and on behalf of such corpora-

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tion, bring or prosecute actions in any of the courts of this state in the same manner and with like effect as if done by an officer of such corporation. If the person so designated die or remove from the place where such corporation has its principal place of business within this state, and such corporation does not, within thirty days after such death or removal, designate in like manner another person upon whom process against it may be served within this state, the secretary of state shall revoke the authority of such corporation to do business within this state, and process against such corporation in actions upon any liability incurred within this state before such revocations, may after such death or removal, and before another designation is made, be served upon the secretary (of state). At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation, if its address or the address of any officer thereof is known to him. For each certificate thus issued by the secretary of state he shall be entitled to receive and shall be paid fees according to the amount of capital stock of each such corporation, as follows:

\$100,000 or less	\$15 00
More than \$100,000 and not exceeding \$300,000.....	20 00
More than \$300,000 and not exceeding \$500,000.....	25 00
More than \$500,000 and less than \$1,000,000.....	30 00
\$1,000,000 or more	50 00

Which fees and the several sums of two dollars above named are to be paid by him to treasurer of state to credit of general revenue fund. Provided that such foreign corporations as comply with the provisions of section 148c of the Revised Statutes, as amended May 16, 1894, shall not be subject to process of attachment under section 5521, Revised Statutes, or any law of Ohio, upon the ground, that it is a foreign corporation or non-resident of this state. If any person solicits, or transacts, within this state, any business for any such foreign corporation, until it shall have complied with all the provisions of this section, he shall be deemed guilty of a misdemeanor, and on conviction, shall be fined not less than ten dollars nor more than five hundred dollars, or be imprisoned not less than ten days nor more than six months, or both. It shall be the duty of the prosecuting attorney, upon direction of the attorney-general, to prosecute any person charged with a violation of the provisions of this section. (April 23, 1898, 93 v. 227; May 19, 1894, 91 v. 355; April 25, 1893, 90 v. 261.)

What are corporations.

In determining whether organizations are or are not corporations, the designation of them as joint stock associations or partnerships, by the statute of New York, under which they were created, and their classification as joint stock associations and partnerships by the courts of New York, are not conclusive, if they have all the properties, rights, attributes, privileges, immunities of corporations, they may be regarded as such. — *State v. United States Express Co.*, 1 N. P. 259 (1895): s. c., 2 N. P. 98 (1895); *Express Co. v. State*, 55 Oh. St. 69 (1896). See *State ex rel. v. Ackerman*, 51 Oh. St. 163, 197 (1894); *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 585 (1898).

Power of foreign corporations.

In the absence of statutes, there is nothing prohibiting a foreign corporation from doing business, suing and being sued, and exercising

all its general powers in this state. — *Newburg Petroleum Co. v. Weare*, 27 Oh. St. 343 (1875); *Hanna v. International Petroleum Co.*, 23 Oh. St. 622 (1873).

Rights obtained only through comity.

Foreign corporations can exercise none of their franchises or powers within this state, except by comity or legislative consent. That consent may be upon such terms and conditions as the general assembly under its legislative power may impose. — *Western Union Tel. Co. v. Mayer*, 28 Oh. St. 521 (1876); *State ex rel. v. W. U. M. Ins. Co.*, 47 Oh. St. 167 (1890).

Do not become Ohio corporations by doing business here.

A foreign railroad corporation, by merely leasing, possessing and operating in this state, the property of a domestic corporation, does not thereby become an Ohio corporation. — *Baltimore, etc., R. R. Co. v. Cary*, 28 Oh. St.

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208 (1876); *Railway v. Stringer*, 32 Oh. St. 468, 472 (1877).

Powers.

A corporation can have no greater power in a foreign state than it has in the state of its creation; it being always limited to the powers conferred in its charter from charging more than six per cent. interest, cannot charge more in a foreign state, although the law there permits a greater rate to be charged. — *Ewing v. Toledo Savings Bank*, 43 Oh. St. 31 (1885). See *Curtis v. Hutchinson*, 10 W. L. J. 134 (1852); *Ohio, etc., R. R. Co. v. Indianapolis, etc., R. R. Co.*, 5 A. L. Rep. 733 (1866).

Same subject — exception.

Where the charter of a foreign corporation denies it a power required by the policy of this state, its acts in this state must be governed by our policy, for instance, a New York corporation, though prohibited in New York, may in Ohio make an assignment for the benefit of creditors. — *Hall v. Ohio, etc., Iron Co.*, 24 W. L. B. 310 (1890).

Same subject — exception.

Where the charter powers of a corporation are general, and are broad enough to cover a certain act, a general law of the state creating the corporation restricting corporations in doing such acts will not affect it in other states; for instance, the power of a New York corporation to take lands by devise in Ohio is not affected by the New York statutes of wills. — *American Bible Society v. Marshall*, 15 Oh. St. 537 (1864).

Power to hold land.

A foreign corporation may hold land in this state when not forbidden by express legislation or the general policy of the law. — *State ex rel. v. Sherman*, 22 Oh. St. 411, 433 (1872); *American Bible Society v. Marshall*, 15 Oh. St. 537 (1864).

Power to sue and be sued.

In the absence of statute a foreign corporation has power in this state to sue and be sued. — *Hanna v. International Petroleum Co.*, 23 Oh. St. 622 (1873); *Lewis v. Bank of Kentucky*, 12 Oh. 132 (1843); *Mohr Distilling Co. v. Lamar Ins. Co.*, 7 W. L. B. 341 (1882).

Power to make assignment for benefit of creditors.

Hall v. Ohio, etc., Coal Co., 24 W. L. B. 310 (1890).

Preference by a foreign corporation.

A foreign corporation having no property in Ohio may prefer an Ohio creditor by transferring to him property out of the state. — *First Nat. Bank v. McKinney*, 16 O. C. C. 80 (1898); s. c., 9 C. D. 1.

Organization to evade our laws.

It is no defense to an action by a foreign corporation that it was organized in a foreign state to evade laws of this state governing

corporations. — *Newburg Petroleum Co. v. Weare*, 27 Oh. St. 343, 352 (1875). See *Second Nat. Bank v. Hall*, 35 Oh. St. 158, 167 (1878); s. c., 2 C. S. C. Rep. 397.

Are not citizens.

Corporations of other states are not citizens entitled to all the privileges and immunities of citizens in the several states within the meaning of the U. S. Constitution. — *Western Union Tel. Co. v. Mayer*, 28 Oh. St. 521 (1876).

Citizenship — removal of actions.

For the purpose of jurisdiction and removal, in such case, a company incorporated by, and doing business within, another state is to be regarded as a citizen of such other state. — *Shelby v. Hoffman*, 7 Oh. St. 450 (1857).

Constitutionality.

These acts are constitutional. — *Etna Iron, etc., Co. v. Taylor*, 3 N. P. 152; s. c., 4 Dec. 180; s. c., 13 O. C. C. 602 (1896); s. c., 5 C. D. 242.

Ouster by quo warranto.

When a foreign corporation doing business in this state is exercising its franchises in contravention of the laws thereof, it may be ousted therefrom by proceedings in quo warranto. — *State ex rel. v. W. U. M. Ins. Co.*, 47 Oh. St. 167 (1890); *State ex rel. v. Insurance Co.*, 49 Oh. St. 440 (1892).

Failure to comply with law.

To take advantage of the act as a defense in a suit instituted by a foreign corporation, the averments of the answer must bring such foreign corporation plainly within the provisions of it, and show that such foreign corporation does not belong to the class of foreign corporations exempted by the law from the provisions. — *Toledo Commercial Co. v. Glenn Mfg. Co.*, 11 O. C. C. 153 (1896); s. c., 5 C. D. 131; s. c., 55 Oh. St. 217; *Brady v. Palmer*, 19 O. C. C. 687; s. c., 10 C. D. 27 (1899); s. c., 8 C. D. 703; s. c. (Sup. Ct. 1901), 45 W. L. B. 176.

Penalty — effect on contract.

Where the penalty imposed by the statute is on the persons acting as agents, and the statute is silent as to the contract, it seems that the contract is good. — See *Union, etc., Ins. Co. v. McMillen*, 24 Oh. St. 67 (1893); *Manhattan Ins. Co. v. Ellis*, 32 Oh. St. 388 (1877).

Failure to comply — effect on contract.

A contract made by a foreign corporation, which had failed to comply with the act of 1893, was not void. — See *Fergus v. Columbus*, 6 N. P. 82 (1899); s. c., 8 Dec. 290.

Right of action merely suspended.

Where the statute provides that a foreign corporation failing to comply with the law shall not maintain an action at law until it has complied with the law, the remedy is

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merely suspended until such time as the certificate is procured. — *Simplex Dairy Co. v. Cole*, 86 Fed. 739 (1898); *Crefeld Miller v. Goddard*, 69 Fed. 141 (1895).

What is doing business.

Whether a foreign corporation is carrying on business in a state must be determined by what it has done, or is doing, rather than by what it may hereafter do, under powers reserved to it in existing contracts, but not yet exercised. For one person to supply the means to another to do business with or on is not the doing of business by the former. — *United States v. American Bell Telephone Co.*, 29 Fed. 17 (1886); s. c., 5 O. F. D. 558.

Need not commence business in its own state.

The legal existence of a foreign corporation cannot be questioned because it has done no business in its home state other than its organization. — *Hanna v. International Petroleum Co.*, 23 Oh. St. 622 (1873).

Failure to comply — no defense to prosecution for crime.

On the trial of an indictment for the embezzlement of moneys coming into the possession of the defendant as the agent of a foreign corporation, it is not a defense that the corporation had failed to file with the secretary of state the statement required by §§ 148c and 148d. — *State v. Pohlmeier*, 59 Oh. St. 491 (1898).

Corporations engaged in interstate commerce.

This law can only apply to such corporations as come within the jurisdiction of the state for the purpose of carrying on their business here; but a state cannot prohibit corporations from doing business in any other state in selling its products or wares in any manner that it chooses. — *Toledo Commercial Co. v. Glen Mfg. Co.*, 11 O. C. C. 153; s. c., 5 C. D. 131 (1896); s. c., 55 Oh. St. 217 (1896); *General Electric Co. v. Lima Electric Ry. Co.*, 4 N. P. 167 (1897); *Haldy v. Tomoor-Haldy Co.*, 3 N. P. 43 (1896); s. c., 4 Dec. 118; *Aultman, Miller Co. v. Holder*, 34 W. L. B. 92 (1895).

Inspection of books.

When a foreign corporation does business in this state its stockholders may obtain an inspection of its books by appropriate proceedings. — *State ex rel. v. Farmer*, 7 O. C. C. 429 (1892).

Waiver of right to remove actions to federal courts.

A statute which requires a foreign corporation, as a condition precedent to obtaining permission to do business here, to waive the right to remove causes to the federal courts, is repugnant to the constitution and laws of the United States, and the waiver is void. — *Railway v. Stringer*, 32 Oh. St. 468 (1877); *Baltimore, etc., R. R. Co. v. Cary*, 28 Oh. St. 208 (1876); *Railway Passenger, etc., Co. v.*

Pierce, 27 Oh. St. 155 (1875); *New York Ins. Co. v. Best*, 23 Oh. St. 105 (1872); *Thoms v. Greenwood*, 7 A. L. R. 320 (1878).

License to do business is not contract.

A license to a foreign corporation to do business in a state on the payment of a fee does not constitute a contract so as to prevent the state from adding another fee. — *Ætna Iron, etc., Co. v. Taylor*, 3 N. P. 152 (1896); s. c., 4 Dec. 180.

Privilege of doing business is not property.

See *Western Union Tel. Co. v. Mayer*, 28 Oh. St. 521 (1876).

Payment of fees under protest — remedy.

See *Ætna Iron, etc., Co. v. Taylor*, 3 N. P. 152 (1896).

License fee.

The fee of one-tenth of one per cent. on the capital stock covers the authorized capital stock, not merely the paid-up stock. — *Opinion of Attorney-General*, 32 W. L. B. 274 (1894). See *Ætna Iron, etc., Co. v. Taylor*, 3 N. P. 152; s. c., 4 Dec. 180; 13 O. C. C. 602 (1896); s. c., 5 C. D. 242.

Legal existence of foreign corporations.

A person dealing with a foreign corporation is estopped to deny its legal existence and right to do business. — *Newburg Petroleum Co. v. Weare*, 27 Oh. St. 343 (1875); *Second Nat. Bank v. Hall*, 35 Oh. St. 158 (1878).

Pleading.

A foreign corporation suing in the courts of this state is not required to set out in the petition the terms of its charter showing its capacity to maintain the action. — *Smith v. Weed Sewing Machine Co.*, 26 Oh. St. 562 (1875). See *Elektron Mfg. Co. v. Jones Bros. Co.*, 8 O. C. C. 311 (1894); s. c., 4 C. D. 555; *Brady v. National Supply Co.*, 45 W. L. B. 176 (1901).

Pleading.

When the charter, powers or franchises of a foreign corporation become the basis of an action in this state, they must be specially pleaded, and a pleading for that purpose which does not disclose the state by which nor the terms in which they were granted is bad on demurrer. — *Devoss v. Gray*, 22 Oh. St. 159 (1871). See *Lewis v. Bank of Kentucky*, 12 Oh. 132, 151 (1843); *Brady v. National Supply Co.*, 45 W. L. B. 176 (1901).

Pleading license to do business.

It is not necessary for a foreign corporation bringing suit to allege compliance with local laws. Want of compliance is a matter of defense. — *Brady v. Palmer*, 19 O. C. C. 687 (1899); s. c., 45 W. L. B. 176.

Proof of existence and powers.

The charter of a foreign corporation being a law of another state, can only be properly

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brought before the court by its introduction as evidence. When thus properly produced, being a written instrument, its construction will be for the court.—*James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 261, 266 (1858). See *Niagara Bank v. Baker*, 15 Oh. St. 68 (1864).

Voluntary appearance, what is.

A foreign corporation which cannot be served, and does not intend to become a party is not to be considered as making a voluntary appearance, so as to justify the court in making it a party to the record, merely because it assumes the defense of the suit for the actual defendant, pursuant to previous contract, and conducts the same by its own attorneys, and in part by witnesses who are under salary from it at the time of testifying; nevertheless the evidence may disclose conduct on the part of the foreign corporation that will estop it in subsequent litigation over the same matter.—*Bidwell v. Toledo Consolidated St. Ry. Co.*, 35 W. L. B. (Fed.) 196 (1896); s. c., 36 W. L. B. 94.

Appointment of agent.

An agent upon whom service can be made must be one actually appointed by or representing the corporation as a matter of fact, not one created by implication or construction, contrary to the intention of the parties.—*United States v. American Bell Telephone Co.*, 29 Fed. 17 (1886); s. c., 5 O. F. D. 558.

Managing agent.

The term managing agent implies the carrying on of the corporate business, or some substantial part thereof, by means of an agent who manages and conducts the same within the limits of the state, for and on account of the foreign corporation.—*United States v. American Bell Telephone Co.*, 29 Fed. 17 (1886); s. c., 5 O. F. D. 558.

Service of process.

While a strict compliance with the statutes will be required, a substantial compliance is necessary. The return must show the service to have been made upon the managing agent in and for this state. It is not sufficient to merely show service upon the defendant's agent.—*Fleckmyer Wheel Co. v. Commercial Wheel Co.*, 35 W. L. B. 358 (1896).

Service of process on managing agent.

A service upon "John Doe, agent of the Lamar Ins. Co., and the chief officer of its agency in the city of Cincinnati. No chief officer of said company found." is service upon its managing agent.—*Mohr Distilling Co. v. Lamar Ins. Co.*, 7 W. L. B. 341 (1882). See *American Express Co. v. Johnson*, 17 Oh. St. 641 (1867); *Barney v. New Albany, etc., R. R. Co.*, 1 Handy. 571 (1855); *Gibbin v. Kanawha Coal Co.*, 2 C. S. C. 75 (1870); *Wheeling, etc., Co. v. Baltimore, etc., R. R. Co.*, 1 C. S. C. 311 (1871).

Service of process.

Foreign corporations doing business in Ohio may be sued in the United States circuit courts by process served on the agent of such corporations in the state, and it is immaterial where the cause of action arose or the contract was executed, or that the plaintiff is not a citizen of Ohio.—*Mohr Distilling Co. v. Sundry Ins. Cos.*, 7 W. L. B. 335 (1882); *Runkle v. Lamar Ins. Co.*, 5 W. L. B. 217 (1880).

Service of process by mail.

See *Heart v. Lycoming Ins. Co.*, 26 Oh. St. 594 (1875); s. c., 2 A. L. R. 355. See *Mohr Distilling Co. v. Fireman's Ins. Co.*, 12 A. L. R. 168 (1883).

Judgments against foreign corporations.

Where a corporation chartered by the state of Indiana was allowed by a law of Ohio to transact business in the latter state upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation, a judgment against the corporation obtained by means of such process ought to have been received in Indiana with the same faith and credit that it was entitled to in Ohio.—*Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404 (1855).

Attachment, exemption from.

A corporation complying with the law is exempt from attachment.—See *Peurring Bros. v. Carter-Crume Co.*, 35 W. L. B. 2 (1896). See § 5521.

Attachment, jurisdiction.

See § 5030; *Rainey v. Jefferson Iron Works*, 8 O. C. C. 674 (1894); s. c., 4 C. D. 231.

Attachment of property, practice.

See *Valette v. Kentucky Trust Co.*, 2 Handy, 1 (1855).

What is a foreign corporation — attachment.

"Nonresident of the county" and "foreign corporation" are not equivalent terms so far as corporations are concerned in the justice of the peace attachment act. Foreign corporations only include corporations organized by other states.—*Boley v. Ohio, etc., Trust Co.*, 12 Oh. St. 139 (1861).

Attachment of stock.

The situs of stock being the domicile of the company, it cannot be reached by garnishment in a foreign state by service on the agent of the corporation and by publication for service on the nonresident owner of the stock.—*Ashley v. Quintard*, 41 W. L. B. 289 (1899).

Garnishment of foreign corporations.

A foreign corporation doing business in Ohio, and having a managing agent in the state, may, by virtue of §§ 5547 and 5534, be served with garnishee process, and held liable

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thereunder.—*Rainey v. Maas*, 28 W. L. B. 246 (1892); *Pennsylvania R. R. Co. v. Peoples*, 31 Oh. St. 537 (1877); *Roche v. Rainey*, 15 W. L. B. 333 (1886). See *Kelley Co. v. Garvin Machine Co.*, 6 N. P. 350 (1896); s. c., 4 Dec. 374; *Baltimore, etc., R. R. Co. v. May*, 25 Oh. St. 347 (1874).

Personal liability of stockholders of foreign corporations.

The obligations of the contract of the stockholders in a foreign corporation cannot be deemed to be impaired by the provision of a statute, enacted prior to the incorporation of such company, imposing the same personal liability upon stockholders in foreign corporations doing business in the state as upon stockholders in domestic corporations.—*Pinney v. Nelson*, 22 Sup. Court Rep. (U. S.) 52 (1901).

Laws applicable to foreign corporations.

When a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws, and the liabilities which those laws impose will attend the transaction of such business.—*Pinney v. Nelson*, 22 Sup. Court Rep. (U. S.) 52 (1901).

Taxation of shares in foreign corporations under old acts.

Hubbard v. Brush, 61 Oh. St. 252 (1899). See *Lee v. Sturges*, 46 Oh. St. 153 (1889); *Bradley v. Bauder*, 36 Oh. St. 28 (1880); *Worthington v. Sebastian*, 25 Oh. St. 1 (1874); *Sturges v. Carter*, 114 U. S. 511 (1884). See opinion of R. P. Rainey, 17 W. L. B. 14 (1887).

Taxation, choses in action.

Choses in action, whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this state and arise out of the corporate business transacted here, are subject to taxation under the provisions of section 2744 of the Revised Statutes.—*Hubbard v. Brush*, 61 Oh. St. 252 (1899).

Corporation created by two states.

A corporation created by concurrent legislation of two states, receiving from each the same charter in legal effect, has a legal domicile in each state, and may lawfully hold its meetings and transact its corporate business in either state.—*Covington, etc., Bridge Co. v. Mayor*, 31 Oh. St. 317 (1877). See *Ohio R. R. Co. v. Wheeler*, 1 Black (U. S.) 286 (1861); *Sebastian v. Covington Bridge Co.*, 21 Oh. St. 451 (1871).

Foreign railway companies.

See § 3399, notes.

Foreign building and loan associations.

See §§ 3836–12 et seq.

Certain corporations cannot do business in Ohio.

Foreign corporations having power to deal in stocks cannot do business in Ohio, and the secretary of state cannot issue a certificate of authority unless such powers are eliminated.—See opinion of Sheets, Attorney-General.

See generally paper by E. J. Marshall, 32 W. L. B. 166 (1894), and paper by F. E. Laughran, 34 W. L. B. 334 (1895).

Domestic corporation does not become a foreign corporation by doing business in a foreign state.

See *Lander v. Burke*, 65 Oh. St. 532 (1902).

An Act to Require Corporations to File Annual Reports with the Secretary of State and to Pay Annual Fees Therefor.

Be it enacted by the General Assembly of the State of Ohio:

§ 1. DOMESTIC CORPORATIONS, FOR PROFIT, REQUIRED TO FILE ANNUAL REPORT WITH SECRETARY OF STATE.—Every corporation organized under the laws of this state, for profit, shall make a report in writing to the secretary of state, annually, during the month of May, in such form as the secretary of state may prescribe, containing the following facts:

1. The name of the corporation.
2. The location of its principal office.
3. The names of the president, secretary, treasurer and members of the board of directors, with postoffice address of each.
4. The date of the annual election of officers of such corporation.
5. The amount of authorized capital stock and the par value of each share.
6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.
7. The nature and kind of business in which the company is engaged and its place or places of business.

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8. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice president, secretary, or general manager of the corporation, and forwarded to the secretary of state.

FEE TO BE PAID UPON FILING SUCH REPORT.— Upon the filing of such report, the secretary of state shall charge and collect from such corporation a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, and to be not less than ten dollars in any case. (April 11, 1902, 95 v. 124.)

§ 2. FOREIGN CORPORATIONS, FOR PROFIT, REQUIRED TO FILE ANNUAL REPORT WITH SECRETARY OF STATE.— Every foreign corporation for profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with the provisions of section 148c of the Revised Statutes of Ohio, shall, in addition to the statements required by section 148c and 148d, Revised Statutes of Ohio, make a report in writing to the secretary of state, annually, during the month of September, in such form as the secretary of state may prescribe, containing the following facts:

1. The name of the corporation and under the laws of what state or country organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state of Ohio.

8. The name and location of its office or offices in Ohio, and the name and address of the officers or agents of the company in charge of its business in Ohio.

9. The value of the property owned and used by the company in Ohio, where situated, and the value of the property owned and used outside of Ohio and where situated.

10. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice president, secretary, superintendent or managing agent in this state, and forwarded to the secretary of state.

FEE TO BE PAID UPON FILING SUCH REPORT.— Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the company represented by its property and business in Ohio, and shall charge and collect from such company, in addition to the initial fees provided for in sections 148c and 148d of the Revised Statutes of Ohio, for the privilege of exercising its franchises in Ohio, annually, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio, and to be not less than ten dollars in any case. (April 11, 1902, 95 v. 125.)

§ 3. DOMESTIC CORPORATIONS, NOT FOR PROFIT AND HAVING NO CAPITAL STOCK, REQUIRED TO FILE ANNUAL REPORT WITH SECRETARY OF STATE.— Every corporation organized under the laws of this state, not for profit, and having no capital stock, shall make a report in writing to the secretary of state,

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annually, during the month of December, in such form as the secretary of state may prescribe, containing the following facts:

1. The name of the corporation.
2. The location of its principal office.
3. The names of the president, secretary, treasurer and members of the board of trustees, or directors, with postoffice address of each.
4. The date of the annual election of such corporation.
5. The object or purpose which such corporation is engaged in carrying out.

Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice president, secretary or other chief officer of the corporation, and forwarded to the secretary of state.

FEE TO BE PAID UPON FILING SUCH REPORT.— Upon the filing of such report the secretary of state shall charge and collect the following fees: For all corporations organized for the purposes mentioned in section 148a, paragraph 4, of the Revised Statutes of Ohio, ten dollars; for all corporations organized for the purposes mentioned in section 148a, paragraph 5, one dollar. (April 11, 1902, 95 v. 126.)

§ 4. CERTIFICATE TO BE ISSUED BY SECRETARY OF STATE SHOWING COMPLIANCE WITH THIS ACT.— Upon the filing of the report and the payment of the fee provided for in the preceding sections of this act, the secretary of state shall make out and deliver to such corporation a certificate of the compliance by such corporation with the preceding sections and the payment of the annual fee therein provided for.

ALL FEES THUS COLLECTED TO BE PAID INTO THE STATE TREASURY; MONTHLY REPORT TO AUDITOR OF STATE.— The secretary of state shall make a report monthly to the auditor of state of the annual fees collected under this act, and shall pay the same into the state treasury to the credit of the general revenue fund. (April 11, 1902, 95 v. 126.)

§ 5. PENALTY FOR FAILURE TO MAKE REPORT OR PAY FEE; CORPORATIONS FOR PROFIT.— In case any corporation required to file the report and pay the fee prescribed in sections 1 and 2 of this act shall fail or neglect to make such report or pay such fee within the period prescribed in said sections, respectively, such corporation shall be subject to a penalty of five hundred dollars, and an additional penalty of one hundred dollars per day for each day's omission after the time limited in this act for filing such report and paying such fee. Such penalty and the annual fee or fees required to be paid by the provisions of sections 1 and 2 of this act may be recovered by an action in the name of the state, and on collection paid into the treasury to the credit of the general revenue fund.

The attorney general, on request of the secretary of state, shall institute such action in the court of common pleas of Franklin county, or of any county in the state in which such corporation has an office or place of business, as he prefers.

REMISSION OF PENALTY.— The governor, secretary of state and attorney general, upon good cause shown, may, in their discretion, remit the penalty on (or) any part thereof prescribed in this section.

PENALTY FOR FAILURE TO MAKE REPORT OR PAY FEE; CORPORATION NOT FOR PROFIT.— In case any corporation required to file the report and pay the fee prescribed in section 3 of this act shall fail or neglect to make such report or pay such fee for three months after the expiration of the time limited by this act, and such default is wilful and intentional, the attorney general shall, on the request of the secretary of state, bring an action in the court of common pleas of Franklin county, or of any county in this state in which such corporation is located, to forfeit

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and annul the charter of such corporation, and if such court is satisfied that such default is wilful and intentional, the court is authorized to revoke and annul such charter. (April 11, 1902, 95 v. 126.)

§ 6. **HEARING BY SECRETARY OF STATE AND APPEAL FROM DECISION THEREOF.**—Any corporation shall have the right to be heard by the secretary of state upon the matter of determination of the amount of fees due under the provisions of this act. Any corporation aggrieved by the decision of the secretary of state may, within ten days, appeal to the auditor of state, treasurer of state and the attorney general, whose decision in the matter shall be final. (April 11, 1902, 95 v. 127.)

§ 7. **CERTAIN CORPORATIONS EXCEPTED FROM THE PROVISIONS OF THIS ACT.**—Provided that electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the auditor of state, and insurance, fraternal beneficial, building and loan, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of the preceding sections of this act.

FIRST REPORT OF NEWLY ORGANIZED CORPORATION; WHEN TO BE FILED.—Provided further, that a corporation shall not be required to file its first annual report under this act until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state. (April 11, 1902, 95 v. 127.)

§ 8. **CERTIFICATE OF DISSOLUTION, REVOCATION OF CHARTER OR ABANDONMENT TO BE FILED WITH SECRETARY OF STATE.**—Every domestic corporation, in case of dissolution, revocation of charter or abandonment of its corporate purposes, shall file with the secretary of state a certificate of such dissolution, revocation of charter or abandonment; in case of dissolution or abandonment by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation; in case of dissolution, or revocation of charter by action of a competent court, such certificate shall be signed by the clerk of the court entering the decree of dissolution or revocation. The fees for making and filing such certificate with the secretary of state shall be taxed in the costs in favor of the party paying the same, and shall have the same priority as other costs in the dissolution proceedings.

FOREIGN CORPORATION RETIRING FROM STATE SHALL FILE CERTIFICATE TO THAT EFFECT.—Every foreign corporation when it shall retire from business in this state is hereby required to file with the secretary of state a certificate to that effect, signed by the president and secretary of the corporation.

FEES FOR FILING SUCH CERTIFICATES.—The fee for filing certificates of dissolution, revocation of charter, abandonment, or retirement of corporations, for profit, shall be five dollars; for filing such certificates of corporations, not for profit, one dollar.

SURRENDER OF CHARTER OF CORPORATION NOT IN ACTIVE EXISTENCE AT TIME OF PASSAGE OF THIS ACT.—Provided, that the charter of a corporation which is shown to have been no longer in active existence at the time of the passage of this act, may be surrendered on the payment of one dollar, on proof as otherwise provided by law.

MERE RETIREMENT FROM BUSINESS, ETC., DOES NOT EXEMPT.—The mere retirement from business or voluntary dissolution of a domestic or foreign

Commissioner of Railroads and Telegraphs, §§ 245-247.

corporation without having filed the certificate provided for in this section, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of this act. (April 11, 1902, 95 v. 127.)

§ 8. This act shall take effect and be in force from and after its passage. (April 11, 1902, 95 v. 127.)

Note: This act is the so called "Willis Law."

Constitutionality.

See Southern Gum Co. v. Laylin, 47 W. L. B. 617 (1902).

COMMISSIONER OF RAILROADS AND TELEGRAPHS.

§ 245. **HOW APPOINTED, AND TERM; WHO ELIGIBLE.**—A commissioner of railroads and telegraphs shall be appointed by the governor, by and with the advice and consent of the senate; and he shall hold his office for two years: no person is eligible to the office who is an officer or employe of a railroad company, or who owns or is interested in the stock or bonds of a railroad company. (April 5, 1867, 64 v. 111, § 1; S. & S. 76.)

For an act authorizing the governor, auditor of state, attorney-general, railroad commissioner, and state librarian, to sell property deeded by Albert A. Bliss and wife to the state of Ohio by deed bearing date February 19, 1852, see 81 v. 175.

For an act to authorize the issue of bonds to meet deficiencies in the general revenue fund, see 83 v. 154.

Must enforce act against having inexperienced employees, see § 3365-13.

To enforce an act entitled "to regulate the height of bridges, etc., overhead roadways, etc., over railroad tracks," see § 3337-18.

To require trains to equip with automatic couplers and air brakes, see § 3365-23 et seq.

To enforce act limiting number of hours of service on railroad, see § 3365-14 et seq.

To compel introduction of fire extinguishers on passenger trains, see § 3354-2 et seq.

Appliances for blocking of railway frogs, etc., to be approved by, see § 3365-18.

Report of number and class of cars equipped with automatic couplers and air brakes, etc., to, every six months until January 1, 1900; commissioner to furnish blanks for same, see § 3365-23a.

Duty as to construction of over-head wires over line of steam railroad, see §§ 3365-28, 3365-29.

Employment of counsel, see § 202.

§ 246. **HIS BOND, AND OATH OF OFFICE.**—The commissioner, before entering upon the discharge of his duties, shall give bond to the state in the sum of five thousand dollars, with two or more sureties, to the acceptance of the governor, conditioned for the faithful performance of his duties; which bond, with his oath of office and the approval of the governor indorsed thereon, shall be deposited with the secretary of state. (April 5, 1867, 64 v. 111, § 2; S. & S. 76.)

§ 247. **DUTY TO EXAMINE TRACKS, BRIDGES, ETC., SUPPOSED TO BE DANGEROUS; SHALL PRESCRIBE RATE OF SPEED FOR PASSING OVER SAME, OR WHOLLY STOP THE TRAINS FROM PASSING OVER SAME; PUNISHMENT OF OFFICERS AND OTHERS FOR DISOBEYING HIS ORDERS, AND PENALTY AGAINST COMPANY.**—When the commissioner has reasonable grounds to believe, either on complaint or otherwise, that any of the tracks, bridges, or other structures of any railroad in this state are in a condition which renders them, or any of them, dangerous, or unfit for the transportation of passengers, he shall forthwith inspect and examine the same; and if, on such examination by himself or his agent, he is of opinion that any of such tracks, bridges, or other structures are unfit for the transportation of passengers with safety, he shall immediately give to the superintendent, or other executive officer of the company operating such road, notice of the condition thereof, and of the repairs or reconstruction necessary to place the same in a safe condition; and he may also prescribe the rate of speed for trains passing over such dangerous or defective track, bridge, or other structure, until the repairs or reconstructions required are made, and the time within which such repairs or reconstruction must be made; or if, in his opinion, it is needful and proper, he may forbid the running of passenger trains over such defective track, bridge, or other structure:

Commissioner of Railroads and Telegraphs, §§ 247a, 247b.

and if a superintendent or other executive officer receiving such notice and order neglects for two days after receiving the same to direct the proper subordinate officers to run the passenger trains over such defective track, bridge, or other structure, at a speed not greater than that so prescribed, or if the running of passenger trains is so forbidden, then to stop running passenger trains over the same; or if any engineer, conductor, or other employe knowingly disobeys such order, every superintendent, officer, engineer, conductor, or employe, so offending, shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the jail for any period not exceeding one year, or both, at the discretion of the court; and the company operating such road, if it neglects or without good cause fails to make the repairs or reconstruction prescribed by the commissioner within the time by him limited, shall for each day that such repair or reconstruction is delayed beyond the time prescribed, forfeit and pay to the state the sum of one hundred dollars. (April 5, 1867, 64 v. 111, § 6; S. & S. 77.)

See § 1 of "an act for the protection of railroad employees," § 3365-18.

§ 247a. **GATES, BELLS, DEVICES OR FLAGMEN AT CROSSINGS.**—When, in the opinion of the commissioner of railroads, the public safety requires that a gate or gates, automatic alarm bell, or other mechanical device be erected and maintained at any place where a public road or street is crossed at the same level by any railroad, and which crossing has been declared by said commissioner to be a dangerous one, or that a flagman be stationed and maintained at such dangerous crossing, he shall give the superintendent, manager or other officer in charge of such railroad, a written notice that the same is required, and such company, person or corporation owning or operating such railroad shall erect or station the same within such time thereafter as said commissioner shall prescribe. Any company, person or corporation neglecting or refusing to erect or maintain such gate or gates, automatic alarm bell, or other mechanical device, or to maintain such flagmen, when so required as aforesaid, shall forfeit and pay to the state, for every such neglect or refusal, the sum of one hundred dollars, and the further sum of ten dollars for every day while such neglect or refusal shall continue. (April 15, 1889, 86 v. 367; May 19, 1894, 91 v. 353.)

Power of city to order gates and watchmen.

In the absence of special statute a city has no power, by ordinance, to compel a railroad company to maintain, at a street crossing within the corporate limits, a watchman to protect travelers along a highway.—*Ravenna v. Pennsylvania Co.*, 45 Oh. St. 118 (1887).

Duty of company to maintain gates.

Where crossings are dangerous it is the duty of the company to maintain gates and watchmen.—*Railway Co. v. Schneider*, 45 Oh. St. 678 (1888); *Lake Shore, etc., Ry. Co. v. Gaffney*, 9 O. C. C. 32 (1894); s. c., 6 C. D.

94; *New York, etc., Ry. Co. v. Swartout*, 14 O. C. C. 582 (1895); s. c., 6 C. D. 768; *Railway Co. v. Reiss*, 13 O. C. C. 405 (1889); s. c., 7 C. D. 450.

Duty of gatemen.

See *Railway Co. v. Schneider*, 45 Oh. St. 678 (1888); *Toledo, etc., Ry. Co. v. Fuller*, 17 O. C. C. 562 (1894); s. c., 9 C. D. 123; *Lake Shore, etc., Ry. Co. v. Geiger*, 8 O. C. C. 41 (1893); s. c., 8 C. D. 307.

Defective gates.

See *Baltimore, etc., R. R. Co. v. Anderson*, 37 W. L. B. 54 (1896).

§ 247b. **REGULATIONS AS TO SUCH GATES, BELLS, DEVICES OR FLAGMEN.**—All gates, bells or devices, which by the provisions of this act are under the direction of the commissioner of railroads, shall be built in such a manner, and within such a time, and of such material as shall be approved by the commissioner of railroads, and shall be located on the highway or street, on one or both sides of the railroad track or tracks as the commissioner may deem the public safety to require, and shall be so constructed as, when closed, to obstruct and prevent any passage across such railroad or railroads from the side on which the gate may be located; or said bell shall be made to ring before the approach of each and every train of cars or of a locomotive within three hundred feet of such crossing, or more, according to the speed of the train, and continue to ring until the train of cars or the locomotive shall have reached the crossing. There shall be a person in charge of every such gate and

Commissioner of Railroads and Telegraphs, §§ 247c-247d.

it shall be his duty to close the same at the approach of every train of cars, or of a locomotive, and to keep it open at all other times. In case an automatic alarm-bell, or other mechanical device shall be required at any such crossing, it shall be the duty of the railroad company at all times to keep such bell or device in good working order. For every neglect of such duty such person or railroad company, upon conviction thereof, shall pay the sum of twenty-five dollars. When more than one railroad crosses a public highway or street at such dangerous crossing, the expense incurred in the erection and maintenance of gates, bells or device provided for in this section, and of the necessary gate-keepers, or of a flagman, shall be shared equally by the railroad companies alongside whose tracks the gates, bells or device shall be located. Provided that an automatic alarm-bell, or other mechanical device as provided for in this and the preceding section, shall not be erected within the limits of any city of the first class or of any city of the first, second, third, and fourth grades of the second class, upon the order of the commissioner of railroads and telegraphs; but nothing herein contained shall prohibit any railroad company from using such automatic alarm-bell or other mechanical device, if it desire, at any public railroad crossing not declared dangerous by said commissioner of railroads and telegraphs; and provided further, that where a gate or gates, has or have been erected, and is or are maintained by the railroad company, or where a flagman has been stationed and is maintained by the railroad company, shall not be abandoned, and any automatic alarm-bell or other mechanical devices be substituted therefor. (April 15, 1889, 86 v. 367; May 19, 1894, 91 v. 353.)

See *Lake Shore, etc., Ry. Co. v. Cleveland, etc., Ry. Co.*, 5 N. P. 83 (1895).

§ 247c. **GATES OR FLAGMEN AT DANGEROUS CROSSINGS IN HAMILTON; DUTY OF PROSECUTING ATTORNEY.**—When, in the opinion of the city council of any city of the third grade or of the second class, the public safety requires that a gate or gates be erected and maintained at any place where a public road or street is crossed in said city at the same level by any railroad, and which crossing has been declared by said council to be a dangerous one, or that a flagman be stationed and maintained at such dangerous crossing, council shall give the superintendent, manager or other officer in charge of such railroad, a written notice that the same is required, and such company, person or corporation owning or operating such railroad shall erect or station the same within such time thereafter as council may prescribe. After said notice has been given to the superintendent, manager or other officer in charge of such railroad that the same is required, such railroad company and said council shall agree as to whether said crossing so declared to be dangerous shall be protected by a gate or gates, or a flagman; and if they fail to come to any agreement within ten days, then the question shall be submitted to arbitrators, the council selecting one person, the railroad company one; the two thus selected shall choose a third. The arbitrators thus selected shall decide whether said dangerous crossing shall be protected by a gate or gates, or a flagman, and their decision shall be final. Any company, person or corporation neglecting or refusing to erect or maintain such gate or gates, or to maintain such flagman when so required as aforesaid, shall forfeit and pay to the state for every such neglect or refusal the sum of one hundred dollars, and the further sum of ten dollars for every day while such neglect or refusal shall continue. Provided further, that nothing herein contained shall be construed as conflicting with section 247a. (May 19, 1894, 91 v. 350.)

§ 2. It is hereby made the duty of the prosecuting attorney of the proper county, upon being advised of the violation of this act, to immediately commence civil action against said company, person or corporation in the name of the state for the recovery of the forfeitures and penalties imposed in this act. (May 19, 1894, 91 v. 350.)

§ 247d. **HOW RAILROADS CAN CROSS EACH OTHER OR A STREAM WITHOUT STOPPING; DISCONTINUANCE.**—When in case two or more railroads or a railroad and an electric railroad crossing each other at a common grade, or any rail-

Commissioner of Railroads and Telegraphs, §§ 247e-247f.

road crossing a stream by a swing or draw-bridge shall, by a system of interlocking, or by other works or fixtures, to be erected by them, or either of them, render it safe for engines or trains to pass over such crossing, or bridge, without stopping, and such system of interlocking works or fixtures shall first be approved by the commissioner of railroads and telegraphs, and a plan of such interlocking works or fixtures, for such crossing or bridge, designating the plan of crossing shall have been filed with such commissioner, then and in that case, it is hereby made lawful for the engines and trains of such railroad or railroads, to pass over such crossing or bridge without stopping, any law, or the provisions of any law, now in force to the contrary notwithstanding, and all such other provisions of law contrary thereto are hereby declared not to be applicable in such case; provided, that the said commissioner shall have and is hereby given power in case such interlocking system or other fixtures, shall, in his judgment, prove to be unsafe or impracticable, to order the same discontinued, opportunity first being given the person or company operating the same to be heard before said commissioner as to the propriety of such order. In case such order is made and enforced, the existing statutes relative to stopping at crossings shall apply until such time as a device approved by said commissioner is substituted. (April 27, 1896, 92 v. 315.)

See § 3333 et seq.

§ 247e. PETITION FOR SAFETY DEVICES AND PROCEDURE THEREON.—In case where the tracks of two or more railroads, or the tracks of a railroad and an electric railroad cross each other at a common grade in this state, any company owning any one of such tracks, whose managers may desire to unite with others in protecting such crossing with interlocking, or other safety devices, and shall be unable to agree with such others on the matter, may file with the said commissioner a petition stating the facts of the situation and asking said commissioner to order such crossing to be protected by interlocking, or other safety devices; said petition shall be accompanied by a plan showing the location of all tracks and switches, and upon the filing thereof notice shall be given to each company or persons owning or operating any track involved in such crossing, and the said commissioner shall thereupon view the site of such crossing and shall, as soon as practicable, appoint a time and place for the hearing of such petition. At the time and place named for hearing, unless the hearing is for good cause continued, said commissioner shall proceed to try the question of whether or not the crossing shall be protected by interlocking or other safety devices, and shall give all companies and parties interested an opportunity to be fully heard; and after such hearing said commissioner shall enter an order upon a record-book, or docket, to be kept for the purpose, granting or denying such petition; and in case the same is granted, such order shall prescribe the interlocking or other safety devices for such crossing and all other matters which may be deemed proper to the efficient protection of such crossing, and in such order the commissioner shall designate the proportion of the cost of the construction of such plant, and the expense of maintaining and operating the same, which each of the companies or persons concerned shall pay, and shall also fix the time within which such appliance shall be put in, such time, however, not to exceed ninety days from the making of such order. (April 27, 1896, 92 v. 315.)

§ 247f. COMPULSORY INTERLOCKING.—In case, however, one railroad company or an electric railroad company shall hereafter seek to cross at grade with its track, or tracks, the track, or tracks, of another railroad, the railroad company, or the electric railroad company, seeking to cross at grade shall be compelled to provide interlocking or other safety devices put in to the satisfaction of the said commissioner of railroads to protect such crossing, and to pay all costs of such appliance, together with the expense of putting them in. The future maintenance and operation thereof shall be equally apportioned between the two or more roads by the said commis-

Commissioner of Railroads and Telegraphs, §§ 247g-250-1.

sioner of railroads and telegraphs; provided this act shall not apply to crossings of side tracks only. (April 27, 1896, 92 v. 315; April 25, 1898, 93 v. 334.)

§ 247g. **CROSSING WITHOUT STOPPING.**—Whenever interlocking or other safety devices are constructed and maintained in compliance with sections 2 or 3 (§§ 247e, 247f) of this act then and in that case it shall be lawful for the engines and trains of such railroad or railroads and the cars of such electric railroad to pass over said crossing without stopping, any law or the provisions of any law, now in force to the contrary notwithstanding; and all such other provisions of law contrary thereto are hereby declared not to be applicable in such case. (April 27, 1896, 92 v. 315.)

§ 247h. **PENALTY FOR NON-COMPLIANCE WITH ORDER.**—Any person, company or corporation refusing or neglecting to comply with any order made by the said commissioner of railroads and telegraphs in pursuance of this act shall forfeit and pay a penalty of five hundred dollars per week for each week of such refusal and neglect, the same to be recovered in an action of debt in the name of the state of Ohio, and to be paid, when collected, unto the county treasurer of any county in which such suit may be tried. (April 27, 1896, 92 v. 315.)

§ 248. **SHALL EXAMINE INTO ALLEGED VIOLATIONS OF LAW BY RAILROADS, ITS OFFICERS, AGENTS OR EMPLOYES.**—When the commissioner, upon complaint, or otherwise, has reason to believe that any railroad company, or any officer, agent, or employe of any railroad company, has violated, or is violating, any of the laws of the state, he shall examine into the matter. (April 15, 1867, 64 v. 111, § 5; S. & S. 76.)

§ 248a. **DUTY OF COMMISSIONERS OF RAILROADS AS TO DIFFERENCE BETWEEN CITIZENS AND COMMON CARRIERS.**—When the commissioner, on complaint or otherwise, has reason to believe that differences have arisen between citizens of the state and any corporation operating as a common carrier, within the state, he shall examine into the matter, and shall report his findings to the general assembly, if in session, otherwise to the governor. (May 18, 1886, 83 v. 206.)

§ 249. **OFFICE IN THE STATE HOUSE; MAY APPOINT A CLERK; POWERS AND DUTIES OF THE CLERK.**—The office of the commissioner shall be in the state house; and he may appoint a clerk, which appointment must be evidenced by the certificate of the commissioner: the clerk shall discharge such duties as are assigned to him by the commissioner, and he may issue subpoenas for witnesses and administer oaths in all matters pertaining to the duties of the office of commissioner. (April 8, 1871, 68 v. 55, § 3; S. & S. 80.)

§ 250. **COMMISSIONER MAY PASS FREE OVER ALL RAILROADS.**—The commissioner shall have the right of passing, in the performance of his duties, on all the railroads within the state, and upon all trains, and any part thereof, free of charge. (April 5, 1867, 64 v. 111, § 4; S. & S. 76.)

§ 250-1. **ADDITIONAL STATEMENTS, ETC., REQUIRED OF RAILROAD AND TELEGRAPH COMPANIES.**—Every railroad company and telegraph company incorporated or doing business in this state, or which shall hereafter become incorporated and do business under any general law in this state, shall, in addition to the reports already required by law, on or before the first day of September in each year, make and transmit to the commissioner of railroads and telegraphs a full and true statement under oath of the proper officers of said corporation, of the affairs of the said corporation as the same existed on the thirtieth day of the preceding June. Such statement shall be in the form and manner as may be prescribed by the said commissioner of railroads and telegraphs. The commissioner shall prepare and furnish each railroad company, or to each organization having one or more railroads in charge,

Commissioner of Railroads and Telegraphs, §§ 250-2-251.

and to each telegraph company or general manager thereof in the state, blank forms for making the report required herein, and the said commissioner may at any time make and propound to such railroad companies any additional interrogatories which to him may seem necessary. When any report is defective, or appears to be erroneous, the said commissioner shall notify the corporation to amend the same in the matter or matters named and make return of the same within fifteen days. Every railroad corporation shall, within a reasonable time after their road shall be constructed, and at any other time when required by said commissioner, cause to be made a map and profile thereof and file the same with the commissioner; every such map shall be drawn on a scale and certified and signed by the president or engineer of such corporation. Every railroad company and telegraph company shall make out under oath and file with said commissioner of railroads and telegraphs, on or before the first day of September of each year, a true list of the names of each and every stockholder, giving the number of shares owned by such stockholder, together with his post-office address. (April 19, 1894, 91 v. 154.)

§ 250-2. **EXPENSE TO BE BORNE BY RAILROADS.**—For the purpose of maintaining the department of commissioner of railroads and telegraphs, and expenses incident to the same, and for the purpose of exercising police duties and supervision of railroads and telegraphs of the state in the interest of public safety, the annual total expenses of said commissioner of railroads and telegraphs, including the salary of said commissioner, clerk, inspector, engineer, experts and additional clerical force, and other expenses incident to said office and officer, not exceeding the sum of \$15,000, shall be borne by the several corporations owning or operating railroads within this state, according to their means, to be apportioned by the state board of equalization, who shall, on or before the first day in each year, assess upon each of said corporations its just proportion of said expenses in proportion to its gross earnings from operations for the next year preceding that in which the assessment is made. Such assessment so made by the state board of equalization shall, forthwith, be certified to the several railroad companies by the auditor of state, and on or before the next following first day of August in each year the said railroad companies shall pay the amount of the assessment so apportioned to them by the auditor of state, who shall cover the same into the state treasury as a special fund for the maintenance of the said office of commissioner of railroads and telegraphs, and expenses incident thereto. (April 19, 1894, 91 v. 154.)

§ 250-3. **PENALTY.**—That any railroad company or telegraph company violating any of the provisions of this act, shall forfeit and pay to the state of Ohio the sum of \$1,000, and \$25 per diem for every day that said company refuses, neglects or fails to comply with the requirements of this act, which forfeiture and fine shall not release said company from the assessments herein provided. (April 19, 1894, 91 v. 154.)

§ 251. **ANNUAL REPORTS OF RAILROAD COMPANIES; WHEN TO BE MADE; WHAT TO CONTAIN; CASUALTIES AND OTHER INFORMATION REQUIRED BY THE COMMISSIONER; REASON FOR FAILURE TO REPORT ANY ITEM, TO BE GIVEN.**—The president, or other officer in charge of any railroad, situate in whole or in part within the state, shall, on or before the first day of September, in each year, make and file in the office of the commissioner a report, verified by the oath of such officer, for the year ending on the thirtieth day of June preceding, which report shall state:

AS TO STOCK AND DEBT.

1. The amount of capital stock subscribed;
 2. The amount of capital stock paid in;
 3. The amount of funded debt;
 4. The amount of floating debt;
- Total amount of paid in stock and debt:

 Commissioner of Railroads and Telegraphs, § 251.

COST OF ROAD AND EQUIPMENT.

5. Cost of right of way;
6. Cost of construction;
7. Amount of all other items embraced in cost of road;
8. Cost of equipment;
- Total cost of road and equipment:

CHARACTERISTICS OF THE ROAD, ETC.

9. Length of main line, single track, laid with rail;
10. Length of branches, single track, laid with rail;
11. Length of double track, main line and branches;
12. Aggregate length of sidings and other tracks, not enumerated above;
Total length of rail computed as single track:
13. The maximum grade, with its length in main road, and also in branches;
14. The shortest radius of curvature, with length of curve in main road, and also in branches;
15. Total degrees of curvature in main road, and also in branches;
16. Total length of straight line in main road, and also in branches;
17. Number of wood bridges, and aggregate length;
18. Number of iron bridges, and aggregate length;
19. Number of stone bridges, and aggregate length;
20. The greatest age of wood bridges;
21. Number of wood trestles, and aggregate length;
22. The greatest age of wood trestle;
23. Number and kind of tunnels, and aggregate length;
24. Length of fence required to inclose road, both sides, and reasons why not completed;
25. Number of engines;
26. Number of express and baggage cars;
27. Number of passenger cars;
28. Number of freight cars;
29. Number of other cars;
30. The highest rate of speed allowed by express passenger trains;
31. The highest rate of speed allowed by mail and accommodation trains;
32. The highest rate of speed allowed by freight trains;
33. The rate of fare for passengers charged for the respective classes per mile;
34. The highest rate per ton per mile charged for the transportation of the various classes of freight, through and local.

DOINGS OF THE YEAR.

35. Length of new rail laid;
36. Length of re-rolled rail laid;
37. Number and kind of bridges built, and length;
38. Number of miles run by passenger trains;
39. Number of miles run by freight trains;
40. Number and kind of farm animals killed, and amount of damages paid therefor;
41. Number of passengers (all classes) carried;
42. Number of passengers carried one mile;
43. Number of tons of local freight carried;
44. Number of tons of through freight carried;
45. Total movement of freight, or number of tons carried one mile:

EARNINGS FOR THE YEAR.

46. From transportation of passengers;
47. From transportation of freight;

Commissioner of Railroads and Telegraphs, §§ 252-255.

48. From mail and express service;
 49. From all other sources;
 Total earnings for the year:

EXPENDITURES FOR THE YEAR.

50. For construction and new equipment;
 51. For maintenance of way and structures;
 52. For maintaining and operating motive power and cars;
 53. For transportation expenses, including those of stations and trains;
 54. For interest on bonds and other indebtedness;
 55. For dividends, stating rate per cent.;
 56. All other expenditures for management of road, and for other purposes;
 Total expenditures during the year:
 57. All casualties resulting in injuries to persons, giving the extent and causes of each, and such other and further information as may be required by the commissioner; but if any company is unable to furnish such required information, the reasons of such inability shall be given. (May 13, 1868, 65 v. 183, § 9; S. & S. 78.)

See *Cleveland, etc., Ry. Co. v. Ullam*, 20 O. C. C. 512 (1898).
 The act of 86 v. 151 requiring railroad companies to pay a fee of one dollar per mile is unconstitutional, see *Railway v. State*, 49 Oh. St. 189 (1892).

§ 252. **THE COMMISSIONER SHALL FURNISH TO RAILROAD AND TELEGRAPH COMPANIES BLANKS FOR REPORTS.**—The commissioner shall prepare and furnish to each railroad company, or to each organization having one or more railroads in charge, and to each telegraph company or chief manager thereof in the state, or having lines in the state, blank forms for making the reports required by this chapter, which blanks may be so prepared by the commissioner as to obtain the information required by the foregoing inquiries more in detail, or omit such of a historical or permanent character as may have been given in previous reports. (May 13, 1868, 65 v. 183, § 9.)

§ 253. **PENALTY AGAINST OFFICER OF RAILROAD FOR FAILURE TO REPORT.**—A president or other officer in charge of a railroad, whether doing business or in course of construction, who refuses or neglects to make and furnish the report at the time prescribed in section two hundred and fifty-one, or any report required by the commissioner, shall forfeit and pay a sum not exceeding one thousand dollars; and he shall be subject to a like penalty for every period of thirty days thereafter he so refuses or neglects to furnish the same. (April 25, 1873, 70 v. 158, § 10.)

§ 254. **ANNUAL REPORT BY TELEGRAPH COMPANY; WHEN TO BE MADE AND WHAT TO CONTAIN.**—The president or chief officer of every telegraph line or company, whether the line is doing business or is in process of construction, shall make a report of the business of such line or company to the commissioner, in such form as he directs, on or before the first day of September, in each year, for the year ending on the preceding first day of June, which report must be verified by the oath of such president or officer in charge; and for neglect or refusal to make and furnish such report at the time herein named, the company owning such line shall forfeit and pay any sum not exceeding five hundred dollars; and the company is subject to a like penalty for every period of thirty days thereafter such president or chief officer so refuses or neglects to furnish the same. (April 25, 1873, 70 v. 158, § 11.)

§ 255. **DEFECTIVE OR ERRONEOUS REPORTS SHALL BE AMENDED IN FIFTEEN DAYS; RETURNS MUST CONFORM TO FORMS PRESCRIBED; REASON MUST BE GIVEN FOR ANY FAILURE IN THIS RESPECT.**—When the returns of any corporation required to report to the commissioner of railroads

Commissioner of Railroads and Telegraphs, §§ 256-260.

and telegraphs are incomplete, defective, or probably erroneous, the commissioner shall notify such corporation thereof, and it shall thereupon amend the return in the matter or matters named, and make return of such amendment within fifteen days; and all returns shall be in strict accordance with the forms prescribed by the commissioner; but if any corporation finds it impracticable to return all the items in detail, as required, it shall state the reason why such details can not be given; but the fact that it does not keep its accounts in such manner as to enable it to make such returns shall not be considered or taken as a valid excuse; and if the form for the returns and report furnished by the commissioner makes necessary any change or alteration in the ordinary method or form of keeping the accounts of such corporation, he shall give to such corporation at least thirty days' notice thereof prior to the commencement of the year for which the changes and additions are necessary in order to make the full returns required. (May 5, 1873, 70 v. 276, § 1.)

§ 256. COMPANIES OPERATING RAILROADS SHALL FURNISH COPIES OF LEASES AND CONTRACTS WITH OTHER COMPANIES DOING BUSINESS THEREON.—Every corporation or company operating a railroad, or any part of a railroad, within this state, shall, on demand of the commissioner, furnish him with copies of all leases, contracts, and agreements with express, sleeping car, freight, or rolling stock companies, or other companies doing business upon or in connection with such road; and the commissioner shall have power, personally or by agent, to examine any officer, agent, or employe of any railroad company, or of any of said other companies, under oath, relative to the stock which any officer, agent, or employe of the railroad company has in any of said other companies, so doing business upon or in connection with such road, and his pecuniary interest, direct or indirect, in any of said other companies. (May 5, 1873, 70 v. 276, §§ 2, 3.)

§ 257. FATAL ACCIDENTS SHALL BE NOTIFIED TO COMMISSIONER BY TELEGRAPH, AND HE MAY EXAMINE INTO CAUSE OF SAME.—The superintendent of every corporation operating a railroad, or any part of a railroad, in this state, shall promptly notify by telegraph the commissioner of all accidents happening on such railroad, or part of a railroad, in this state, resulting in loss of life to any person or persons; and the commissioner may, personally or by agent, examine into the cause and character of such accidents. (May 5, 1873, 70 v. 276, § 2.)

§ 258. COMMISSIONER HAS POWER TO SUBPÆNA WITNESSES, ETC.—The commissioner, in the discharge of his duties, has power to subpœna witnesses, administer oaths, compel the production of books and papers, and punish for contempt in the same manner and to the same extent as justices of the peace. (April 5, 1867, 64 v. 111, § 5; May 5, 1873, 70 v. 276, § 3.)

§ 259. PENALTY FOR OFFICER, AGENT, OR EMPLOYE OF RAILROAD TO REFUSE TO ANSWER QUESTION.—An officer, agent, or employe of any railroad company who refuses to answer any question propounded to him by the commissioner in the course of any examination authorized by this chapter, shall be fined in any sum not less than fifty dollars nor more than five hundred dollars; and the property of the railroad company of which he is an officer, agent or employe, is liable to be taken in execution to satisfy the fines and costs in such cases. (May 5, 1873, 70 v. 276, § 3.)

§ 260. STATEMENT REQUIRED TO BE MADE BY RAILROAD COMPANIES.—The secretary of each railroad company, and of each telegraph company, now doing business, or whose line is in process of construction, or which may be hereafter organized in the state, shall, within thirty days after the election of the directors of such company, make out and forward to the commissioner of railroads and telegraphs a list of the officers and directors of their respective companies, giving the place of residence and post-office address of each; and thereafter, if any change occurs in the organization of the officers or board of directors of the company, shall notify the com-

Commissioner of Railroads and Telegraphs, §§ 261-265.

missioner of railroads and telegraphs of the fact of such change, and the residence and post-office address of each of the officers and directors. (April 24, 1873, 70 v. 155, § 1.)

§ 261. **PENALTY FOR FAILURE TO COMPLY.**—For a failure to comply with the provisions of the preceding section, any company so neglecting for thirty days after the time herein provided, shall be subject to the same penalties as attach for neglecting or refusing to make the required annual report to the commissioner of railroads and telegraphs. (April 24, 1873, 70 v. 155, § 2.)

§ 262. **PROSECUTIONS FOR FINES ONLY TO BE BY CIVIL ACTION, AND FOR FINE AND IMPRISONMENT BY INDICTMENT.**—All prosecutions against railroad or telegraph companies, or any officer, agent or employe thereof, for forfeitures, penalties or fines, without imprisonment, provided for in this chapter, and other sections of the statutes and laws of Ohio, if not otherwise specifically stated, shall be by civil action in the name of the state; and all prosecutions for penalties involving imprisonment shall be by indictment. (April 25, 1893, 90 v. 299; April 5, 1867, 64 v. 111, § 7; May 5, 1873, 70 v. 276, § 3.)

§ 263. **PROSECUTION BY CIVIL ACTION; BY WHOM BROUGHT.**—The civil action provided for in the next preceding section shall be brought by the prosecuting attorney of the proper county at the instance of said commissioner of railroads and telegraphs; and in case said commissioner fail to so instruct the said prosecuting attorney of the proper county, upon the written request of any taxpayer of the county to commence civil action provided for in the next preceding section, said prosecuting attorney shall do so, provided he is furnished with evidence which in his judgment will probably sustain such action, and if the action fail the costs in such case shall be adjudged against the county, except in such cases as hereinafter provided; provided, further, that where cause of civil action, arises, as provided for in the next preceding section, within the boundary lines of any municipality, in addition to the provisions already provided for in this section for instituting prosecutions of civil action, the city solicitor of any municipality shall, when required so to do by resolution of the council adopted by a majority of the quorum, institute such proceedings and prosecute them to final judgment. When such action is so brought by the municipality and fails of final judgment in the supreme court, the cost thereof shall be adjudged against such municipality, and time for notice of appeal and giving of bond shall not apply to cases within the meaning of this act. (April 25, 1893, 90 v. 299; April 5, 1867, 64 v. 111, § 8.)

§ 264. **ANNUAL REPORT TO BE MADE BY THE COMMISSIONER, AND WHAT TO CONTAIN.**—The commissioner shall make to the governor, on or before the first day of January, of each year, a report of the affairs and condition of all the railroad and telegraph companies having lines in this state, and also of accidents on railroads resulting in injuries to persons, and the circumstances and cause thereof; and he shall include in his report such other information and such suggestions and recommendations as, in his opinion, are of importance to the state. (February 27, 1877, 74 v. 33, § 12.)

§ 265. **MONEYS COLLECTED SHALL BE PAID INTO THE STATE TREASURY; FEES OF PROSECUTING ATTORNEYS.**—All moneys arising from suits in the name of the state, or prosecutions against railroad companies or against any of their officers, or employes, for violation of any of the provisions of law relating to railroads, shall be paid into the state treasury; but prosecuting attorneys shall, for any moneys collected therein by them, be allowed ten per centum thereof for their services. (April 5, 1867, 64 v. 111, § 7.)

Superintendent of Insurance, §§ 266-270.

SUPERINTENDENT OF INSURANCE.

§ 266. **APPOINTMENT AND TERM; WHO ELIGIBLE.**—The superintendent of insurance shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office for three years; and no person shall be appointed who is not an elector of this state, or who has any official connection with an insurance company, owns any stock in such company, or is interested in the business thereof, except as a policy holder. (March 12, 1872, 69 v. 32, § 2.)

§ 267. **BOND TO BE GIVEN, AND, WITH OATH OF OFFICE INDORSED THEREON, TO BE FILED WITH THE SECRETARY OF STATE.**—Before entering upon the discharge of his duties, the superintendent shall give bond to the state in the sum of twenty thousand dollars, with not less than two sureties, to be approved by the governor, conditioned for the faithful discharge of his duties; and the bond, with his oath of office and the approval of the governor indorsed thereon, shall be filed with the secretary of state. (March 12, 1872, 69 v. 32, § 3.)

§ 268. **DUTY OF SUPERINTENDENT TO ENFORCE INSURANCE LAWS.**—The superintendent shall see to the execution and enforcement of all laws relating to insurance. (March 12, 1872, 69 v. 32, § 3.)

Discretion vested in commissioner.

State v. Moore, 42 Oh. St. 103-106 (1884).

§ 269. **HE MAY APPOINT A DEPUTY SUPERINTENDENT TO TAKE OATH AND GIVE BOND, AND MAY DISCHARGE DUTIES OF SUPERINTENDENT; COMPENSATION; CLERKS AND EXPERTS.**—The superintendent may appoint a deputy superintendent having the same qualifications as the superintendent, whose appointment may be evidenced by a certificate under the official seal of the superintendent. Before entering upon the discharge of his duties, the deputy superintendent shall take the oath of office, and give bond in the sum of ten thousand dollars to the superintendent, with two or more sureties to the acceptance of the superintendent, conditioned for the faithful performance of his official duties. In case of the absence or inability of the superintendent, the deputy superintendent shall have the powers and perform the duties of the superintendent. The deputy superintendent shall receive a salary of two thousand four hundred dollars per annum. Foreign insurance companies shall pay, annually, as fees for making out and forwarding annually, semi-annually and quarterly the interest checks and coupons accruing upon bonds and securities deposited, the sum of twenty-five dollars on each one hundred thousand dollars so deposited, which fees shall be turned over to the state treasurer on the warrant of the state auditor. The superintendent may employ from time to time such other clerks as the prompt dispatch of business requires; and he may, also from time to time, employ skilled and competent persons to examine the business and affairs of insurance companies and report thereon. (May 12, 1902, 95 v. 549; April 26, 1898, 93 v. 292; March 12, 1872, 69 v. 32, § 4.)

State v. Moore, 42 Oh. St. 103-106 (1884).

§ 270. **INSURANCE DEPARTMENT; EXPENDITURES, SALARIES; OFFICE AND FEES OF SUPERINTENDENT.**—The office of the superintendent shall be in the state house, and all salaries and expenditures of the insurance department shall be paid [on the certificate of the superintendent; but no money shall be paid]* out of the state treasury in excess of the amount collected from insurance companies, as provided by law; and provided, also, that, in case the excess of fees collected and paid into the state treasury, as provided by section two hundred and eighty-two, Revised Statutes of Ohio, over the total salaries and expenditures of said insurance department, shall equal the sum of fifteen thousand dollars, the said superintendent of insurance shall receive, out of said excess of fees, a sum not exceeding ten per centum on such excess; provided, that said superintendent shall not receive in such fees exceeding the sum of one thousand dollars per annum in addition to his salary, as

Superintendent of Insurance, §§ 271-273.

now provided by law; provided further, that all fees shall be paid by the superintendent of insurance into the state treasury on the warrant of the state auditor. And the said additional salary, so provided, shall be paid under appropriations, by the state treasurer, upon the warrant of the state auditor. (May 12, 1902, 95 v. 549; May 1, 1885, 82 v. 202; Rev. Stat. 1880; March 12, 1872, 69 v. 32, § 4.)

* NOTE.—The words in brackets do not appear in 95 O. L. 549, but are required by the sense, and an examination of the former enactment shows that they were undoubtedly omitted by mistake.

§ 271. INSTRUMENTS UNDER SUPERINTENDENT'S SEAL TO BE EVIDENCE, AND ENTITLED TO RECORD.—Any certificate, assignment, or conveyance, executed by the superintendent in pursuance of law, and sealed with his seal of office, shall be received as evidence, and may be recorded in the proper recording office in the same manner and with like effect as a deed regularly acknowledged before an officer authorized by law to take acknowledgments of deeds; and all copies of papers in the office of the superintendent, certified by him and authenticated by the seal, shall in all cases be evidence equally and in like manner as the originals. (March 12, 1872, 69 v. 32, § 5.)

§ 272. EXAMINATIONS OF COMPANIES DOING BUSINESS IN THE STATE.—The superintendent, when he has reason to suspect the correctness of any statement of an insurance company doing business in the state, whether incorporated in this state or not, or that its affairs are in an unsound condition, shall make, or cause to be made by some person by him for that purpose appointed, an examination into the affairs of such company; and such company, its officers and agents shall submit their books and business to such examination, and in every way facilitate the same, and he shall, annually, make or cause to be made, an examination of the assets of every life insurance company organized under the laws of this state, and ascertain if the same are invested in the manner prescribed by law at the date each investment was made, and, also, if the last preceding annual statement of assets and unpaid death claims was correct. The actual expenses incurred by said examination shall be paid by the state treasurer on the warrant of the state auditor upon the certificate of the superintendent of insurance; provided that, when any examination is made upon the demand of the company therefor, the expenses of the same shall be paid by the company; and provided further, that, when, by the laws of any other state, district, territory or nation, examinations of companies of this state are required or permitted to be made by the insurance department or other authority of such state, district, territory or nation at the expense of such companies, then the expenses of all examinations made by the insurance department of this state of all companies of such state, district, territory or nation shall be respectively charged to and collected from the companies so examined. (May 12, 1902, 95 v. 549; May 15, 1878, 75 v. 576, § 7; March 12, 1872, 69 v. 32, § 12.)

No appeal from superintendent's decision.

Appeal will not lie from the decision of the superintendent in revoking the license of a company on the ground of being in an "unsound condition."—State v. Moore, 42 Oh. St. 103-106 (1884).

Special charter.

Companies organized under special charter prior to the constitution of 1851 are subject to this section.—State v. Ins. Co., 50 Oh. St. 252; s. c., 153 U. S. 446 (1893).

§ 273. POWER OF EXAMINERS; MAY PUBLISH RESULT.—For the purposes of such examination, the superintendent, or the person or persons so appointed by him, have power to administer oaths to and examine the officers and agents of such company relating to its business and affairs; and when the superintendent deems it to the interest of the public, he may publish the result of such investigation in a newspaper printed in Columbus, and of general circulation in the state, and in one printed in the county where the principal office of such company is located. (March 12, 1872, 69 v. 32, § 8.)

Superintendent of Insurance, §§ 274-276.

§ 274. PROCEEDINGS AGAINST UNSOUND COMPANIES. — When it appears to the superintendent, from examination, or otherwise, that the assets of any life insurance company, organized under the laws of the state, are insufficient to reinsure its outstanding risks, as provided by this chapter, or that the assets of any joint stock insurance company other than life, organized under the laws of this state, after deducting therefrom all actual liabilities and a reinsurance fund equal to fifty per cent. of the whole amount of premiums on all unexpired risks and policies, are reduced twenty per cent. or more below the capital stock required by law, he shall require the officers thereof to direct the stockholders to pay in the amount of such deficiency, within such period as he designates in such requisition; and after the superintendent issues his requisition calling for a sum to be paid by the stockholders of any company, amounting to or exceeding forty per cent. of the capital, it is unlawful for the company to issue any new policies or transact any new business until the superintendent of insurance issues to such company a license, authorizing it to resume business, or until the court has rendered its decision in the case, as herein provided; but in case the requisition calls for a less amount than forty per cent. of the capital, and the officers of the company, in accordance with the requisition, direct the stockholders to pay the amount required for making up the capital, and so signify to the superintendent, then it will be lawful for the company to continue business as before the issuing of the requisition, for the term of thirty days from the date thereof; and, if at the expiration of the thirty days, any portion of the requisition of the superintendent remains unpaid, the company shall not issue any new policies, or transact any new business until authorized by the superintendent as aforesaid. (April 26, 1873, 70 v. 165, § 9.)

§ 275. PROCEDURE IN CASE OF DEFAULT TO COMPLY WITH REQUISITION. — In case of default on the part of the company to comply with such requisition, the superintendent shall communicate the fact to the attorney-general, who shall apply to the court of common pleas of the county in which the principal office of the company is located for an order requiring such company to show cause why the business thereof should not be closed, and shall give to the company such notice of the pending of such application as the court directs, and the court shall thereupon proceed to hear the allegations and proof of the respective parties; or, the court shall have power to refer the application of the attorney-general to a referee, to inquire into and report upon the facts stated therein: In case it appears to the satisfaction of the court that the assets of the company are not sufficient, as aforesaid, or that the interests of the public so require, the court shall decree a dissolution of the company and a distribution of its effects; and any transfer of the stock of a company made during the pendency of such investigation shall not release the party making the transfer from his liability for losses which have occurred previous to the transfer. (April 26, 1873, 70 v. 165, § 10.)

§ 276. IN RELATION TO UNSOUND MUTUAL INSURANCE COMPANIES. — If, upon examination, it appears to the superintendent that the assets of any company organized on the plan of mutual insurance, after deducting therefrom all actual liabilities and a reinsurance fund equal to fifty per cent. of the advanced cash premiums received on all unexpired risks and policies, are insufficient to justify the continuance of such company in business, he shall proceed, in relation to such company, in the same manner as is herein required in regard to joint stock companies; and the trustees or directors of such company are hereby made personally liable for any losses which are sustained upon risks taken after the superintendent of insurance has issued his requisition for filling up the deficiency in the assets, and before such deficiency is made up; but nothing herein shall be so construed as to require any mutual fire insurance company to keep on hand any cash reinsurance reserve or funds invested in securities, other than their premium notes, when the premium notes amount in gross to three per centum of the amount at risk by the company. (April 26, 1873, 70 v. 165, § 11.)

Superintendent of Insurance, §§ 277-279.

Re-insurance fund not a debt.

The sum set aside as a re-insurance fund is not a debt to be deducted in making returns for taxation. — *Ins. Co. v. Cappellar*, 38 Oh. St. 560, 568 (1883).

Unpaid assessment.

A stockholder, who has not paid his assessment, made in pursuance to this section, is not entitled to share in dividends afterwards declared by the company until such assessment is paid. — *Rhodes v. Ins. Co.*, 3 O. C. C. 501 (1888); s. c., 2 C. D. 288.

§ 277. **REVOCATION OF AUTHORITY TO SUCH COMPANIES.** — When it appears to the superintendent of insurance, from the report of the person appointed by him, or other satisfactory evidence, that the affairs of any company, partnership, or association, not organized under the laws of this state, are in an unsound condition, he shall revoke the authority granted to such company to do business in this state, and cause a notice thereof to be published in at least one newspaper published in the city of Columbus, and in the county where the general agency is located within this state; and after the publication of such notice, it is unlawful for the agents of such company to procure any new applications for insurance or to issue any new policies. (March 12, 1872, 69 v. 32, § 12.)

See *State v. Moore*, 42 Oh. St. 103, 106 (1884).

Remedy to prevent revocation.

Mandamus will not lie to prevent the revoking of the license of an insurance com-

pany. Injunction is proper remedy. — *State v. Hahn*, 50 Oh. St. 714 (1893); overruling *State v. Reimmund*, 45 Oh. St. 214 (1887).

§ 278. **RECORD OF PROCEEDINGS AND REPORT THEREOF.** — The superintendent shall keep and preserve, in a permanent form, a full record of his proceedings, including a concise statement of the condition of each company reported, visited, or examined by him; and he shall, annually, at the earliest practicable date after the returns are received from the several companies, make a report to the legislature of the general conduct and condition of the insurance companies doing business in this state, with such suggestions as he deems expedient, including also the information contained in the statements required of the companies, and the result of the official valuations of life policies, to be arranged in tabular form, and prepare the same for printing in two separate reports, one pertaining to life insurance companies, and the other to all insurance companies other than life; and he shall also report the names and compensation of the clerks employed by him, the whole amount of income, the source whence derived, and the expenses in detail, during the year ending on the thirty-first day of the preceding December. (March 12, 1872, 69 v. 32, § 13.)

See *State v. Reimmund*, 45 Oh. St. 214 (1887).

§ 279. **ANNUAL VALUATIONS, RATE OF INTEREST, ETC.; EXCEPTION.** — The superintendent shall, annually, make or cause to be made, net valuations of all outstanding policies, additions thereto, unpaid dividends, and all other obligations of every life insurance company transacting business in this state; and for the purpose of such valuations, and for making special examinations of the condition of life insurance companies, as provided in the laws of this state relating to life insurance companies, and for valuing all policies of whatever description, and for any purpose whatever, the rate of interest shall be four per cent. per annum, and the rate of mortality shall be established by the tables known as the American experience tables, but when the laws of any other state of the United States authorize a valuation of life insurance policies, by some designated state officer, according to the standard herein provided, or according to any other standard which makes the value of the policy not less than that of the standard herein provided, the valuation made according to the said standard, by such officer of the policies and other obligations of any life insurance company not organized under the laws of this state, and certified by said officer, may be received as true and correct, and no further valuation of the same shall be required of such company by the superintendent of insurance, except that in no case

Superintendent of Insurance, §§ 280-282.

shall the superintendent of insurance accept the certificate of valuation of such officer of another state of the United States, when such officer does not accept, or refuses or fails to accept a like certificate from him of the valuation of the policies of any life insurance company incorporated under the laws of Ohio, or when any such officer of another state is prohibited by law from accepting the certificate of valuation of the superintendent of insurance of this state, the said superintendent shall forthwith require the officers of all companies located in such state to submit to him, within a reasonable time, the descriptions of the policies thereof for valuation, and he shall proceed to make, or cause to be made, a valuation thereof according to the standard herein named, and in case said descriptions are not submitted to the said superintendent within the time fixed by him, he shall revoke the license of such company or companies as shall fail to do so, and shall refuse to renew the same, until such description shall be submitted and a valuation by him shall have been completed. (February 7, 1889, 86 v. 11; Rev. Stat. 1880; May 15, 1878, 75 v. 580, § 14.)

§ 280. FORMS OF STATEMENTS TO BE FURNISHED. — The superintendent shall, annually, in September, furnish to the insurance companies doing business in this state, two or more printed copies of the forms of statements required by this chapter to be made by them, and he may make such changes, from time to time, in the form of the same, and such additions thereto, as seems to him best adapted to elicit from the companies a true exhibit of their condition. (March 12, 1872, 69 v. 32, § 15.)

§ 281. SECURITIES SHALL BE DEPOSITED IN THE STATE TREASURY. — All securities deposited with the superintendent of insurance, pursuant to the provisions of any law of the state, shall be deposited by him with the treasurer of state, who, with his sureties, shall be responsible for the safe keeping thereof; and the treasurer shall only deliver such securities or coupons attached thereto upon the written order of the superintendent of insurance. (April 26, 1873, 70 v. 165, § 16.)

§ 282. FEES SHALL BE PAID BY COMPANIES. — There shall be paid by every insurance company doing business in this state, to the superintendent of insurance, the following fees: For filing copy of its charter or deed of settlement, twenty-five dollars; for filing each statement, twenty dollars; for each certificate of authority, or license and certified copy thereof, two dollars; for each copy of a paper filed in his office, the sum of twenty cents per folio; and for affixing the seal of office and certifying any paper, one dollar; all of which fees shall be paid by the superintendent into the state treasury. There shall also be paid by every life insurance company doing business in this state, annually, by way of compensation for the valuation of its policies, in case no certified valuation of the same has been furnished to the superintendent of insurance, as provided in section 279 of the Revised Statutes of Ohio, one cent on every one thousand dollars insured by it on lives, which shall be paid by the superintendent of insurance into the state treasury. When by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money, or of [securities], certificates, or other obligations or prohibitions are imposed on insurance companies of this state, doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation, doing business within this state, and upon their agents here. (May 12, 1902, 95 v. 549; March 30, 1892, 89 v. 167; March 25, 1891, 88 v. 196; March 12, 1872, 69 v. 32, § 17.)

See § 3631a.

As to operation of last clause of this section, see *State v. Reinmund*, 45 Oh. St. 214 (1887).

As to valuation of policies, *State v. Reinmund*, 45 Oh. St. 214 (1887).

Section retaliatory.

This section is retaliatory, and therefore must be confined to cases fairly within it. — *State v. Ins. Co.*, 49 Oh. St. 440 (1892).

Section construed. — *State v. Ins. Co.*, 49 Oh. St. 440 (1892).

§ 283. LICENSE, ETC., OF PERSONS MAKING APPLICATION FOR INSURANCE. — It shall be unlawful for any person, company, or corporation in this state, either to procure, receive, or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and licensed by the superintendent of insurance, in conformity to the provisions of this chapter. (March 12, 1872, 69 v. 32, § 18.)

§ 284. ANNUAL PUBLICATION OF CERTIFICATE REQUIRED. — Every insurance company doing business in this state shall publish, at least once a year, in some newspaper of general circulation, in every county where such company has an agent, a certificate from the superintendent of insurance that such company has, in all respects, complied with the laws of the state relating to insurance; and the certificate shall also contain a statement, under the oath of the president or secretary of such insurance company, of the actual amount of paid up capital, the aggregate amount of assets and liabilities, together with the aggregate income and expenditures of such company for the year preceding the date of such certificate; a copy of which certificate shall be filed in the office of the recorder in each county in which the company has an agent, and for every such paper the recorder shall receive the sum of ten cents. No other publication than as herein provided for is required of such companies. (March 12, 1872, 69 v. 32, §§ 19, 21; S. & S. 227.)

§ 285. FOREIGN INSURANCE COMPANIES MAY APPOINT AGENTS, ETC. — Any insurance company not organized under the laws of this state may appoint one or more general agents in this state, by resolution of its board of directors or managers, with authority to appoint other agents of the company in this state, a certified copy of which resolution shall be filed with the superintendent of insurance; and agents of such company, appointed by such general agent, shall be held to be the agents of such company as fully, to all intents and purposes, as if they were appointed directly by the company; and agents for any such company in this state may be appointed by the president, vice-president, chief manager, or secretary thereof, in writing, with or without the seal of the company, and when so appointed shall be held to be the agents of such company as fully as if appointed by the board of directors or managers in the most formal mode. (March 12, 1872, 69 v. 32, § 20.)

§ 286. DISCONTINUANCE OF BUSINESS BY LIFE INSURANCE COMPANY. — When any life insurance company, transacting the business of insurance within the state of Ohio, desires to discontinue its business, the superintendent shall, upon application of such company, or association, give notice of such intention in a paper published and having general circulation in the county in which such company or its general agency is located, at least once a week for six weeks, the expenses of publication to be paid by the company. After such publication, the superintendent shall deliver up to such company, or association, the securities held by him belonging to it, on being satisfied by the exhibition of the books and papers of such company, or association, and on examination to be made by himself, or some competent disinterested person or persons, to be appointed by him, and upon the oath of the president or principal officer, and the secretary or actuary of the same, that all debts and liabilities of every kind are paid and extinguished, that are due, or may become due, upon any contract or agreement made with any citizen or resident of the United States; and the superintendent may also, from time to time, deliver up to such company, or association, or its assigns, any portion of said securities, on being satisfied that an equal proportion of the debts and liabilities, of every kind, that are due, or may become due, upon any contract or agreement made with any citizen or resident of the United States, by said company, or association, has been satisfied; but the amount of securities retained by him shall not be less than twice the amount of remaining liabilities. (March 12, 1872, 69 v. 32, § 22.)

Superintendent of Insurance, §§ 286a-289.

§ 286a. **DISCONTINUANCE AND WITHDRAWAL OF SECURITIES BY COMPANY OTHER THAN LIFE.** — When any insurance company or corporation other than life, which has made, or hereafter shall make, a deposit with the superintendent of insurance, intends to discontinue its business in Ohio, the superintendent shall, upon application of such company or corporation, give notice of such intention in three newspapers of general circulation in the state at least once a week for six weeks, the expense of such publication to be paid by the company. After such publication, and on being satisfied by the affidavit of the principal officers of the company and by an examination of the books and records of the company or corporation to be made by him or some competent disinterested person or persons by him appointed for that purpose, if such examination be by him deemed necessary, that all debts and liabilities of every kind that the deposit is made to secure, or that may become due on any policy issued to any resident or citizen of the state of Ohio, are fully paid off, satisfied and discharged, the superintendent shall deliver up to such company or corporation or its assigns the securities held by him belonging to it. (March 22, 1893, 90 v. 103.)

§ 287. **APPLICABLE TO COMPANIES UNDER LAWS OF THE UNITED STATES.** — All the provisions of this chapter relating to insurance companies organized under the laws of any other state of the United States shall apply to any company organized under the laws of the United States, for any of the purposes specified in this chapter; and all the provisions of this chapter relating to agents of companies organized under the laws of any state shall apply to the agents of such companies organized under the laws of the United States; and any violation of the provisions of this chapter by any person, or agent, in the employment of any such company, organized under the laws of the United States, shall subject the offender to the same penalties provided by this chapter for any violation of its provisions by persons acting for similar companies organized under the laws of any other state of the United States. (March 12, 1872, 69 v. 32, § 23.)

§ 288. **PENALTY FOR VIOLATION OF STATUTORY PROVISIONS RELATING TO INSURANCE COMPANIES.** — Any person who violates any of the provisions of this chapter, or of any insurance law of this state for the violation of which no penalty is elsewhere provided, shall be fined not more than one thousand dollars or imprisoned not more than six months, or both. Any corporation, company or association violating any of the provisions of this chapter, or of any insurance law of this state for the violation of which no penalty is elsewhere provided, shall be liable to a penalty of not more than one thousand dollars nor less than one hundred dollars, to be recovered by action in the name of the state, and on collection paid to the superintendent of insurance to be covered by him into the state treasury. (May 19, 1894, 91 v. 331; April 17, 1885, 82 v. 138; 69 v. 32, § 24.)

Cited, *State ex rel. v. Ackerman*, 51 Oh. St. 163, 193 (1894).

§ 289. **INSURANCE BUSINESS UNLAWFUL EXCEPT UNDER PROVISIONS OF THIS CHAPTER.** — The provisions of this chapter shall apply to individuals and parties, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance; and it is unlawful for any company, corporation, or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, or to engage in the business of guaranteeing against liability, loss or damage, unless the same is expressly authorized by the statutes of this state, and such statutes and all laws regulating the same and applicable thereto have been complied with. (May 12, 1902, 95 v. 553; March 12, 1872, 69 v. 32, § 25.)

Cited, *State v. Ackerman*, 51 Oh. St. 163, 193 (1894).

Does not apply to insuring one's own property in unauthorized company.
Pennsylvania v. Biddle, 11 L. R. A. (Penn.) 561 (1891).

Cemetery Associations, §§ 1465-1-1465-3.

An Act Providing a Method of Procedure for Collecting Claims Payable from Funds Deposited with the Superintendent of Insurance, or other State Officer.

Be it enacted by the General Assembly of the State of Ohio:

§ 1. **ACTION TO SUBJECT DEPOSIT TO PAYMENT OF LIABILITIES, ETC.; DUTY OF ATTORNEY-GENERAL.**—If any company, corporation, or association, which may by the statutes of this state, be required to make a deposit with the superintendent of insurance, or other state officer, for the purpose of securing the contracts of such company, corporation, or association, or for any other purpose, shall fail to pay any of its liabilities upon such contracts, or other obligations, for which such deposit has been made, according to the terms of such contract, or other obligation, after the liability thereon shall have been determined; or if such company, corporation, or association has ceased to do business within this state, leaving unpaid any such liability, or has become insolvent, the attorney general of the state, on behalf of the superintendent of insurance, or such other officer, shall, upon the application of any party entitled to participate in such deposit, or the proceeds arising therefrom, commence a civil action in the court of common pleas of Franklin county, Ohio, to determine the rights of all parties claiming any interest in such deposit, to subject such deposit to the payment or satisfaction of all liability or liabilities and to distribute said fund among the persons entitled thereto, making the company, corporation, or association a party defendant. Said action shall be brought by the attorney general, but for such services he shall receive no compensation other than the salary provided for by section 1284 of the Revised Statutes of Ohio. (May 10, 1902, 95 v. 480.)

§ 2. **NOTICE TO PARTIES INTERESTED IN SAID FUND; PUBLICATION OF; NOTICE TO COMPANY.**—That upon the filing of such petition, the superintendent of insurance, or such other officer, shall cause a notice thereof to be published for six consecutive weeks in three papers of general circulation within the state of Ohio, one of which shall be published in the city of Columbus, Ohio, which notice shall contain a succinct statement of the object and prayer of said petition, and notifying all persons claiming to have any interest in said fund, to intervene and set forth such interest therein, and when they are required to answer thereto. A copy of such notice shall be forwarded to the last known address of such company, corporation, or association, by the clerk of said court as provided for in section 5048, Revised Statutes. Upon the hearing of said cause, such order, judgment, or decree shall be entered by the court as may be deemed just and equitable. (May 10, 1902, 95 v. 481.)

§ 3. **PROCEDURE.**—The code of civil procedure shall govern such proceedings in so far as the same may be applicable. (May 10, 1902, 95 v. 481.)

§ 4. This act shall take effect from and after its passage. (May 10, 1902, 95 v. 481.)

§ 1465-1. **TAX FOR ERECTION OF BUILDINGS UPON GROUNDS OF CEMETERY ASSOCIATION.**—The trustees of any township in this state, wherein their township owns a burial-place within the grounds of a cemetery association, may levy a tax not exceeding five (5) mills upon the dollar of the tax duplicate of said township for the purpose of erecting permanent buildings upon and within such cemetery grounds. (April 20, 1893, 90 v. 218.)

§ 1465-2. **APPLICATION OF TAX.**—When such tax shall have been assessed and collected the same shall be paid to the officers of said cemetery association, and by them applied to the erection of such permanent buildings as in their judgment may be requisite for the accommodation of the patrons of said cemetery. (April 20, 1893, 90 v. 218.)

§ 1465-3. **BONDS IN ANTICIPATION OF TAX.**—The officers of such cemetery association may issue and sell bonds in anticipation of said tax; such bonds to bear

Cemetery Associations, §§ 1469-1470-3.

interest at a rate not exceeding six (6) per cent. per annum. (April 20, 1893, 90 v. 218.)

§ 1469. NO LEVY ON LOTS.—Any lot held by an individual in a cemetery shall, in no case, be subject to be levied on or sold on execution. (April 17, 1857, 54 v. 187, § 4; S. & C. 228.)

§ 1470. PENALTY FOR CORPSE NUISANCE.—If the sexton or other person in charge of a township, or other cemetery suffers the dead to remain in any vault or other receptacle until the same become offensive, he shall be liable, on the complaint of any person before a justice of the peace of the township, to a fine of not over twenty dollars, and an additional penalty of five dollars for every day, after the fine afore-said, that the nuisance is continued. (April 17, 1857, 54 v. 187, § 5; S. & C. 228.)

§ 1470-1. TRUSTEES OF TOWNSHIPS OR CEMETERY ASSOCIATIONS MAY CAUSE DEAD BODIES TO BE REMOVED IN CERTAIN CASES.—In all cases in which either the trustees of any township or the trustees or board of any cemetery association, incorporated or not, in Ohio, or both combined, shall have heretofore determined or shall hereafter determine to discontinue the use of any burial ground for such purposes, and there shall be opened for public use a burial ground in the near vicinity thereof, the said township trustees, or the said trustees or board of directors of such cemetery association, or both combined, may order and provide for the removal of all bodies remaining or being buried within said burial grounds so to be discontinued, and for the removal of all stones and monuments marking the graves thereof, and for the reinterment of said bodies and the re-erection of such stones and monuments in some suitable and public ground in the near vicinity, and pay for the same out of the township treasury; provided, however, that they shall cause notice first to be given to the family, friends or kindred of the deceased, if known to such board or boards, of the order for their removal and of the time within which, not less than thirty days, such removal must be made, and that it is desired that such removal be made by the friends or kindred of the dead, and if at the expiration of such time such removals have not been made, such boards may cause them to be made as afore-said. (March 15, 1876, 73 v. 33.)

§ 1470-2. MAY SELL BURIAL GROUNDS AT PUBLIC SALE; PROVISIO.—Township trustees and trustees and boards of directors of cemetery associations are hereby empowered to dispose of at public sale, due notice thereof being first given in two newspapers of the county, of general circulation, if there be so many, and make conveyance of any burial grounds under their control that they may have determined to discontinue as burial grounds; provided, however, that possession thereof shall not be given to a grantee until after the dead therein buried, together with the stones and monuments, shall have been removed as hereinbefore provided. (March 15, 1876, 73 v. 33.)

§ 1470-3. DISINTERMENT, ETC., OF BODY BURIED IN CEMETERY.—That the trustees or board of any cemetery association, or other officers having control and management of a cemetery, shall disinter or issue a permit for disinterment, and deliver any body now buried, or that may hereafter be buried in such cemetery under their control, on application of the next of kin of the deceased, being of full age and sound mind, to such next of kin, on payment of the reasonable cost and expense of the disinterment; provided, however, that no such disinterment shall be made during the months of April, May, June, July, August and September of any year; and in no event where the deceased has died of a contagious or infectious disease, and not until a permit has been issued by the local health department. (May 14, 1894, 91 v. 231.)

Who are next of kin?

Brothers and sisters are next of kin of minor children deceased; but where these brothers and sisters are minors, the parents

are next of kin and competent to make the application.—State ex rel. v. Shonhoft, 14 C. C. 354 (1897); s. c., 7 C. D. 716.

Price of Electric Light and Gas, § 2478.

§ 1470-4. **FORM OF APPLICATION.**—Such application shall be in writing; shall state the relation of the applicants to the deceased; that the applicants are the next of kin of the deceased, of full age and sound mind; the disease of which the deceased died; where the body shall be reinterred; and shall be subscribed and sworn to before some officer authorized to administer oaths. (May 14, 1894, 91 v. 231.)

§ 1470-5. **WRIT OF MANDAMUS.**—In case said trustees or board or other officers in charge of said cemetery shall refuse to issue said permit for disinterment, there shall be issued by the court of common pleas of the county wherein the cemetery is situated, a writ of mandamus requiring said trustees or board or other officers to issue said permit. (May 14, 1894, 91 v. 231.)

§ 1471. **MAY BE REMOVED, ETC.**—The trustees shall, when the dead laid in any vault or other receptacle become offensive, on complaint of any householder of the township, issue an order forthwith to the sexton or other person in charge, to have the same immediately interred; and in case the interment is neglected for three days after the complaint, any justice of the peace of the township may issue his written order to any householder of the township to inter the dead at the expense of the trustees, and shall allow a reasonable charge for the service aforesaid. (April 17, 1857, 54 v. 187, § 6; S. & C. 228.)

§ 2478. **REGULATING PRICE OF ELECTRIC LIGHT, ARTIFICIAL AND NATURAL GAS.**—The council of any city or village in which electric lighting companies, natural or artificial gas companies, or gas light or coke companies may be established, or into which their wires, mains or pipes may be conducted, are hereby empowered to regulate, from time to time, the price which said electric lighting, natural or artificial gas, or gas and coke companies may charge for electric light or for gas for lighting or fuel purposes, furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places; and such electric lighting, natural or artificial gas, or gas-light and coke companies shall, in no event, charge more for any electric light, or natural or artificial gas furnished to such corporation or individuals than the price specified by ordinance of such council; and such council shall also have power to regulate and fix the price which such companies shall charge for rent of their meters. (March 1, 1889, 86 v. 62; March 4, 1887, 84 v. 39; R. S. 1880; May 7, 1869, 66 v. 218, § 415.)

In absence of ordinance fixing price, company can only charge reasonable price.

If the authorities fail to act in respect to the power vested in them by this section, and an individual and the electric light company could not agree as to price, on appeal to the courts, the company would be compelled to furnish light at a reasonable price.—Cincinnati, Hamilton, etc., R. R. v. Bowling Green, 57 Oh. St. 336, 346 (1897). See §§ 2494, 2495, and notes thereto.

Company chartered prior to present constitution, subject to regulation.

A gas company chartered prior to the adoption of the present constitution is nevertheless subject to the provisions of this section, unless the right to fix its own prices is expressly conferred in its charter.—Zanesville v. Gas Light Co., 57 Oh. St. 1 (1889); State ex rel. v. Gas Light Co., 34 Oh. St. 572. See Cleveland Gas Co. v. Cleveland, 35 W. L. B. 155 (1891).

Injunction will lie to compel company to furnish gas at prices fixed by ordinance.

Gas Light Co. v. Zanesville, 57 Oh. St. 35 (1889).

Presumption in favor of good faith of council.

The presumption is in favor of the good faith and validity of the action of the council in passing an ordinance regulating price, and this presumption can only be overcome by the averment of issuable facts to the contrary.—See State ex rel. v. Gas Co., 18 Oh. St. 262 (1868); approved 115 U. S. 659, and 118 U. S. 371; State ex rel. v. Gas Co., 37 Oh. St. 45, 49 (1881).

Inadequacy of price; what must be shown.

On the absence of facts showing fraud or bad faith on the part of the council, the inadequacy of the price is not subject to inquiry.—State ex rel. v. Gas Co., 37 Oh. St. 45, 49

Gas Companies; Use of Streets by, §§ 2480-2481.

(1881). See *Cleveland Gas Co. v. Cleveland*, 35 W. L. B. 155 (1891). Also *State ex rel. v. Gas Co.*, 18 Oh. St. 262 (1868); approved, 115 U. S. 659, and 118 U. S. 371.

Cannot delegate regulation of prices, etc.

Does not authorize a contract that for an indefinite period leaves to other parties the regulation of the price to be paid, or the quantity or quality of gas that shall be furnished.—*Cincinnati Gas Co. v. Avondale*, 43 Oh. St. 257 (1885).

Ordinance fraudulently passed, or stipulating unreasonable price, is void.

An ordinance passed for a fraudulent purpose, and fixing the price at a rate which the council knows it cannot be manufactured, imposes no obligations on the company intended

to be affected thereby.—*State ex rel. v. Gas Co.*, 18 Oh. St. 262 (1868); approved, 115 U. S. 659, and 118 U. S. 371; *Cleveland Gas Co. v. Cleveland*, 35 W. L. B. 155 (1891).

See as to granting exclusive right to individual company, and the subject generally, §§ 2485 and 3550, and notes thereto.

See as to regulation of prices, *State ex rel. v. Gas Co.*, 3 O. C. C. 251 (1888); s. c., *Cleveland Gas Co. v. Cleveland*, 35 W. L. B. 155 (1891). Cited, *Findlay Gas Co. v. Findlay*, 2 O. C. C. 237, 243 (1887).

Extent of power of council.

A city council has no power under this and the next section to compel a gas company, without its assent to the ordinance, to furnish gas in a manner and at a rate entirely at the option of the consumer.—*Logan Natural Gas, etc., Co. v. Chillicothe*, 65 Oh. St. 186 (1901).

§ 2479. MINIMUM NOT TO BE REDUCED DURING TERM AGREED UPON.—

In case the council fixes the minimum price at which it requires any company to furnish gas to the citizens, or public buildings, or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, and public grounds, for a period not exceeding ten years, and the company assents thereto, by written acceptance, filed in the office of the clerk of the corporation, it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed on, not exceeding ten years, as aforesaid. (May 7, 1869, 66 v. 218, § 416.)

Contract for longer than ten years; inoperative as to time beyond that period.

Agreement was entered into between a city and gas company by which the latter was to furnish gas at a stipulated price for a period of twenty years. City performed its contract for ten years; held that beyond that period the contract was inoperative, and city could regulate price thereafter.—*State ex rel. v. Gas Co.*, 37 Oh. St. 45 (1881). See *Toledo v. Gas Co.*, 5 O. C. C. 557 (1890).

Applicable to natural gas companies.

Toledo v. Gas Co., 5 O. C. C. 557 (1890).

Agreement unlimited as to time, valid for ten years and no longer.

Toledo v. Gas Co., 5 O. C. C. 557 (1890).

This section limits the period for which municipalities may contract for the supply of gas under § 2491.

Lima Gas Co. v. Lima, 4 O. C. C. 22 (1889).

Contract cannot be altered.

When a council has fixed the price of gas under this section and the company has accepted the same, it cannot be altered without the consent of the company within ten years.—*Logan Natural Gas, etc. Co. v. Chillicothe*, 65 Oh. St. 186 (1901).

§ 2480. WHEN COUNCIL MAY OCCUPY STREETS FOR GAS PURPOSES. ETC.—If such companies are, at any time, required by the council to lay pipes, and light any street, alley, avenue, wharf, landing place, public ground or building, and refuse or neglect for six months after being notified, by authority of the council, to comply with such requirement, the council may lay pipes and erect gas-works, for lighting such streets, alleys, or public grounds, and all other streets, alleys, and public grounds, not already lighted; and such gas companies or gas-light and coke companies, shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings, not already furnished with gas pipes of such companies; and the council may open any street for the purpose of conveying gas as aforesaid. (May 7, 1869, 66 v. 218, § 417.)

§ 2481. GAS COMPANIES MAY BE PERMITTED TO OCCUPY STREETS.—The council may, at any time after the default mentioned in the preceding section, permit such gas companies to use and occupy the streets, alleys, and public grounds of

Gas Companies; Regulations as to, §§ 2482-2485.

such corporation, for the purpose of lighting the same, and furnishing gas to the citizens and public buildings. (May 7, 1869, 66 v. 218, § 418.)

§ 2482. **FORFEITURE OF CHARTER FOR NEGLECT TO FURNISH GAS, ETC.**—A neglect to furnish gas to the citizens, and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed and established by the council, from time to time, shall forfeit all rights of such company under the charter by which it has been established; and the council may proceed to erect, or, by ordinance, empower any person to erect gas-works, for the supply of gas to such corporation and its citizens; provided, that nothing in this section or in sections twenty-four hundred and seventy-nine and twenty-four hundred and eighty, shall operate to impair or affect any contract heretofore made between any municipal corporation and any gas-light and coke company. (May 7, 1869, 66 v. 219, § 419.)

Cited, *Toledo v. Gas Co.*, 5 O. C. C. 557 (1890).

§ 2483. **A TEMPORARY FAILURE SHALL WORK NO FORFEITURE.**—A temporary failure to furnish gas shall not operate as a forfeiture, unless such failure is through the neglect or misconduct of such gas-light, or gas-light and coke companies. (May 7, 1869, 66 v. 219, § 420.)

§ 2484. **COUNCIL MAY APPOINT GAS INSPECTOR; HIS DUTIES AND COMPENSATION.**—The council of any corporation in which gas-works may be constructed may provide, by ordinance, for the appointment of an officer, to be known as inspector of gas, whose duty it shall be to inspect all gas and gas-meters, and certify the correctness of all bills against consumers of gas, make photometric tests, and perform such other duties as may be prescribed by ordinance; and the council shall fix his compensation. The council may also provide for the inspection and testing of meters used for measuring electric current for electric light, power or other purposes, furnished by any individual or company within the corporation, and may prescribe a suitable charge for such inspection and testing, and the manner of collecting the same. (May 7, 1869, 66 v. 219, § 421; April 12, 1876, 73 v. 227, § 4; May 18, 1894, 91 v. 300.)

§ 2485. **EXCLUSIVE MONOPOLY SHALL NOT BE ALLOWED TO GAS COMPANIES.**—It shall not be lawful for any council to agree by ordinance, contract, or otherwise, with any person or persons, for the construction or extension of gas-works for manufacturing or supplying the corporation or its inhabitants with gas, which shall give or continue to any person or persons making such agreements with the council the exclusive privilege of using the streets, lanes, commons, or alleys, for the purpose of conveying gas to the corporation, or the citizens thereof, or which shall deprive the council of the right to designate the kind of meter to be used for the correct measurement of the gas furnished under such agreement, and to provide for inspecting or regulating the same, or which shall not specify the exact quality of the gas to be furnished, and reserve to the council the right to enforce an exact compliance with such specification, under such rules as the council may prescribe; nor shall the council make any such agreement which shall not secure to the council the right to purchase such works, and all the appurtenances belonging thereto, at any time within the existence of such contract or agreement. (May 7, 1869, 66 v. 219, § 422.)

No exclusive grant without express authority.

Municipality cannot grant exclusive right to use of streets, without power expressly granted, or so far necessary to the proper powers granted as to be free from doubt.—See note to *State ex rel. v. Hamilton*, under § 3550; *State v. Gas Co.*, 18 Oh. St. 262 (1868).

Franchise to manufacture includes right to purchase gas.

See *Hamilton v. Hamilton Gas, etc., Co.*, 8 N. P. 510 (1901).

Right to use streets is a franchise.

The right to use the street for the laying of the pipes to convey gas, whether in the hands of an individual or a corporation, is a

Railroads in Municipal Corporation, § 10 Mun. Code.

franchise, and must directly or indirectly emanate from the legislature.—*State v. Gas Co.*, 18 Oh. St. 262 (1868).

"Person or persons," include corporation.

The words "person or persons," as used in this section, include corporations.—*Cincinnati Gas Co. v. Avondale*, 43 Oh. St. 257 (1885).

Contract legal, though it fails to give right to purchase franchise.

A contract between the city and a gas-light company is legal, though it fails to secure to the city the right to purchase plant.—*Lima Gas Co. v. Lima*, 4 O. C. C. 22 (1889).

Not applicable to natural gas companies.

Logan Natural Gas, etc., Co. v. Chillicothe, 65 Oh. St. 186 (1901).

§ 2485a. **CONSOLIDATION OF COMPANIES DOING BUSINESS IN SAME MUNICIPALITY.**—Any two or more of the companies mentioned in section 2478, which are doing business in the same municipal corporation, or which are incorporated and organized for the purpose of doing business in the same municipal corporation, may consolidate into a single corporation in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3390, 3391 and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections. (April 16, 1900, 94 v. 315.)

§ 2491. **CONTRACT TO SUPPLY MUNICIPALITY WITH ELECTRIC LIGHT OR GAS.**—A municipal corporation may contract with such company for supplying, with electric light, natural or artificial gas for the purpose of lighting (or heating) the streets, squares and other public places and buildings in the corporation limits; but this section shall be subject to the restrictions in the last clause of section thirty-five hundred and fifty-one. (March 1, 1889, 86 v. 62; March 4, 1887, 84 v. 39; R. S. 1880.)

Power to contract limited to period of ten years by § 2479.

Lima Gas Co. v. Lima, 4 O. C. C. 22 (1889).
Cited, *Findlay Gas Co. v. Findlay*, 2 O. C. C.

237 (1887); *Toledo v. Gas Co.*, 5 O. C. C. 557, 571 (1890); *Bellaire Goblet Co. v. Findlay*, 5 O. C. C. 418, 424 (1890).

RAILROADS IN MUNICIPAL CORPORATION.

Municipal Code, § 10. **WHEN MUNICIPAL CORPORATIONS MAY APPROPRIATE RAILROAD PROPERTY.**—All municipal corporations shall have power to appropriate, enter upon and hold, real estate within their corporate limits, for the following purposes:

1st. For opening, widening, straightening, changing the grade of and extending streets and all other public places, and for this purpose the corporation may appropriate the right of way across railway tracks and lands held by railway companies where such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement; and for obtaining material for the improvement of streets and other public places. * * *

When city will be enjoined.

The appropriation for a street crossing over railroad tracks will not be interfered with if the use of the property by the railroad company is not destroyed, and if the city is acting in good faith.—*Little Miami R. R. Co. v. Dayton*, 23 Oh. St. 510 (1872); *Baltimore, etc., R. R. Co. v. Bellaire*, 4 W. L. B. 201 (1872). See *Railroad Co. v. Hyde Park*, 4 N. P. 296 (1897); s. c., 7 Dec. 156.

v. Hyde Park, 4 N. P. 296 (1897); s. c., 7 Dec. 156.

City cannot appropriate property for use of railroad.

See *Morehouse v. Norwalk*, 6 W. L. B. 267 (1880).

Appropriation of railroad property for other purposes.

See *Railroad Co. v. Belle Centre*, 48 Oh. St. 273 (1891).

Appropriation proceedings under this section, pleading, etc.

See *Toledo, etc., Ry. Co. v. Fostoria*, 7 O. C. C. 293 (1893); s. c., 4 C. D. 602; *Railroad Co.*

When company estopped to deny right to extension.

Where a company obtains the right to cross certain streets on condition that when it

Railroads in Municipal Corporation, §§ 2494-2495.

becomes necessary to open or extend the same it shall grant a right of way, it is estopped from denying the right to make such opening or extension.—*Chicago, etc., R. R. Co. v. Hamilton*, 3 O. C. C. 455 (1888); s. c., 2 C. D. 259.

Appropriation for parks.

See *Toledo, etc., R. R. Co. v. Toledo*, 7 N. P. 285 (1894); s. c., 5 Dec. 306.

Appropriation for ditches.

Lake Erie, etc., Ry. Co. v. Seneca County, 57 Fed. 944 (1893).

§ 2494. COUNCIL TO PASS ORDINANCE TO LIGHT BRIDGE OR RAILWAY.

—When it is deemed necessary by the council of any city or village to have any bridge or railway, located in whole or in part in such corporation, owned, possessed, or operated by any individual, company, association or corporation, or any portion of the same, lighted, the council shall pass an ordinance for that purpose, requiring the individual, company, association, or corporation, owning possessing or operating the same, to light such bridge or railway within a specified time: **Provided**, that it shall not require any such railway or portion thereof to be lighted with electric arc lights. (May 7, 1902, 95 v. 419; March 23, 1872, 69 v. 47, § 429.)

Constitutionality.

This act is a police regulation, and is constitutional.—*Cincinnati, etc., R. R. Co. v. Sullivan*, 32 Oh. St. 152 (1877); *Cleveland, etc., Ry. Co. v. St. Bernard*, 15 O. C. C. 588 (1898); s. c., 8 C. D. 385.

Applicable to what railroads.

Although the company operating the railroad is not the owner or the lessee, it is liable under this section.—*Cincinnati, etc. v. Bowling Green*, 57 Oh. St. 336 (1899).

Notice of intention to pass ordinance.

The passage of an ordinance is not rendered nugatory by failure of the village to notify the company of its intention.—*Cleveland, etc., Ry. Co. v. St. Bernard*, 19 O. C. C. 299 (1900); s. c., 10 C. D. 415.

See generally *Bowling Green v. Railroad Co.*, 10 C. C. 63 (1894); s. c., 4 C. D. 39; *Railroad Co. v. Bowling Green*, 9 O. C. C. 524 (1895); s. c., 6 C. D. 531; *Railroad Co. v. St. Mary's*, 14 O. C. C. 202 (1897); *Railroad Co. v. St. Bernard*, 15 O. C. C. 588 (1898); s. c., 8 C. D. 385.

§ 2495. CHARACTER OF THE ORDINANCE.—The ordinance shall specify the manner in which such bridge or railway shall be lighted, the number and style of lamp-posts, gas-posts, electric lights or other lights and fixtures and the time such lights shall be kept burning in each twenty-four hours. (April 13, 1894, 91 v. 147; May 7, 1869, 66 v. 220, § 430.)

Construction of ordinance.

An ordinance under this section should receive a reasonable construction. The instrument should be reasonably certain in its requirements, but no particular form of words is necessary. It will not be held defective as failing to fix a specified time for the performance of such requirement by the company, if its language, taking the ordinance all together, is sufficiently definite to inform the company that such lighting is required to be done, how and when it is to be done.—*St. Mary's v. Lake Erie, etc., R. R. Co.*, 60 Oh. St. 136 (1899).

Reasonableness of ordinance.

It is a good defense that the ordinance is unreasonable in that the light required will obscure headlights and endanger the service of the company.—*Cleveland, etc., Ry. Co. v. St. Bernard*, 15 O. C. C. 588 (1898); s. c., 8 C. D. 385.

Number of hours.

An ordinance prescribing that "the number of hours that said electric lights shall be required to be lighted during each period of twenty-four hours shall be the same as the said council does now or may hereafter require for electric lamps within the limits of

said village for lighting streets, shall be lighted," is sufficiently definite.—*Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Oh. St. 336 (1897).

Kind and manner of lighting.

The city or village has authority to prescribe the kind of light that shall be employed, and where an electric light plant is in operation within such city or village lighting its streets and furnishing light to its inhabitants, an ordinance is not unreasonable because it requires a railroad company to use the particular kind of lamp and illuminating material in use for lighting the streets of such city or village.—*Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Oh. St. 336 (1897).

What time reasonable.

A requirement that the company proceed to do the lighting by electricity within twenty days after notice of the passage of the ordinance is not necessarily unreasonable.—*St. Mary's v. Lake Erie, etc., R. R. Co.*, 60 Oh. St. 136 (1899).

Duty of electric light company to sell light.

See *Cincinnati, etc., R. R. Co. v. Bowling Green*, 57 Oh. St. 336 (1897).

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§ 2496. **NOTICE OF REQUIREMENT TO BE GIVEN.**—Notice of such requirement to light any bridge or railway shall be given at least twenty days before penalty or charge shall be imposed for default, and such notice may be given by delivering to any owner or part owner, or any person having possession, charge or management of such bridge or railway, a written or printed copy of the ordinance, provided, however, that when such ordinance requires the lighting of a railway, service of such written or printed copy of the ordinance upon any ticket or freight agent of such railway company in such city or village, and if there be no such ticket or freight agent in such city or village, upon any ticket or freight agent of such railway company in the county wherein such city or village is located, shall be deemed sufficient and shall charge the person, company, corporation, or partnership, owning or operating such railway with notice of the passage of said ordinance and the requirements thereof. (May 6, 1902, 95 v. 369; May 7, 1869, 66 v. 220.)

Notice to agent not sufficient.

See *C. C. & St. L. Ry. Co. v. De Graft*, 20 O. C. C. 710 (1899); *Dayton v. C. C. & St. L. Ry. Co.*, 46 W. L. B. 287 (1901).

§ 2497. **PROCEDURE ON FAILURE TO LIGHT BRIDGE OR RAILWAY.**—If the person, company, or corporation, owning, possessing, or operating such railway or bridge, neglect or fail to do such lighting in conformity with the provisions of the ordinance for twenty days after notice as aforesaid, the council may immediately proceed to cause the lighting to be done at the expense of such person or persons, company, or corporations. (March 23, 1872, 69 v. 47, § 432.)

§ 2498. **ASSESSMENT FOR EXPENSE OF SUCH LIGHTING, ETC.**—The council may direct the manner in which the expense of lighting such bridge or railway shall be assessed and collected, and when assessed, the amount shall be a debt due against and payable by such person, company, or corporation, and shall be a lien to be enforced as any other lien on such bridge and the land on which the same is built, or upon the real estate of the railway company or leasehold interest situate or being within the county wherein such city or village is located. (March 23, 1872, 69 v. 47, § 433.)

Lien for expense.

When, on default of the railway company, such lighting is procured to be done by the council, the expense of such lighting may, by the council, be assessed or declared a lien upon any of the real estate of the railway company within the municipality.—*Cincinnati, etc., R. R. Co. v. Sullivan*, 32 Oh. St. 152 (1877).

How liability enforced.

The liability of the railway company to pay such expenses can only be enforced by suit or action, or in the language of the constitution, "by due course of law." It is not

a tax or an assessment in the nature of a tax for local improvements, and cannot therefore be summarily placed upon the county duplicate and collected as a tax or assessment proper.—*Cincinnati, etc., R. R. Co. v. Sullivan*, 32 Oh. St. 152 (1877).

Evidence of expense.

Where an assessing ordinance, fixing the expense of such lighting, has been enacted in conformity with this section, such ordinance of itself furnishes prima facie evidence of the expense of the lighting.—*St. Mary's v. Lake Erie, etc., R. R. Co.*, 60 Oh. St. 136 (1899).

§ 2499. **HOW LIEN MAY BE ENFORCED.**—The charge may be collected or the lien enforced in the manner pointed out in the chapter providing for the assessment of damages and expenses for making public improvements. (May 7, 1869, 66 v. 221, § 434.)

Mode of collection.

The mode of collecting such charge or enforcing the lien thereof, prescribed by this section, is by suit in the name of the munic-

pal corporation, in a court of competent jurisdiction.—*Cincinnati, etc., R. R. Co. v. Sullivan*, 32 Oh. St. 152 (1877).

§ 2500. **REGULATION OF RATE OF SPEED.**—When a railroad track is laid in a municipal corporation, the council may by ordinance regulate the speed of all locomotives and railroad cars within the corporate limits; provided, such ordinance

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shall not require a less rate of speed than four miles an hour, and in villages having a population of two thousand or less it shall not be fixed at a less rate than eight miles an hour; and the corporate authorities may by civil action, recover against any engineer, conductor, or company violating such ordinance a sum not less than five dollars nor more than fifty dollars for each offense. (April 27, 1877, 74 v. 132, § 1.)

Evidence in negligence cases.

In an action to recover for an injury alleged to have been caused by cars moving on a railroad track, proof that the company was moving its cars in violation of a city ordinance at the time the injury was inflicted, while not sufficient per se to create a liability, is yet competent to go to the jury as tending to show negligence and to excuse contributory negligence.—Meek v. Pennsylvania Co., 38 Oh. St. 632 (1883); Hart v. Devereux, 41 Oh. St. 565 (1885); Becker v. Cincinnati Street Ry. Co., 1 N. P. 359 (1894); s. c., 2 Dec. 137; Cincinnati, etc., R. R. Co. v. Murphy, 18 O. C. C. 298 (1899); s. c., 10 C. D. 195; Pennsylvania Co. v. Trainer, 18 O. C. C. 716 (1897); s. c., 7 C. D. 567; Railway Co. v. Herrick, 49 Oh. St. 25, 32 (1892); Engleman v. Lake Shore, etc., Ry. Co., 34 W. L. B. 229 (1895).

Power to regulate running of trains.

See Ravenna v. Pennsylvania Co., 45 Oh. St. 118 (1887).

Gates, watchmen, etc.

See §§ 247a, 247b, and notes.

An Act Authorizing Changes and the Extensions of Existing Street Railway Routes, and in Existing Transfer Systems.

Be it enacted by the General Assembly of the State of Ohio:

§ 1. **MUNICIPALITIES MAY AGREE WITH STREET RAILWAY COMPANY FOR PAYMENT OF PERCENTAGE OF GROSS RECEIPTS IN LIEN OF CAR LICENSE FEES.**—That it shall be competent for the board of public service, in any city of the first grade of the first class, and for the council or other legislative body of any other municipal corporation, by and with the consent of the mayor, to agree with any street railway company or companies operating any street railway route or routes in such city or other municipal corporation for the payment of a percentage or additional percentage not less than one per cent. upon its gross receipts in lieu of car license fees that may have been exacted under existing grants, and upon such changes in and extensions of existing street railway route or routes, and any changes in or revision of any prevailing or existing system of transfers between such routes as such board of public service or council, or other legislative body may deem to be to the benefit, convenience or advantage of the public.

NO INCREASE IN RATE OF FARE; CONSENTS TO CHANGES OR EXTENSIONS OF EXISTING ROUTES NOT NECESSARY, WHEN.—Provided, that nothing herein contained shall be construed to authorize any increase in the rate of fare by reason of any such changes, revisions or extensions; and provided, further, that when any such changes in or extensions of existing routes are made so as to run in whole or in part over and along existing tracks already belonging to such company or companies, it shall not be necessary to secure and file the consents to such changes or extensions of the owners of the property abutting on the streets on which such existing tracks are located. Provided, further, that nothing herein contained shall be construed to authorize the extension of the track or route of one street railway company over those of any other street railway company, otherwise than in the manner already provided by law, excepting by agreement of both such companies.

NO EXTENSION IN LENGTH OF FRANCHISE; NOTICE AS TO ORDINANCE TO EXTEND OR CHANGE ROUTE; CONSENTS NECESSARY WHEN.—Provided, that nothing herein contained shall authorize the extension of existing street railway routes or any portion thereof over and along existing tracks or portions thereof for a longer period than the terms for which the original franchises for such roads or routes existing at the time of the passage of this act, were granted. Provided, further, that no resolution or ordinance, providing for such extension or change of route or routes, or changes or revision of systems of transfers, shall be passed until public notice of the pendency of such resolution or ordinance shall have been given in one or more of the daily newspapers published in said municipal corporation, if there be such,

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and, if not, then in one or more newspapers of general circulation in said municipal corporation, for the period of at least three consecutive weeks; and provided, further, that no change or extension of any existing route shall be granted over any street or streets now occupied by street railway tracks, unless the consent of a majority of the owners of property abutting on such street or streets shall have been first obtained as now by law required. (May 10, 1902, 95 v. 502.)

§ 2. **NO SUBSEQUENT CHANGE IN FIVE YEARS.**—Whenever any street railway route or routes shall have been changed under agreement as provided in the preceding section of this act, no subsequent change of said route or routes shall be made within a period of five years thereafter. (May 10, 1902, 95 v. 503.)

§ 3. This act shall take effect and be in force from and after its passage. (May 10, 1902, 95 v. 503.)

§ 2501. **TERMS AND CONDITIONS OF CONSTRUCTION AND OPERATION TO BE FIXED BY COUNCIL; RENEWAL OF GRANT.**—No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest. (April 21, 1896, 92 v. 206; March 4, 1887, 84 v. 40; R. S. 1880; June 12, 1879, 76 v. 156, § 4; May 7, 1869, 66 v. 217, § 411.)

What is sufficient application.

The presentation of the ordinance for a street railway grant to a common council is a sufficient written application therefor.—*Sanflet v. Toledo*, 10 O. C. C. 460 (1893); s. c., 8 C. D. 711.

Application by corporation before organization.

A grant to a corporation is not invalid because the application to the city for a franchise was filed before the articles of incorporation of the railway company reached the secretary of state.—*Sloane v. People's, etc., Ry. Co.*, 7 O. C. C. 84 (1891); s. c., 3 C. D. 674.

Application in alternative.

An application to a city council for leave to construct a street railway may designate a portion of the proposed route in the alternative.—*Simmons v. Toledo*, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64.

Application by trustee.

The city may entertain an application from a person describing himself as trustee.—*Simmons v. Toledo*, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64.

Extension of term.

An extension of the term of a grant is not invalid because made without competitive bidding, notice or consents.—*Clement v. Cincinnati*, 16 W. L. B. 355 (1886); *Haskins v.*

Cincinnati, etc., R. R. Co., 4 W. L. B. 1126 (1880); *State ex rel. v. East Cleveland R. R. Co.*, 6 O. C. C. 318 (1891); s. c., 3 C. D. 471.

Renewal of grant.

A street railway grant may be renewed before its expiration.—*Cincinnati v. Cincinnati Ry. Co.*, 31 W. L. B. 308 (1894).

See generally as to renewal, *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296 (1896); s. c., 73 Fed. 716; *Louisville Trust Co. v. Cincinnati, etc., Ry. Co.*, 78 Fed. 307 (1897).

Same subject.

The consent of abutting lot-owners upon a street occupied by a street railroad is not a condition precedent to the right of the council to grant a renewal of the franchise of such street railroad company.—*Pelton v. East Cleveland R. R. Co.*, 22 W. L. B. 67 (1889).

Cars without conductors.

See as to enforcement of ordinance requiring company to furnish conductors, *Thornhill v. Cincinnati*, 4 O. C. C. 354 (1890); s. c., 2 C. D. 592.

See Municipal Code, § 28.

Violation of terms and conditions, remedy.

The city may have a remedy by action on the contract or the state may proceed by way of quo warranto.—*State ex rel. v. Toledo Ry. & Light Co.*, 23 O. C. C. 603 (1902).

Municipal Code, § 29. **STREET RAILWAY FRANCHISES; STREET RAILWAY FRANCHISES.**—The right so to construct or extend such railway as provided in section 3437 Revised Statutes of Ohio, within or beyond the limits of a municipal corporation can be granted only by the council thereof, by ordinance, and the right

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to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by the order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant or renewal of a grant during the term for which said grant or renewal shall have been made. Provided, that no authority shall be given by such municipal or county authorities, to occupy the track, whether single or double, or other structure, of any existing street railways for more than one-eighth of the entire distance between the termini of the route, as actually constructed, operated and run over, of the company or individual to whom such grant is made; except, however, in granting permission to extend existing routes in cities, such cities, and the companies owning such route, shall have the same rights and powers they have under the laws and contracts now existing; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provisions of section 2501 of the Revised Statutes of Ohio and section 30 of this act.

Municipal Code, § 30. PUBLICATION, BIDS, CONSENTS, TERM, RELEASE OF OBLIGATIONS.— Nothing mentioned in section 2501 of the Revised Statutes of Ohio shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council; and no ordinance for the purpose specified in section 2501 of the Revised Statutes of Ohio shall be passed until public notice of the application therefor has been given by the clerk of the corporation once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation; and no such grant as mentioned in section 2501 of the Revised Statutes of Ohio shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.

Other statutes.

See § 3437 et seq.

Publication of notice.

Publication of notice of an application on the same day of the week for three consecutive weeks in a daily newspaper published and of general circulation in such city is sufficient in a case where the council proceeding under such notice passes an ordinance granting the right, notwithstanding a general ordinance of the city required such notices to be published in two daily papers of the city.—*Simmons v. Toledo*, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64. See *Smith v. Columbus*, etc., Ry. Co., 8 N. P. 1 (1900).

When publication should be made.

If the notice of the application is to be given before the passage of the first ordinance or resolution, to merely establish or define a route, and inviting proposals for the construction thereof, on certain terms, it is not so far jurisdictional in its character as to make the first ordinance or resolution invalid if notice is not given, and if such notice is given before the passage of the final ordinance it will be sufficient, but if not so given, the final ordinance will be invalid.—*Aydelott v. Cincinnati*, 11 O. C. C. 11 (1893); s. c., 4 C. D. 486. See *Sloane v. People's*, etc., Ry. Co., 7 O. C. C. 84 (1891); s. c., 3 C. D. 674; *Hamilton v. C. &*

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H., etc., Ry. Co., 5 N. P. 457 (1898); s. c., 8 Dec. 174.

Ordinances regulating publication, etc.

Where the council has enacted a general ordinance regulating publication, etc., it may make a grant without reference to such ordinance by following the general statutes.—See Aydelott v. Cincinnati, 11 O. C. C. 11 (1893); s. c., 4 C. D. 486; Simmons v. Toledo, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64.

Who should order publication.

A grant is not invalid because the city clerk caused the application and invitation for bids to be published without any action having been taken by the city council directing such publication where the council afterwards recognizes and acts upon such application.—Sloane v. People's, etc., Ry. Co., 7 O. C. C. 84 (1891); s. c., 3 C. D. 674.

Mandamus to compel advertisement.

Mandamus will not lie upon the relation of a citizen and owner of land abutting upon a street through which a line of railroad is to pass, if constructed, to compel the city clerk to make the advertisement required of him by the ordinance when he wrongfully refuses or neglects so to do.—State ex rel. v. Henderson, 38 Oh. St. 644 (1883).

Bids, acceptance.

A city council may adopt reasonable regulations as to the form of bids and as to the time when bidding shall close, but in the absence of such regulations, if the application is published for the time required by the statute, and the council acting in good faith, after the expiration of that time, make the grant to the only bidder therefor, and whose bid is reasonable, the exercise of such franchise will not be enjoined on account of irregularities on the part of the council in opening and considering such bid.—Sloane v. People's, etc., Ry. Co., 7 O. C. C. 84 (1891); s. c., 3 C. D. 674.

Irregularities in bids.

Informalities in bids which do not go to the substance of the bid are to be disregarded.—Compton v. Johnson, 9 O. C. C. 532 (1895); s. c., 6 C. D. 110.

Good faith of bidder—rules to determine.

See Gallagher v. Johnson, 30 W. L. B. 139 (1893); s. c., 31 W. L. B. 24; Compton v. Johnson, 9 O. C. C. 532 (1895); s. c., 6 C. D. 110.

Bidder's bond—what is valid.

See Gallagher v. Johnson, 30 W. L. B. 139 (1893); Compton v. Johnson, 9 O. C. C. 532 (1895); s. c., 6 C. D. 110.

Bidder's bond—power of council.

See Sloane v. People's, etc., Ry. Co., 7 O. C. C. 84 (1891); s. c., 3 C. D. 674; Simmons v. Toledo, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64.

Who is lowest bidder.

The grant of a franchise to one whom the council has in good faith found and determined to be the bidder offering to carry passengers at the lowest rates of fare, will not be held invalid without clear proof that the council erred in its finding.—Simmons v. Toledo, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64.

Same subject.

The question whether a valid contract has been made by the city with a party for the construction and operation of a street railroad route under this section depends upon the fact whether such party in his bid agreed to carry passengers at the lowest rates of fare.—Knorr v. Miller, 5 O. C. C. 609 (1891); s. c., 3 C. D. 297.

When ordinance inviting bids takes effect.

See Sloane v. People's, etc., Ry. Co., 7 O. C. C. 84, 93 (1891); s. c., 3 C. D. 674.

Power of council over bids.

Simmons v. Toledo, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64.

Lowest rates of fare—what are.

The council is not authorized to make a grant to the company which will bid "the lowest price of commutation tickets in packages," and where an ordinance contains such unauthorized provisions, and they are so connected with authorized provisions that their separation is impracticable, the whole ordinance is invalid.—Cincinnati Street R. R. Co. v. Smith, 29 Oh. St. 291 (1876).

Right to fix rates of fare.

Though a grant may be made fixing rates of fare, there is no power in a city after a grant is made to change the rates.—See Cleveland City Ry. Co. v. Cleveland, 94 Fed. 385 (1899).

Duration of term.

A city has the right to limit the life of a franchise, and the fact that the life of a corporation is for an unlimited term does not abridge its capacity to accept a grant of a street franchise for a shorter term.—Louisville Trust Co. v. Cincinnati, 76 Fed. 296 (1896); s. c., 10 O. F. D. 112; s. c., 73 Fed. 716; s. c., 8 O. F. D. 704.

Grant for more than twenty-five years.

When a grant is made for a period greater than twenty-five years, it will be valid to the extent of twenty-five years.—Sommers v. Cincinnati, 8 A. L. Rec. 612 (1880).

Expiration—injunction pending negotiations for new franchise.

Where the franchise of a company has expired, and it has been perpetually enjoined from operating, but the operation of the decree has been suspended for a time, the court will not take charge of the road and operate

Street Railway Franchises, § 31 Mun. Code—§ 2503.

it by a receiver, but will enjoin interference with the operation while the decree is suspended.—*Cincinnati v. Cincinnati, etc., Ry. Co.*, 4 N. P. 187; s. c., 7 Dec. 2 (1896); s. c., 4 N. P. 57, 6 Dec. 81.

Route through private property—effect.

See *Harrison v. Mt. Auburn, etc., Ry. Co.*, 17 W. L. B. 265 (1887).

Line may fork and be but one route.

See *Aydelott v. Cincinnati*, 11 O. C. C. 11 (1893); s. c., 4 C. D. 486.

Effect of § 3439 on this section.

See *Neare v. Mt. Auburn, etc., Ry. Co.*, 29 W. L. B. 171, 54 Oh. St. 153 (1896).

Council cannot delegate authority.

A grant of a street railway franchise must be made directly to the successful bidder, and authority to make a grant cannot be delegated to any officer or board.—*State ex rel. v. Bell*, 34 Oh. St. 194 (1877).

Signature of mayor not necessary.

See *Aydelott v. Cincinnati*, 11 O. C. C. 11 (1893); s. c., 4 C. D. 486; *State ex rel. v. Henderson*, 38 Oh. St. 644 (1883).

What is release of obligation.

A modification of a contract between the city and a company, made in good faith, for the better accommodation of the public, is not void by virtue of this section as a release from an obligation, although in consideration of more rapid transit at a greater rate of fare.—See *Cincinnati, etc., Ry. Co. v. Cincinnati*, 8 N. P. 80 (1900); *Clement v. Cincinnati*, 16

W. L. B. 355 (1886); *Cincinnati v. Cincinnati*, 2 N. P. 298 (1893); s. c., 2 Dec. 468; *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385 (1899).

Illegal contract by company with councilman.

A contract with a member of a city council to assist a company in procuring a right of way over city streets is against public policy and will not be enforced.—*Railroad Co. v. Morris*, 10 O. C. C. 502 (1895); s. c., 6 C. D. 640.

Cities may require companies to employ conductors.

Municipal Code, §§ 8–28.

Validity and effect of speed ordinances.

See *Lewis v. Street Ry. Co.*, 10 Dec. 53 (1900); *Ulrich v. Street Ry. Co.*, 10 O. C. C. 635 (1895); s. c., 5 C. D. 111; *Becker v. Street Ry. Co.*, 1 N. P. 359 (1894); s. c., 2 Dec. 137.

Rule where there is no speed ordinance.

Where no speed ordinance has been enacted the speed must be reasonable in view of all the facts and circumstances.—*Cincinnati Street Ry. Co. v. Lewis*, 23 O. C. C. 127 (1901).

Reading ordinance.

See *Smith v. Columbus, etc., Ry. Co.*, 8 N. P. 1 (1900).

Injunction to restrain city and company from carrying ordinances into effect, when granted.

See *Ross v. Columbus*, 8 N. P. 420 (1901).

Municipal Code, § 31. RIGHTS OF ABUTTING OWNERS; CURATIVE ACT.—

Nothing herein contained shall be construed to impair the rights of abutting property owners, where unnecessary or additional burdens are placed upon the streets by operation of any grants herein authorized to be made, and nothing in this act, or any part thereof, shall be construed to impair or enlarge the rights of any corporation now using the streets of any municipality in the state under authority of any law now or hereafter in force; but all unexpired grants of rights or franchises heretofore made by any municipality, in accordance with the provisions of any statute or act of the General Assembly existing at the time when they were made, and which have been accepted and where money has been expended in good faith on account thereof, are hereby regranted for such unexpired portion of the respective periods of the original grants in accordance with the terms and conditions of the same; any law, or part of law, to the contrary notwithstanding.

§ 2503. GRADE OF STREETS WHEN STREET RAILROAD IS CONSTRUCTED.

—Before any street railroad shall be constructed, on any street less than sixty feet in width, with a roadway of thirty-five feet, or under, the council shall provide, that the crown of the street shall be made a nearly flat uniform curve, from curb to curb, without ditch gutters, and in such manner as to give all wheeled vehicles the full use of the roadway up to the face of the curb, after the plan of the streets in the cities of Philadelphia and New York. And on any street, whenever the tracks of two street railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade, the crossings shall be made with crossing-frogs of the most approved pattern

Street Railway Franchises, §§ 2504-2505.

and materials and kept up and in repair at the joint expense of the companies owning said tracks. (April 20, 1881, 78 v. 296; R. S. 1880; May 7, 1867, 66 v. 217.)

Constitutionality.

This section, so far as concerns crossing-frogs, is a valid exercise of the police power of the state.—Cincinnati, etc., Ry. Co. v. Cincinnati, etc., R. R. Co., 32 W. L. B. 4 (1894).

Applicable to what companies.

The provisions of this section apply to all such companies, whether their lines have been constructed before or after its passage.—Cincinnati, etc., Ry. Co. v. Cincinnati, etc., R. R. Co., 32 W. L. B. 4 (1894).

Duty to renew.

A compliance with the terms of this section on one occasion does not absolve the companies so complying from the duty of using other crossing-frogs and materials when the latter are subsequently found to be of a more approved pattern or character.—Cincinnati, etc., Ry. Co. v. Cincinnati, etc., R. R. Co., 32 W. L. B. 4 (1894).

§ 2504. PAVEMENT OF STREETS WHERE RAILROADS ARE CONSTRUCTED; PROVISIO.—The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or the Nicholson or other wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders, or the Nicholson or other wooden or asphaltic pavement shall not be required; provided, that in cities of the second grade of the first class, the council may require of any street railroad company to pave and keep in constant repair, sixteen feet for a double track or seven feet for a single track, all of which pavement shall be of the same material as the balance of the street is paved with. (April 21, 1890, 87 v. 246; May 7, 1867, 66 v. 217, § 414.)

Obligation to repair under ordinance conditions.

When the granting ordinance provides that the company shall repair the street between rails, and that in case of default the city may do the work and recover the cost: the city is not divested of its right to control the street, and it may cause new improvements to be made and determine the kind of improvement. The company, in accepting the grant, incurs the obligation to repair, and if the company is notified to do the work any time before the work is commenced, and on default the city does the work, the reasonable cost of the same

may be recovered.—Columbus v. Street R. R. Co., 45 Oh. St. 98 (1887). See Cincinnati, etc., Ry. Co. v. Carthage, 36 Oh. St. 631 (1881).

Franchises and tracks subject to assessment.

See Cleveland v. Cleveland, etc., R. R. Co., 1 C. L. Rep. 304 (1878).

Paving in Cleveland.

See Cleveland v. Cleveland, etc., R. R. Co., 1 N. P. 413 (1894); s. c., 3 Dec. 92.

§ 2505. COUNCIL OF CITY OR VILLAGE MAY GRANT EXTENSION OF STREET RAILROAD.—The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections three thousand four hundred and thirty-seven, three thousand four hundred and thirty-eight, three thousand four hundred and thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two, and three thousand four hundred and forty-three, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation. (March 9, 1880, 77 v. 43; R. S. 1880; May 7, 1869, 66 v. 140, § 1.)

Publication of notice.

The advertisement of the application provided for in § 2502 is intended to apply only to proposed construction of new routes, and not to extension of existing routes upon which no additional fare is to be charged.—State ex rel. v. Cincinnati, etc., Ry. Co., 19 O. C. C. 79 (1899); Sommers v. Cincinnati, 8 A. L. Rec. 612 (1880).

Consents for extensions.

See Sommers v. Cincinnati, 8 A. L. Rec. 612 (1880).

Consents—how counted.

The consent of a property owner for a certain designated extension cannot be made available, and counted as a consent for another and different extension.—Neare v. Mt.

Street Railway Franchises, § 2505a.

Auburn, etc., Ry. Co., 29 W. L. B. 171 (1893).

Consents for each street must be obtained.

In the extension of a street railway over streets not occupied by any road, the consents of the owners of more than one-half of the feet front of the lots or lands abutting on each street to be occupied by such extension are requisite.—Mt. Auburn, etc., Ry. Co. v. Neare, 54 Oh. St. 153 (1896); s. e., 29 W. L. B. 171.

What is an extension.

A prolongation of an existing street railroad track through any street or streets within the corporation within which the council declare that the same will be beneficial to the public, no matter in what direction such prolongation may be made, is an extension of an existing track within the meaning of this section, the requisites of such extension being that it shall be constructed only in such streets as are so designated by council, and that no additional fare shall be charged.—Sommers v. Cincinnati, 8 A. L. Rec. 612 (1880).

Power to declare extension beneficial.

When the council designates two or more streets in which they declare it beneficial to the public to have an extension located, leaving to the company the choice of the various routes so designated, the discretion conferred upon the council by this section has been completely exercised, and no part of this discretion can be said to be delegated to the company.—Sommers v. Cincinnati, 8 A. L. Rec. 612 (1880).

Interference by courts.

The courts will interfere with the public authorities authorizing an extension only when fraud or bad faith is shown.—Cincinnati v. Cincinnati, etc., Ry. Co., 31 W. L. B. 308 (1894); Sims v. Street R. R. Co., 37 Oh. St. 556 (1882).

The ordinance does not confer corporate power.

The corporate power to make an extension is conferred by statutes under which the company is incorporated and acting. The ordinance granting permission to make an extension is not a grant of corporate power, but a permit to exercise powers already granted.—Sims v. Street R. R. Co., 37 Oh. St. 556 (1882).

Extension of steam road.

A steam railroad cannot be extended under this section, but only under the general railroad act. A street railroad, operating under a charter authorizing a steam railroad, cannot be extended by condemnation or appropriation.—Cincinnati, etc., Ry. Co. v. Cincinnati, 7 N. P. 511 (1897); s. e., 5 Dec. 562.

Conditions — power to impose.

An extension may be granted on conditions.—See Cincinnati v. Cincinnati, etc., Ry. Co., 31 W. L. B. 308 (1894).

Consents not required when existing tracks used.

Where a company obtains permission to extend its line over existing tracks, the consents of property owners need not be obtained.—See State ex rel. v. Cincinnati, etc., Ry. Co., 19 O. C. C. 79 (1899).

§ 2505a. **POWER TO LEASE OR PURCHASE, TO ENTER INTO BENEFICIAL ARRANGEMENT, TO PURCHASE STOCK, ETC.; PERFECTION OF LEASE OR PURCHASE; RIGHTS OF DISSENTING STOCKHOLDERS; INCREASE OF FARE PROHIBITED.**—Any corporation or company organized for street railway purposes, may lease or purchase any street railroad, or street railroads, or railroad operated as a street railroad and by electric power or inclined plane railroad or railroads, together with all the property, real, personal or mixed, and all the franchises, rights and privileges respecting the use and operation of such railroad or railroads, situate or existing in whole or in part within this state, constructed and held by any other corporation or company, corporations or companies, the latter being hereby invested with corresponding power to let or sell upon such terms and conditions as may be agreed upon between the corporations or companies; and any two or more of such corporations or companies may enter into any agreement for their common benefit consistent with and calculated to promote the objects for which they were created. No such lease or purchase shall be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place, and in such manner, as is provided for annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, or at any properly adjourned meeting, assent thereto. Provided that any stockholder who refuses to assent to such lease or sale and signifies the same by notice in writing to the lessee or purchaser within ninety days thereafter, shall be entitled to demand and receive compensation

Street Railways, §§ 2505b, 2505c.

in the manner provided for the compensation of stockholders in sections 3302, 3303 and 3304 of the Revised Statutes, and the said sections are adopted and made to be a part of this section. Provided, that, whenever any such lease or purchase is made as herein provided, there shall be no increase of the existing rates of fare by reason of such lease or purchase nor shall any fare be charged upon any of the separate routes so leased or purchased in excess of the fare charged over such separate routes prior to the lease or purchase thereof, and provided that when any such lease or purchase is made as herein provided, the fare charged for one continuous route or ride in the same general direction over all such leased or purchased lines within any municipal corporation shall not exceed the maximum fare charged over any one of said lines prior to such lease or purchase. (April 23, 1898, 93 v. 214; April 22, 1896, 92 v. 277; May 1, 1891, 88 v. 493.)

Remedy when excessive fares are charged.

When a company has made a lease or purchase under this section and is charging more for a continuous ride in the same general di-

rection than is lawful, quo warranto will lie. As to what allegations are sufficient on demurrer, see *State ex rel. v. Toledo Ry. & Light Co.*, 23 O. C. C. 603 (1902).

§ 2505b. **CONSOLIDATION.**—Whenever the lines or authorized lines of road of any street railroad corporations or companies meet or intersect, or can be conveniently operated from one power house or from a power house or power houses owned, under lease or operated by one of such street railroad corporations or companies, or whenever any such line of any street railroad corporation or company, and that of any inclined plane railway or railroad company or corporation, or any railroad operated by electricity may be conveniently connected, to be operated to mutual advantage, or whenever any such line of any street railroad corporation or company and that of any inclined plane railway or railroad company or corporation or the railway of any company operated by electricity can be conveniently operated from one power house or from a power house owned, under lease or operated by one of such street railroad corporations or companies or inclined plane railway or railroad companies or corporations or by any company or corporation, the railway of which is operated by electricity such corporations or companies, or any two or more of them, are hereby authorized to consolidate themselves into a single corporation, provided they are not competing lines, but the provisions herein as to competing lines shall have no application to such companies or corporations whose lines are nearby or wholly situate in any city of the state of Ohio or whenever a line of road of any street railroad company or corporation organized in this state is made, or is in process of construction to the boundary line of the state, or to any point either within or without the state, such corporation or company may consolidate its capital stock with the capital stock of any corporation or company, or corporations and companies in an adjoining state, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391 and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections and each of them; and the said sections, including these so amended and supplemented are adopted and made a part of this section. (May 10, 1902, 95 v. 510; April 22, 1896, 92 v. 277; April 18, 1892, 89 v. 406; May 1, 1891, 88 v. 493.)

See *Greene v. Woodland, etc., R. R. Co.*, 62 Oh. St. 67 (1900).

§ 2505c. **USE OF STREET RAILWAY TRACKS FOR OPERATION OF PASSENGER CARS OF OTHER RAILWAY COMPANY, ETC.**—Whenever any railway company is incorporated and organized under the laws of this state for the purpose of building, acquiring, owning, leasing, operating and maintaining a railroad or railroads to be operated by electricity or other motive power from one municipal corporation or point in this state, to any other municipal corporation, municipal corporations, or point in this state, it shall have an authority to make an arrangement or agreement

Street Railways, § 2505e.

with any street railway company or companies owning or operating any street railway or railways in any such municipal corporation or corporations, and said street railway company or companies shall have authority to make and enter into such arrangement or agreement with said railway company, whereby the passenger cars of such railway company may be run and propelled over and along the track or tracks of such street railway company or companies, for such compensation and upon such terms as may be agreed upon in the same manner, upon the same conditions and for the same length of time as the cars owned or operated by said street railway company or companies are operated in such municipal corporation or corporations. The said cars of said railway company shall, while they are running and being operated over and along the track or tracks of such street railway company or companies in any such municipal corporation, be entitled to all the privileges and subject to all the obligations enjoyed and imposed by and upon the cars of such street railway company or companies owning or operating its cars in any such municipal corporation, and shall be operated only by the same motive power with which the cars of such street railway company or companies are or may be operated. Such arrangement and agreement, when authorized by not less than two-thirds in amount of the stockholders of each company proposing to enter into such arrangement and agreement, ratified by a majority of the directors and executed by the proper officers thereof, shall give to such railway company full authority to operate its said cars on the tracks of said street railway company or companies in such municipal corporation or municipal corporations. Provided that it shall not be necessary for such railway company, in case it uses in any such municipal corporation or municipal corporations, only the tracks of a street railway company or companies owning or operating a street railway or railways within such municipal corporation or municipal corporations to obtain any additional grant, franchise or right, except by said arrangement or agreement with said street railway company or companies. Provided further, that the fare charged by said railway company for transporting passengers within the municipal corporation or municipal corporations, shall not be greater than that fixed in the franchise or franchises held or owned by such street railway company or companies; and where there is a public park or cemetery on the line of such railway and within one mile of, and owned by, such municipal corporation, such company shall for such fare so transport passengers to and from said park or cemetery the same as though either was within the limits of such corporation. (May 21, 1894, 91 v. 379.)

See State ex rel. v. Cincinnati, etc., Ry. Co., 19 O. C. C. 79 (1899).

§ 2505e. STREET RAILWAY COMPANY MAY LEASE OR PURCHASE PROPERTY, ETC., OF ELECTRIC LIGHT AND POWER COMPANY; STOCKHOLDERS' MEETING TO PERFECT LEASE OR PURCHASE; DISSENTING STOCKHOLDER; POWERS OF PURCHASING COMPANY; LEASE OR SALE NOT TO AFFECT LIABILITY OF LIGHT AND POWER COMPANY.—Any corporation or company maintaining and operating a street railroad, or a railroad operated by electricity, may lease or purchase all the property, real, personal and mixed, and all the franchises, rights and privileges of any company organized for the purpose of supplying electricity, or natural or artificial gas, or both electricity and natural or artificial gas, for power, light, heat or fuel purposes, or which has been engaged in such business in whole or in part in any municipality within this state, the latter being hereby vested with corresponding power to let or sell, upon such terms and conditions as may be agreed upon between the corporation and company. No such lease or purchase shall be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty (30) days' notice to each stockholder at such time and place and in such manner as is provided for the annual meetings of the companies and the holders of at least two-thirds of the stock of each company in person or by proxy, at such meeting, or at any properly adjourned meeting assent thereto. Provided, that any stockholder who refuses to assent to such

Taxation of Corporations, §§ 2734, 2735.

lease or sale and so signifies by notice in writing to the lessee or purchaser within ninety (90) days thereafter shall be entitled to demand and receive compensation in the manner provided for the compensation of stockholders in sections 3302, 3303 and 3304 of the Revised Statutes and the said sections are adopted and made a part of this section. Any such company so leasing or purchasing the property, rights and franchises of an electric light and power company, or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall have all the rights, power and authority of the company where property rights and franchises are so leased or purchased, but the liability of an electric light and power company or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall in no manner be affected by its lease or sale as herein provided. (May 6, 1902, 95 v. 390; April 19, 1898, 93 v. 139.)

TAXATION OF CORPORATIONS.

§ 2734. WHO SHALL LIST PERSONAL PROPERTY.—Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely; the property of every ward shall be listed by his guardian, of every minor child, idiot, or lunatic having no guardian, by his father, if living; if not, by his mother, if living; and if neither father nor mother be living, by the person having such property in charge; of every wife by her husband, if of sound mind, if not, by herself; of every person for whose benefit property is held in trust, by the trustees; of every estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of every company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by any society for savings or bank having no capital stock, by the president or principal accounting officer. (March 7, 1879, 76 v. 28, § 2; May 11, 1878, 75 v. 441, § 1; April 8, 1865, 62 v. 105, § 4.)

§ 2735. WHERE PERSONAL PROPERTY SHALL BE LISTED.—Every person required to list property on behalf of others shall list the same in the same township, city, or village in which he would be required to list it if such property were his own; but he shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs; all merchants' and manufacturers' stock, and all personal property upon farms shall be listed in the township, city, or village in which the same may be situated; and all other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, and if not, then in the township, city, or village where the property is when listed. (April 8, 1865, 62 v. 105, § 4.)

Where corporation resides.

A corporation resides at the place of its principal office as fixed by its articles of incorporation.—*Pelton v. Transportation Co.*, 37 Oh. St. 450 (1882).

Removal of residence.

A corporation whose principal office is located in a specified township, and without the

limits of a city, may, if the city limits be so extended as to include the site of the office, remove the same to some other part of the township and thus avoid municipal taxation.—*Pelton v. Transportation Co.*, 37 Oh. St. 450 (1882).

Valuation of stocks.

See § 2739.

Taxation of Corporations, § 2744.

§ 2744. **CORPORATIONS GENERALLY; THEIR RETURNS.**—The president, secretary, and principal accounting officer of every canal or slack-water navigation company, turnpike company, plank-road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village, or township. It shall be the duty of the accounting officer aforesaid to make return to the auditor of state during the month of May of each year of the aggregate amount of all property by him returned to the several auditors of the respective counties in which the same may be located. It shall be the duty of the auditor of each county, on or before the first Monday of May, annually, to furnish the aforesaid president, secretary, principal accounting officer, or agent, the necessary blanks for the purpose of making aforesaid returns; but no neglect or failure on the part of the county auditor to furnish such blanks shall excuse any such president, secretary, principal accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed: provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint-stock company held by the state. (April 8, 1876, 73 v. 139, § 16.)

Charitable institutions exempt.

See § 2732; *Cleveland, etc., Ass'n v. Pelton*, 36 Oh. St. 253 (1880); *Humphries v. Little Sisters*, 29 Oh. St. 201 (1876); *Morning Star Lodge v. Hayslip*, 23 Oh. St. 144 (1872).

Express, telegraph, and telephone companies.

See §§ 2778, 2780-17 et seq.

Sleeping-car companies.

See § 2780-13.

Freight-line and equipment companies.

See § 2780-8.

Electric light, gas, natural gas, pipe line, water works, street, suburban or interurban railroad, messenger or signal, union depot, and railroad companies.

See § 2780-17 et seq.

Manufacturers.

See § 2742.

Franchise to be a corporation is not property.

See *Exchange Bank v. Hines*, 3 Oh. St. 1, 7 (1853).

Unpaid stock subscriptions must be listed.

See *Farmers' Ins. Co. v. La Rue*, 22 Oh. St. 630 (1872).

Interests in unincorporated companies.

When a corporation has an interest in an unincorporated company, it is relieved from the duty of listing its interest in such unincorporated company.—See *Pomeroy Salt Co. v. Davis*, 21 Oh. St. 555 (1871).

How value of property ascertained.

See *State ex rel. v. Jones*, 51 Oh. St. 492, 511 (1894).

Taxation of Corporations — Insurance Companies, § 2745.

Capital stock listed under this section.

The legislature intended by the description of property in this section to embrace the capital stock of corporations; for the fund subscribed and paid in to carry out the purposes of the organization remains the capital stock of the company after it has been converted into property necessary for the business operations, and for which it was originally subscribed.—*Jones v. Davis*, 35 Oh. St. 474, 477 (1880).

What listed by foreign corporation.

See *Hubbard v. Brush*, 61 Oh. St. 252 (1899).

Correction of returns.

See *Ohio, etc., Co. v. Hard*, 59 Oh. St. 248 (1898).

Returns for five years — § 2781.

See *Ohio, etc., Co. v. Hard*, 59 Oh. St. 248 (1898).

§ 2745. FOREIGN INSURANCE COMPANIES; ANNUAL STATEMENTS.—

Every insurance company, incorporated by the authority of any other state or government shall, in its annual statement to the superintendent of insurance, set forth the gross amount of premiums received by it in the state during the preceding calendar year, without deductions for commissions, return premiums or considerations paid for reinsurance, or any deductions whatever; and shall, also, therein set forth, in separate items, return premiums paid for cancellations and, also, considerations received from other companies for reinsurance in this state, during such year.

PAYMENT OF TAX TO SUPERINTENDENT OF INSURANCE.—Every such company shall, annually, in the month of November, pay to the superintendent of insurance an amount equal to two and one-half per cent of the balance of such gross amount, after deducting such return premiums and considerations received for reinsurances, as shown by its next preceding annual statement.

RETALIATORY PROVISION.—If the laws of any other state, territory or nation authorize charges for the privilege of doing business therein, or taxes against any insurance companies, which are, or may be organized in this state, exceeding the charges herein provided, the same shall be charged against all insurance companies of such state, territory or nation, doing business in this state, in place of the charges herein provided.

PENALTY FOR FAILURE TO PAY TAX OR MAKE TRUE STATEMENT.—

If any such company refuse to pay said tax, after demand therefor has been made; or, if the statement made by it, under this section is false, the superintendent of insurance shall revoke the license of such company to do business in this state.

EXAMINATION OF BOOKS OF COMPANY.—If, at any time, said superintendent has reason to suspect the correctness of any such statement he may, at the expense of the state, make an examination of the books of such company, or of its agents, for the purpose of verifying the same. All taxes collected under the provisions of this section by the superintendent of insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state.

Insurance companies and associations, incorporated by the authority of another state or government or the superintendent of insurance, shall not be required to make returns of deposits of such companies or associations, made as required by law with such superintendent of insurance for the benefit and security of policy holders, and shall not be governed, in respect to such deposits, by the provisions of section 2744, or of section 2734 of the Revised Statutes of Ohio. (April 29, 1902, 95 v. 290; March 27, 1894, 91 v. 91; April 19, 1893, 90 v. 201; April 12, 1889, 86 v. 274; April 11, 1888, 85 v. 183; R. S. 1880; April 8, 1876, 73 v. 138.)

Annual valuation of outstanding policies.

See § 279.

When retaliatory provision effective.

This section prescribes the rate of taxation upon every foreign insurance company doing

business in this state. The last clause of § 282 is operative only when it is shown that the law of the state where such company is organized taxed Ohio corporations doing business there at a rate higher than foreign companies are taxed by this section. In such case the foreign company, in addition to the tax

Taxation of Corporations — Insurance Companies, §§ 2745a, 2745b.

on the gross receipts, should be taxed in such additional sum as will be sufficient to make the total equal to the amount that would be realized were the rule of the state where the company was organized applied to its transactions in this state, but no more.—State ex rel. v. Reimmund, 45 Oh. St. 214 (1887).

Amount to be paid.

Under this section a regular foreign mutual life insurance company, having filed a statement as required by § 3606 and § 3608, is required to pay to the superintendent of insurance such sum as, added to the amounts paid to the different county treasurers, will produce an amount equal to two and one-half per cent. of the gross premium and assessment receipts of such company for the year as shown by such statements filed in the insurance department.—State ex rel. v. Hahn, 50 Oh. St. 714 (1893).

Remedy to test amount of taxes.

Mandamus is not the proper remedy to test the amount of taxes to be paid to the superintendent of insurance under this section, and to prevent the superintendent of insurance from revoking the license of an insurance company to do business in this state. Injunction is the proper remedy.—State ex rel. v. Hahn, 50 Oh. St. 714 (1893).

When license may be revoked.

The power of the superintendent of insurance to revoke or decline to renew a license continues and may be exercised notwithstanding the commencement and pendency of an action brought by him against a company to recover the taxes thus assessed.—State ex rel. v. Matthews, 58 Oh. St. 1 (1898).

§ 2745a. **INSURANCE POLICY ON OHIO PROPERTY NOT TO BE PLACED IN AGENCY OUTSIDE STATE; RE-INSURANCE.**—It shall be unlawful for any insurance company or agent legally authorized to transact insurance business in the state of Ohio to write, place or cause to be written or placed, any policy, renewal of policy, contract for insurance upon property situated or located in the state of Ohio, except through a legally authorized agent in the state of Ohio, who shall countersign all policies so issued and enter the payment of the premium upon his record, and the writing, renewal, placing or causing to be written or placed any policy of insurance in any other manner or form is hereby declared to be a violation of the law providing for the payment of taxes by foreign insurance companies doing business in the state of Ohio, as set out and provided in section 2745 of an act passed by the General Assembly of the state of Ohio, April 12, 1889 (88 v. 487). And no fire insurance company or association authorized to do business in this state shall reinsure, dispose of, cede, pool, divide or in any manner or form whatsoever, reduce any portion of its risk or liability, covering property located in whole or in part in this state, in or with any company, association, person or persons whatever, incorporated or otherwise, not authorized by law to do the business of fire insurance in this state, or to reinsure, or assume as a reinsuring company or otherwise, in any manner or form whatsoever, the whole or any part of any risk or liability, covering property located in whole or in part in this state, of or for any insurance company, association, person or persons; incorporated or otherwise, not authorized by law to do the business of fire insurance in this state. It shall be the duty of the superintendent of insurance of this state annually, and at such times as he may see fit, to require the president or other chief officer of each company or association, to file a statement under oath, showing the names of each fire insurance company, or association, with whom or for whom any liability for insurance on property located in whole or in part in this state has been reinsured, disposed of, ceded, pooled, divided, or in any manner or form whatsoever reduced or increased. (April 16, 1900, 94 v. 299; 88 v. 487.)

See also §§ 2745b and 2745c.

§ 2745b. **REVOCATION OF LICENSE FOR VIOLATING ABOVE.**—That any company or companies violating the provisions of section 2745a of this act, upon notice and satisfactory proof thereof being made to the superintendent of insurance of the state of Ohio, shall have its or their authority to transact business in the state of Ohio revoked for a period of not less than ninety days; and any insurance company whose license to do business in the state of Ohio may be so revoked by the superintendent of insurance of the state of Ohio, shall not be again permitted to do business

Taxation of Corporations, §§ 2745c-2746.

in the state of Ohio, until all taxes and penalties due thereon shall have been paid, together with any expense that may be due under the provisions of this bill, to the superintendent of insurance of the state of Ohio; and such company shall only be re-admitted to transact business in the state of Ohio upon a complete re-compliance with the laws now in force in regard to the admission of insurance companies to do business in Ohio. (May 1, 1891, 88 v. 488.)

§ 2745c. **SUPERINTENDENT OF INSURANCE TO INSPECT COMPANY CHARGED WITH VIOLATING THE LAW.**—That when notice of any violation of the first section of this act is received by the superintendent of insurance of the state of Ohio, (that) it shall forthwith be his duty in person, or by deputy, to visit the office of such company or companies where such contract of insurance may have been written or made, and demand an inspection of the books and records of such company or companies; any company or companies refusing to exhibit its or their books and records for his inspection shall be deemed guilty of violating the provisions of the first* section of this act, and the penalties provided in this act shall immediately be enforced against such company or companies, by the superintendent of insurance of the state of Ohio. (May 1, 1891, 88 v. 488.)

* The first section includes §§ 2745a, b, c, and d.

§ 2745d. **EXPENSES OF INSPECTION.**—The superintendent of insurance of the state of Ohio shall receive, as a compensation for the services rendered under the provisions of this act, his necessary expenses, which sum shall be charged against the company or companies so visited by him, and shall be collected from such company or companies by suit in any court of competent jurisdiction. (May 1, 1891, 88 v. 488.)

§ 2746. **IN WHOSE NAME PROPERTY TO BE LISTED; BUT STOCK IN COMPANIES WHICH MAKE RETURN OF CAPITAL NOT TO BE LISTED BY SHAREHOLDER.**—Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company. (May 5, 1859, 56 v. 175, § 59.)

Definition of investments in stocks.

See § 2730.

Capital stock of domestic corporations listed under § 2744. Shares need not be listed.

The personal property which a corporation organized and doing business under the laws of this state is required to list under § 2744 embraces the capital stock of the corporation, and such being the case, an owner of shares of the capital stock of such company is not required to list his shares for taxation.—*Jones v. Davis*, 35 Oh. St. 474 (1880).

Meaning of capital stock.

Capital stock and capital property mean practically the same thing. Primarily the capital stock is the money paid in by the stockholders in compliance with the terms of their subscriptions. It soon, however, takes the form of real estate or personal property, or both, including machinery, buildings, credits, rights in action, etc. So that it may be

taken to mean personal property, and such real estate as may be necessary to the daily operations of the company, and its moneys and credits. The capital is thus represented by the property in which it has been invested.—*Lee v. Sturges*, 46 Oh. St. 153, 160 (1889); *Jones v. Davis*, 35 Oh. St. 474, 476 (1880).

Exemption must clearly appear.

An exemption from taxation must be shown to indubitably exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.—See *Lee v. Sturges*, 46 Oh. St. 160 (1889).

How exemption shown.

A stockholder is not required to show that the corporation has listed all the property. He is only required to show that the corporation is required to list.—See *Lee v. Sturges*, 46 Oh. St. 153, 175 (1889).

Taxation of Corporations, §§ 2747-2748.

Stock in foreign corporations.

Investments in stocks of foreign corporations by residents of Ohio may lawfully be taxed in Ohio, and the act imposing such taxes is constitutional.—*Worthington v. Sebastian*, 25 Oh. St. 1 (1874); *Bradley v. Bauder*, 36 Oh. St. 28 (1880).

Stock in foreign corporations.

This section does not apply to shares of a foreign corporation, although the capital of the corporation is taxed in the state where located, and although the corporation has substantial property in Ohio on which it pays taxes here.—*Lee v. Sturges*, 46 Oh. St. 153 (1889). See *Bradley v. Bauder*, 36 Oh. St. 28 (1880); *Sturges v. Carter*, 114 U. S. 511 (1885). See § 148c and 148d.

Same subject.

Where all the business of a foreign corporation is transacted in this state, and all of its property situated and taxed here, shares of its capital stock held here are exempt.—*Hubbard v. Brush*, 61 Oh. St. 252 (1899).

Stock in consolidated companies.

This section does not apply to shares of a railroad company which is formed by the consolidation of an Ohio company with companies of other states, notwithstanding such company pays taxes in Ohio on the portion of its property which is situated here.—*Lee v. Sturges*, 46 Oh. St. 153 (1889).

Preferred stock.

This section makes no distinction between common and preferred stock.—*Miller v. Ratterman*, 47 Oh. St. 141 (1890).

Scrip certificates.

Issuing scrip certificates to the stockholders of a corporation, redeemable in the future in stock of the company, for surplus earnings, is not a division of the surplus in money, or a promise to pay money to the stockholders. In

such case the corporation continues thereafter to be the owner of such surplus, and the stockholders have nothing more than a promise to have stock in the future for the surplus; and if the company is required to list its property in Ohio, then such scrip certificates are not taxable.—*Adams v. Shields*, 17 O. C. C. 129 (1898); s. c., 9 C. D. 558; s. c., 5 N. P. 1901. See *State v. Franklin*, 10 Oh. 91 (1840).

Pledged stock taxed in name of pledgor.

Shares of stock which have been pledged as collateral security for loans, with power to the pledgee to transfer the shares to his own name, and in case the loans are not paid, to sell, but which stand on the books of the company in the name of the pledgor, are properly taxable in his name.—*Ratterman v. Ingalls*, 48 Oh. St. 468 (1891).

Construction of law by officials does not bind the state.

A construction, by officers having the enforcement of the tax laws, to the effect that stock of certain companies is not taxable in Ohio, does not bind the successors of such officers, nor the state in the assessment and collection of taxes on such stock.—*Lee v. Sturges*, 46 Oh. St. 153 (1889).

What is "false return of stock."

See *Ratterman v. Ingalls*, 48 Oh. St. 468 (1891); *Ratterman v. Phipps*, 7 O. C. C. 458 (1893); s. c., 4 C. D. 678.

Void or illegal stock not taxable.

See *McDonald v. Haggerty*, 7 O. C. C. 568 (1893); s. c., 4 C. D. 702.

What stock not exempt.

Stock held by residents of Ohio in domestic or foreign corporations is not exempt under this section except when the property of the corporation is taxed in its name in this state.—*Lander v. Burke*, 65 Oh. St. 532 (1902).

§ 2747. WHEN LISTS TO BE MADE; NOTICE AND FORMS TO BE GIVEN BY ASSESSORS.—The listing of all personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be made between the second Monday of April and the third Monday of May, annually; and the assessor shall, on or before the first Monday of May, annually, leave with each person, resident in his township or ward, of full age, and not a married woman, or insane person, or at the office, usual place of residence or business of each person, a written or printed notice, requiring such person to make out for the assessor a statement of the property which, by law, he is required to list, accompanied with printed forms, in blank, of the statement required; and the assessor shall, at the time he delivers such notice and blank forms, demand and receive such statement, unless such person shall require further time to make out the same, in which case he shall call for the same before the third Monday of May. (May 5, 1859, 56 v. 175, § 17.)

§ 2748. STATEMENTS TO BE VERIFIED BY OATH.—Every such statement shall be verified by the oath of the person making the same. (May 5, 1859, 56 v. 175, § 17.)

Taxation of Corporations — Banks, § 2759.

§ 2749. STATE AUDITOR TO FURNISH BLANKS; OATH OF PERSON LISTING PROPERTY; FIXING VALUES; COUNTY AUDITOR TO ASSEMBLE AND INSTRUCT ASSESSORS AND FURNISH BLANKS.— The auditor of the state shall, annually, on or before the first Monday of April, furnish each county auditor with a blank form of statement for listing personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, containing all the items required in section 2737, and such subdivisions thereof, and additional items, as he may deem necessary to secure accurate, full and honest returns, and values for taxation; and county auditors, all assessors, and parties required to list all or any of the items named in said statement, shall use true copies of said blank statement, and fill up the blanks therein with the true value in money of the several items therein named; and every person or party so listing property, or other items named in said statement, shall take and subscribe an oath or affirmation according to law, to be actually administered by the assessor, to the effect (adapting the form to the capacity in which the person making the return acts), that the statement contains, as he verily believed, a true account of all the taxable personal property, moneys, credits, and investments in bonds, stocks, joint-stock companies, annuities or otherwise, owned or controlled by such party, for his own use, or as husband, parent, guardian, trustee, executor, administrator, receiver, accounting officer, agent, factor, or otherwise, and also of all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, held for him, or any one residing in this state, for whom he is required by law to list, by any party residing in or out of this state, and not listed for taxation in pursuance of law in this state by such holder, and every interest and right, legal or equitable, of the party listing and of those for whom he is required by law to list in any bonds, stocks, joint-stock companies, or otherwise, which he is required by law to list for taxation, and that the value affixed to each of said items is the value thereof as ascertained by the usual selling price thereof for cash, at voluntary sales thereof, at the time and place of listing; and if there be no usual selling price, then at such price as could be obtained therefor in money, at such time and place, and that he has not made any acknowledgment or agreement, or contracted any debt, without receiving an adequate consideration therefor or resorted to any device, or created any trust, or sold or exchanged or disposed of any money, property, or effects, which were taxable in this state, for United States bonds or other non-taxable securities or moneys, for the purpose of evading taxation, or diminishing the amount of his return for taxation, and that all interest that he has or owns in any credit or evidence of indebtedness, secured in any manner, upon real estate or personal property, situated outside of the county in which he resides, or in any taxable stocks or bonds, or in any stocks or bonds of any foreign corporation, has been duly listed by him for taxation. Each county auditor shall, before the fifteenth day of April, annually, issue a call to all the assessors of his county, to meet at his office or some other place designated by him, at the county seat, within five days, for consultation, and said assessors shall meet as so ordered; and the auditor shall meet with said assessors, and answer such questions and give such instructions as shall tend to a uniformity in the action of the assessors in his county, and it shall be his duty to specially call their attention to the provisions of law relating to their duties, and to the listing of property, and to require of them full compliance therewith; and the auditor shall provide and deliver to said assessors blank forms and instructions, or forward them to the township clerks, immediately after the meeting of said assessors. (March 13, 1891, 88 v. 96; 62 v. 114, § 56.)

§ 2759. STATEMENT BY BANKS; DEDUCTIONS BY COUNTY AUDITOR.— All unincorporated banks and bankers, except as provided in § 2765, shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First — The average amount of notes and bills receivable, discounted or pur-

Taxation of Corporations — Banks, §§ 2759a, 2759b.

chased in the course of business, by such unincorporated bank, banker or bankers, and considered good and collectible.

Second — The average amount of accounts receivable.

Third — The average amount of cash and cash items in possession or in transit.

Fourth — The average amount of all kinds of stocks, bonds, including United States government bonds, or evidences of indebtedness, held as an investment, or in any way representing assets.

Fifth — The amount of real estate at its assessed value.

Sixth — The average amount of all deposits.

Seventh — The average amount of accounts payable.

Eighth — The average amount of United States government and other securities that are exempt from taxation.

Ninth — The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated, the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh and eighth items, and the remainder thus obtained, added to the amount of item nine, shall be deemed to be the property employed by such bank or bankers in the business of banking, and shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid on the same as provided for other personal property assessed and taxed in the same city, ward, or township. (April 16, 1900, 94 v. 347; April 17, 1882, 79 v. 109; R. S. 1880; April 16, 1867, 64 v. 204, § 10.)

Deductions of liabilities.

Private bankers cannot deduct their liabilities from their moneys and credits.—*Exchange Bank v. Hines*, 3 Oh. St. 1 (1853); *Ellis v. Linck*, 3 Oh. St. 66 (1853).

Deposits.

Moneys deposited with a bank or banker (unless special deposits) become the moneys of the bank or banker, appertaining to the business of banking, and proper to be listed with the other moneys belonging to that business, and this is equally true of general deposits, whether they happen to be used in the discounting of paper, or held in reserve to pay probable current demands.—*Ellis v. Linck*, 3 Oh. St. 66 (1853).

What must be averaged and returned.

Under the act of April 13, 1852, § 19, all the assets and resources of a bank, whether specie or balances in other banks, should, if employed in any manner whereby the bank received a profit, be averaged for taxation. So balances

upon which no profit was received were not required to be returned.—*Stark County Bank v. McGregor*, 6 Oh. St. 45 (1856).

Constitutionality.

This section is constitutional except to the extent of including the entire third item among those from which the deduction is to be made.—*Treasurer v. Bank*, 47 Oh. St. 503 (1890). See *Patton v. Commercial Bank*, 10 Dec. 321 (1900). Section cited *Chapman v. First Nat. Bank*, 56 Oh. St. 310, 329 (1897).

Principle of taxation.

The provision of the statute for obtaining the value of the capital stock of a bank, and the provisions for obtaining the value of the capital of an unincorporated bank, are merely different methods provided by law, which is permissible, for arriving at the true value in money of each kind of property.—See *Cleveland Trust Co. v. Lander*, 19 O. C. C. 271 (1900); s. c., 10 C. D. 452.

§ 2759a. **FURTHER STATEMENT REQUIRED.**—The said bank, banker or bankers shall, at the same time, make statement under oath, of the amount of capital paid in or employed in such banking business, together with the number of shares or proportional interest each shareholder or partner has in such association or partnership. (April 17, 1882, 79 v. 109, 110.)

§ 2759b. **SAVINGS BANKS.**—That the provisions of section 2759 shall apply to and govern savings banks incorporated under the act of April 16, 1867. (April 16, 1890, 87 v. 215.)

Constitutionality.

This section is not repugnant to either § 2 or § 3 of article 12 of the constitution.—*Collett v. Springfield Savings Society*, 13 O. C. C. 131 (1896); s. c., 7 C. D. 146.

Deposits.

The deposits in such societies are the property of the depositors; the societies are merely incorporated agencies for the depositors as principals to receive, loan and invest the sav-

Taxation of Corporations — Banks, §§ 2760-2762.

ings of the latter.—*Collett v. Springfield Savings Society*, 13 O. C. C. 131 (1896).

Subject of taxation.

The depositors are required to return and pay taxes upon the value of their interests in the society, and the society to return and pay taxes upon the remainder of the property not the reciprocal of such interests. The surplus,

undivided profits, real estate and furniture do not add to the taxable value of the depositor's interests, and a complete taxation of all the taxable property is effected by requiring the depositors to pay upon the value of their interests and the society to pay upon the surplus, undivided profits, real estate and furniture.—*Collett v. Springfield Savings Society*, 13 O. C. C. 131 (1896).

§ 2760. **HOW AVERAGES OBTAINED.**—The averages provided for in the preceding section shall be obtained by adding together the amounts of each item above specified, owned by or standing on the books of such bank, banker, or bankers, on the first Monday of each month of the year preceding the Monday of May in which the return is made, and dividing the same by the number of months in the year: provided, that in cases where such bank, banker, or bankers commenced business during the preceding year, the division shall be made by the number of months elapsed after the commencement of such business. (April 16, 1867, 64 v. 204, § 11.)

§ 2761. **PERSONS COMMENCING THE BUSINESS OF BANKING AFTER THE DAY PRECEDING THE SECOND MONDAY OF APRIL; HOW TO BE LISTED.**—When any person, persons, company, or association unincorporated, shall commence or engage in the business of banking, after the day preceding the second Monday in April, in any year, the average value of whose personal property intended to be employed in such business shall not have been previously entered on the assessor's list for taxation, in said county, such person, persons, company, or association shall report to the auditor of the county the probable average value of the personal property by him or them intended to be employed in such business until the day preceding the second Monday in April thereafter, and shall pay into the treasury of such county a sum which shall bear the same proportion to the levy for all purposes, on the average value so employed, as the time from the day on which he or they shall commence or engage in such business as aforesaid, to the day preceding the second Monday in April next succeeding, shall bear to one year. (April 5, 1859, 56 v. 175, § 14.)

§ 2762. **SHARES TO BE LISTED.**—All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, and all the shares of the stockholders in any unincorporated bank located in this state, the capital stock of which is divided into shares, shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located, and not elsewhere. (April 16, 1900, 94 v. 348; April 16, 1867, 64 v. 204, § 1.)

Deduction of debts.

The holder of national bank shares has no right under the statutes to deduct his legal bona fide debts from the value of such shares, but he is legally bound to pay tax upon the assessed value of such shares without deduction.—*Chapman v. First Nat. Bank*, 56 Oh. St. 310 (1897); *Niles v. Shaw*, 50 Oh. St. 370 (1893); *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193 (1888); *Mercantile Nat. Bank v. Shields*, 59 Fed. 952 (1894).

Value of shares.

See *Chapman v. First Nat. Bank*, 56 Oh. St. 310 (1897).

Power to tax national bank stock.

The state has power to tax shares in the national banks located in Ohio, subject to the limitations that such tax shall not exceed the

rate imposed upon other moneyed capital of individuals, nor that imposed upon shares in state banks, as provided in the act of congress of June 3, 1864.—*Frazer v. Siebern*, 16 Oh. St. 614 (1866); *Cleveland Trust Co. v. Lander*, 62 Oh. St. 266 (1900). See *Mercantile Nat. Bank v. Hubbard*, 98 Fed. 465 (1899).

What shares taxed.

The shares in national banks to be taxed are to be understood as the individual property or choses of the stockholders, as contradistinguished from aliquot parts of the capital and property of the bank, and as such may be taxed at their full value without deduction for the franchise, for real estate otherwise taxed or for untaxable bonds owned by the bank.—*Frazer v. Siebern*, 16 Oh. St. 614 (1866).

Taxation of Corporations—Banks, §§ 2763-2766.

Remedy when tax is excessive.

Where the tax on shares in national banks exceeds the rate of that imposed upon the banks of the state, its collection will only be enjoined upon payment of a sum which shall be a fair equivalent for the tax on state banks.—*Frazer v. Siebern*, 16 Oh. St. 614 (1866).

§ 5219, R. S. U. S.

The restriction in § 5219, Revised Statutes of the United States, as to the taxation of national bank shares at a rate not greater than on other moneyed capitals, requires that both the rate per centum of taxation and the value of the assessment against such shares shall not be greater than on other moneyed

capital in the hands of individual citizens of the state.—*Cleveland Trust Co. v. Lander*, 62 Oh. St. 266 (1900).

Bank not liable for back taxes.

An agreement by a bank to pay the taxes assessed on the shares of stockholders does not make the bank liable for assets not returned or admitted by the bank or stockholders to be assessable, nor for any other than the current tax on the duplicate. Such agreement does not authorize the assessment of a back tax against the bank upon what is claimed to be newly-discovered resources not returned for back years.—*Miller v. First Nat. Bank*, 9 W. L. B. 353 (1883); *Miller v. Fourth Nat. Bank*, 12 W. L. B. 66 (1884).

§ 2763. TAX ON REAL ESTATE.—The real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals. (April 16, 1867, 64 v. 204, § 2.)

§ 2764. NAMES OF STOCKHOLDERS AND NUMBER OF SHARES HELD BY EACH.—There shall at all times be kept in the office where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which shall be at all times during business hours open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation. (April 16, 1867, 64 v. 204, § 3.)

§ 2765. RETURN TO BE MADE BY CASHIER TO THE AUDITOR.—The cashier of each incorporated bank, or of each unincorporated bank whose capital stock is divided into shares held by the owners of such bank, shall make out and return to the auditor of the county in which every such bank is located, between the first and second Monday of May, annually, a report in duplicate under oath, exhibiting in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share. (April 16, 1900, 94 v. 347; April 12, 1877, 74 v. 88, § 1.)

Shares must be listed in names of owners.

There is no authority in the statutes of the state, nor of the United States, for listing and valuing the shares in a national bank in the aggregate, and placing such aggregate on the tax list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax

list in the names of the respective owners.—*Miller v. First Nat. Bank*, 46 Oh. St. 424 (1889).

Correction of return.

The correction of returns made by the cashier of the bank to the county auditor is provided for by § 2769 and not by § 2782, R. S.—*Miller v. First Nat. Bank*, supra.

§ 2766. AUDITOR TO FIX VALUE OF BANK SHARES, AND REPORT TO BOARD OF EQUALIZATION.—Upon receiving such report the county auditor shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor. (March 9, 1883, 80 v. 54; April 13, 1880, 77 v. 191; R. S. 1880; April 12, 1877, 74 v. 88, § 2; April 16, 1867, 64 v. 204, § 5.)

Taxation of Corporations — Railroads, §§ 2770-2771.

Discriminations in valuation.

A petition for an injunction against a tax on bank shares, which shows that the plaintiff's property was valued only at eighty per cent. of its true value in money, while other property in the county was valued at only forty per cent. of its value, and avers that such valuations were unequal, unjust and illegal, does not state sufficient facts.— *Wagoner v. Loomis*, 37 Oh. St. 571 (1881). See *Pelton v. National Bank*, 101 U. S. 143 (1879); *Exchange Nat. Bank v. Miller*, 19 Fed. 372

(1884); *First Nat. Bank v. Treasurer*, 25 Fed. 749 (1885).

Deduction of liabilities.

The holder of national bank shares has no right to deduct his legal bona fide debts from the value of such shares, but he is bound to pay taxes on the full assessed value.— *Chapman v. First National Bank*, 56 Oh. St. 310 (1897); *Niles v. Shaw*, 50 Oh. St. 370 (1893); *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193 (1888).

§ 2769. **PROCEEDINGS WHEN BANK FAILS TO MAKE RETURN; PENALTY FOR MAKING FALSE STATEMENT.**—If any bank shall fail to make out and furnish to the county auditor the statement required, within the time herein fixed, it shall be the duty of said auditor to examine the books of said bank; also, to examine any officer or agent thereof under oath, together with such other persons as he may deem proper, and make out the statement. Any bank officer failing to make out and furnish to the county auditor the statement, or willfully making a false statement, as required in section twenty-seven hundred and sixty-five, shall be liable to a fine not exceeding one hundred dollars, together with costs and other expenses incurred by the auditor or other proper officer in obtaining such statement aforesaid; and said auditor shall have the same powers, and the probate judge of the county shall exercise the same powers, and perform the same duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any party has failed to make any return, or has made a false return for taxation; and the statement so made out by the auditor shall in all respects stand as the statement required to be made by the cashier. (April 16, 1867, 64 v. 204, § 9.)

Correction of returns.

The correction of returns made by the cashier of a bank is provided for by this section,

and not by § 2782.—*Miller v. First Nat. Bank*, 46 Oh. St. 424 (1889).

§ 2770. **BOARD OF APPRAISERS FOR RAILROAD COMPANY.**—The county auditors of the several counties in this state in which any railroad company now has, or hereafter may have its track and roadway, or any part thereof, shall constitute a board of appraisers and assessors for such railroad company; any railroad company having its road, or any part thereof, in one county only, the auditor of such county shall constitute such board. (May 1, 1862, 59 v. 88, § 1.)

§ 2771. **PRESIDENT OF BOARD; QUORUM; SECRETARY; RECORD OF VOTES; COPY OF MINUTES TO BE KEPT IN AUDITOR'S OFFICE.**—The auditor of the county where such railroad company has its principal office, if such principal office is in this state, and if such principal office is not in this state, then the auditor of the county having the largest city or village upon the line of such road shall be the president of said board, whose duty it shall be to appoint the time and place for the meeting of such board, and notify the proper county auditors of the same, at least five days before the time appointed for such meeting. In the absence or inability of the president, the board shall appoint one of its members president pro tempore. In all meetings of any such board, a majority of such county auditors shall constitute a quorum, and a majority of those present at any meeting having a quorum shall decide all questions submitted. Each board shall appoint one of its number secretary, and full minutes of its proceedings shall be kept, which shall consist of a full and complete record of the votes of each member of said board. The valuation of the property shall be fixed only on motion made and duly seconded. On all such motions the yeas and nays shall be called, and each member's vote shall be recorded by the secretary.

Taxation of Corporations — Railroads, §§ 2772-2773.

Immediately after the board has adjourned, the secretary shall make a complete record of all the transactions of the proceedings of the board, and set forth therein the names and official capacity of the officials of the railroad present at such meeting. And a certified copy of such proceedings, signed by the president and secretary thereof, shall be forwarded at once to the county auditor of each county constituting a member of said board, and the same shall be recorded in a book kept in the county auditor's office, subject to the inspection of any person during office hours, and the certified copy shall alike be kept on file in said county auditor's office, and for like examination. (May 1, 1862, 59 v. 88, § 2; April 30, 1891, 88 v. 417.)

§ 2772. BOARD OF VALUATION OF RAILROAD TO MEET ANNUALLY, IN MAY; DUTIES OF THE BOARD.—It shall be the duty of each board to meet in the month of May, in the present and each succeeding year, at such time as the president thereof may appoint; and if no meeting be appointed by him before the second Tuesday in May, the several county auditors shall meet on that day, in the place where the proper railroad for which said auditors constitute the board, as aforesaid, has its principal office, or in the principal city or village upon the line of such road, as the case may be, and proceed to ascertain all the personal property, which shall be held to include road bed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys, and credits of such company, and the undivided profits, reserved or contingent fund of said company, whether the same may be in moneys, credits, or in any manner invested, and the actual value thereof in money; and also locomotives and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car company or other company; but as to such rolling stock not belonging to it, but under its control, the railroad company may return the same separate from its own property, and if so returned, the board shall fix the valuation of such property separated, but include the amount in the aggregate valuation. Such boards shall have power to require from the president, secretary, treasurer, receiver, and principal accounting officer of such road, a detailed statement, under oath, of all the items and particulars constituting such property, moneys, and credits, and the value thereof, and may examine the books and papers of such road, and any or all of its officers, receivers, servants, or agents, under oath, touching any matter relating to the same. Any county auditor present at such meeting is authorized and empowered to administer such oath. It shall be the duty of said board of appraisers and assessors to report annually, on or before the first Monday in the month of June, to the auditor of state, the amount assessed upon each railroad company, specifying the total sum, and amount distributed to each county; which shall be by the auditor of state communicated to the general assembly, with his annual report, in tabular form. (April 5, 1867, 64 v. 114, § 3.)

§ 2773. PENALTY FOR OFFICERS, ETC., REFUSING TO COMPLY WITH REQUIREMENTS OF BOARD; CONTEMPT OF BOARD; PUNISHMENT.—Any president, secretary, receiver, accounting officer, servant, or agent, of any railroad company having any portion of its road-way in this state, who shall refuse to attend before the proper board of appraisers and assessors when required so to do, or refuse to submit to the inspection of said board any books or papers of such railroad company in his possession, custody, or control, or shall refuse to answer such questions as may be put to him by said board or its order, touching the business, property, moneys and credits, and the value thereof, of said railroad company, shall be guilty of a misdemeanor, and, on conviction thereof, before any court of competent jurisdiction, shall be confined in the jail of the county not exceeding thirty days, and be fined in any sum not exceeding five hundred dollars and costs; and any president, secretary, receiver, accounting officer, servant, or agent, as aforesaid, so refusing, as aforesaid, shall be deemed guilty of contempt of such board, and may be confined by order of

Taxation of Corporations — Railroads, §§ 2774-2776.

said board in the jail of the proper county until he shall comply with such order, and pay the costs of his imprisonment. (May 1, 1862, 59 v. 88, § 4.)

§ 2774. APPORTIONMENT OF VALUATION OF RAILWAY PROPERTY.— The value of such property, moneys and credits, of any railroad company, as found and determined by such board, shall be apportioned by said board among the several counties through which such road, or any part thereof, runs, so that to each county and to each city, village, township and district, or part thereof therein, shall be apportioned such part thereof as shall equalize the relative value of the real estate, structures, and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures, and stationary personal property of such railroad company in this state; and so that the rolling stock, main track, road bed, supplies, moneys and credits of such company shall be apportioned in the same proportion that the length of such road in such county bears to the entire length thereof in all said counties or county, and to each city, village, and district, or any part thereof therein, provided that if the line of any railroad company is divided into separate divisions or branches, so much of the rolling stock of such company as belongs to or is used solely upon any one of such divisions or branches shall be apportioned in the same manner to the counties or county, and to each city, village, and district, or any part thereof therein, through which such branch or division runs, and the board shall certify to the county auditor of each county, and to each city, incorporated village, township and district, or any part thereof therein interested, the amount apportioned to his county, and the board shall make and forward a like certificate, together with all the reports of the various railroad officers, and other papers and evidence which formed the basis of their valuation, to the auditor of state, for the use of the state board of equalization of railroad property. It shall be the duty of the county auditor, upon receiving the certificate aforesaid, to apportion the amount therein stated to the cities, villages, townships, districts, or parts thereof: but the auditor shall not put the same on the tax-list until he shall have been advised of the action of said state authority, when the proper amounts shall be entered on the tax-lists. (April 27, 1885, 82 v. 160; R. S. 1880; March 16, 1867, 64 v. 58, § 1; May 1, 1862, 59 v. 88, § 5.)

Validity — tax district.

This section is valid. A railroad passing through a taxing district created under the "one mile assessment pike law," it is subject to taxation in such district, in the proportion fixed under this section.—Railroad Co. v. Commissioners, 48 Oh. St. 249 (1891).

How rolling stock on branches or divisions apportioned.

See State ex rel. v. Aldridge, 47 W. L. B. 619 (1902).

Telephone and telegraph companies.

The principle of this section is substantially applied to telephone and telegraph companies.—State ex rel. v. Jones, 51 Oh. St. 492, 508 (1894).

Construction of law in 1881.

See Wabash, etc., Ry. Co. v. Kelsey, 11 W. L. B. 234 (1881).

§ 2775. COMPENSATION OF MEMBERS OF THE BOARD.— Each county auditor shall be paid from the treasury of his county the sum of three dollars for each day's attendance as a member of any board aforesaid under this chapter, and five cents a mile going to and returning from its place of meeting. (May 1, 1862, 59 v. 88, § 7.)

§ 2776. HOW PORTION OF VALUE FOR THIS STATE FOUND WHEN PART OF ROAD IN ANOTHER.— When any railroad company has part of its road in this state and part thereof in any other state or states, the proper board shall take the value of such property, moneys, and credits of such company so found and determined, as aforesaid, and divide it in the proportion the length of such road in this state bears to the whole length of such road, and determine the principal sum for the value of such road in this state accordingly, equalizing the relative value thereof in this state, as above provided. (May 1, 1862, 59 v. 88, § 8.)

Taxation of Corporations — Express, Telegraph, Telephone, §§ 2777, 2778.

§ 2777. WHO DEEMED EXPRESS, TELEGRAPH OR TELEPHONE COMPANY.

— Any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of conveying to, from, or through this state, or any part thereof, money, packages, gold, silver, plate or other article by express, not including the ordinary lines of transportation of merchandise and property in this state, shall be deemed to be an express company; any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, shall be deemed to be a telegraph company; and any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of transmitting to, from, through, or in this state, telephonic messages, shall be deemed to be a telephone company. (May 10, 1894, 91 v. 220; April 27, 1893, 90 v. 330; May 1, 1862, 59 v. 91, § 5.)

Constitutionality.

The act of 91 v. 237 relating to express companies was held constitutional.—Express Co. v. State, 55 Oh. St. 69 (1896); State

ex rel. v. Jones, 51 Oh. St. 492 (1894); Western Union Co. v. Mayer, 28 Oh. St. 521 (1876); Adams Express Co. v. Poe, 61 Fed. 470 (1894).

§ 2778. ANNUAL STATEMENT TO AUDITOR OF STATE.— Every express, telegraph and telephone company defined in section 2777, doing business in this state, shall annually, between the first and thirty-first days of May, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the auditor of state a statement, in such form as the auditor of state may prescribe, containing the following facts:

1. The name of the company.
2. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.
4. The name and post-office address of the president, secretary, auditor, treasurer and superintendent or general manager.
5. The name and post-office address of the chief officer or managing agent of the company in Ohio.
6. The number of shares of the capital stock.
7. The par value and market value, or if there be no market value, the actual value of its shares of stock on the first day of May.
8. A detailed statement of the real estate owned by the company in Ohio, where situate, and the value thereof as assessed for taxation.
9. A full and correct inventory of the personal property, including moneys and credits, owned by the company in Ohio on the first day of May, where situate, and the value thereof.
10. The total value of the real estate owned by the company and situate outside of Ohio.
11. The total value of the personal property owned by the company and situate outside of Ohio.
12. In the case of telegraph and telephone companies, the whole length of their lines, and the length of so much of their lines as is without and is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use under lease or otherwise; also, the miles of wire in each taxing district in Ohio.
13. In the case of telegraph and express companies, the entire gross receipts of the company, from whatever source derived, for the year ending the first day of May, of business wherever done.
14. In the case of telegraph and express companies, the gross receipts for the

Taxation of Corporations — Express, Telegraph, Telephone, § 2778a.

year ending the first day of May, from whatever source derived, of each office within the state of Ohio, and the total gross receipts of the company for such period in Ohio.

15. In the case of express companies, the whole length of the lines of rail and water routes, over which the company did business on the first day of May, and the length of so much of said lines of land and water transportation as is without and is within Ohio, naming the lines within Ohio.

16. Such other facts and information as the auditor of state may require in the form of returns prescribed by him.

Blanks for making the above statement shall be prepared, and, on application, furnished any company by the auditor of state. Express, telegraph and telephone companies shall not be required to make returns under, and shall not be governed by the provisions of section 2744 of the Revised Statutes. (May 10, 1894, 91 v. 220; April 27, 1893, 90 v. 330; April 13, 1865, 62 v. 174, § 1.)

Involuntary payment — what is.

See *Ratterman v. Express Co.*, 49 Oh. St. 608 (1892); *Western Union Co. v. Mayer*, 28 Oh. St. 521 (1876).

When receipts from interstate commerce taxable.

Ratterman v. Express Co., 49 Oh. St. 608, 618 (1892); *Western Union Co. v. Mayer*, 28

Oh. St. 521 (1876); *Express Co. v. State*, 55 Oh. St. 69 (1896); *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411 (1888); *Adams Express Co. v. Auditor*, 166 U. S. 185 (1897); *Adams Express Co. v. Auditor*, 165 U. S. 174 (1897); *United States Express Co. v. Poe*, 61 Fed. 475 (1894).

§ 2778a. **STATE BOARD OF APPRAISERS AND ASSESSORS; ASSESSMENTS BY; CORRECTION THEREOF.**—The auditor of state, treasurer of state and attorney-general shall constitute a board, named the state board of appraisers and assessors, of which board the auditor shall be ex officio president. In the absence or inability of the auditor, the board shall appoint one of its members president pro tempore. The board shall appoint a secretary and full minutes of its proceedings shall be kept. The board shall, annually, on the first Monday in June, meet in the office of the auditor of state, for the purpose of assessing the property of express, telegraph, and telephone companies in Ohio. On the meeting of the board, the auditor of state shall lay before the board the statements and schedules returned to him under section 2778. The said board shall proceed to ascertain and assess the value of the property of said express, telegraph, and telephone companies in Ohio, and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. The board may adjourn from time to time until the business before it is finally disposed of. In case any company fails or refuses to make the statement required by law, or furnish the board any information requested, the board shall inform itself, as best it may, on the matters necessary to be known, in order to discharge its duties with respect to the assessment of the property of such company. At any time after the meeting of the board on the first Monday in June, and before the assessment of the property of any company is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of the valuation of the property of any company for taxation. After the assessment of the property of any company for taxation by the board, and before the certification by the auditor of state of the apportioned valuation to the several counties, as provided in section 2780, the board may, on the application of any interested person or company, or on its own motion, correct the assessment or valuation of the property of any company, in such manner as will, in its judg-

Taxation of Corporations — Express, Telegraph, Telephone, §§ 2779, 2780.

ment, make the valuation thereof just and equal. The provisions of section 167 of the Revised Statutes shall apply to the correction of any error or over valuation in the assessment of property for taxation by the state board of appraisers and assessors, and to the remission of taxes and penalties illegally assessed thereon. (May 10, 1894, 91 v. 220; April 27, 1893, 90 v. 330.)

See *Western Union Tel. Co. v. Poe*, 61 Fed. 449 (1894); *Western Union Tel. Co. v. Poe*, 64 Fed. 9 (1894).

§ 2779. **PENALTY FOR FAILURE TO FILE STATEMENT; FURTHER POWERS OF BOARD; PENALTY FOR REFUSAL TO TESTIFY OR BRING BOOKS; STATUTES AS TO FALSE RETURNS APPLICABLE.**—In case any company required to file a statement under the provisions of section 2778, fails to make and file such statement on or before the thirty-first day of May, such company shall be subject to a penalty of five hundred dollars, and an additional penalty of one hundred dollars for each day's omission after the thirty-first day of May to file such statement, said penalty to be recovered by action in the name of the state, and, on collection, paid into the state treasury to the credit of the general revenue fund. The attorney-general, on the request of the state board of appraisers and assessors, shall institute such action against any company so delinquent in the court of common pleas of Franklin county. That the state board of appraisers and assessors shall have power to require the president, secretary, treasurer, receiver, superintendent or managing agent, or other officer, or employe or agent, of any express, telegraph, and telephone company to attend before the board, and bring with him for the inspection of the board, any books or papers of such company in his possession, custody or control, and to testify under oath touching any matter relating to the business, property, moneys or credits and the value thereof, of such company. Any member of the board is authorized and empowered to administer such oath. Any officer, employe or agent of such company who shall refuse to attend before the board when required to do so, or shall refuse to bring with him and submit for the inspection of the board any books or papers of such company in his possession, custody or control, or shall refuse to answer any question put to him by the board or any member thereof, touching the business, property, moneys and credits and the value thereof, of such company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both; and any officer, employe or agent of such company so refusing, as aforesaid, shall be deemed guilty of contempt of such board, and may be confined, by order of said board, in the jail of the proper county until he shall comply with the requirement of the board and pay the costs of his imprisonment. The state board of appraisers and assessors shall have and may exercise all the powers possessed by county auditors under sections 2781 to 2785 inclusive, of the Revised Statutes; and said express, telegraph, and telephone companies shall be subject to all the provisions and penalties of said sections. (May 10, 1894, 91 v. 222; April 27, 1893, 90 v. 332; May 1, 1862, 59 v. 91, §§ 2, 3.)

§ 2780. **REPORT OF BOARD; FILING OF STATEMENTS, ETC.; DEDUCTION OF VALUE OF REAL ESTATE; APPORTIONMENT AND TAXATION OF VALUATIONS.**—The state board of appraisers and assessors shall, on or before the first Monday in August, report to the auditor of state the total value of the property of express, telegraph and telephone companies in Ohio, as ascertained and assessed by the board; at the same time, the board shall file with the auditor of state the statements of the various companies and other papers before it. The auditor of state shall deduct from the total value of the property of each of said companies in Ohio, the value, as assessed for taxation, of any real estate situate in Ohio and owned by such company. The value of the property of said companies in Ohio, after deducting the

Taxation of Corporations — Freight Line, Equipment, §§ 2780-7-2780-8.

value of the real estate, shall be apportioned by the auditor of state among the several counties through or into which the lines of such telegraph or telephone companies run, so that to each county shall be apportioned such part of the entire valuation as will equalize the relative value of the property of the company therein, in proportion to the whole value of the property of the company in the state, and in the proportion that the length of the lines of wire owned by the company, or in the county bears to the whole length of the lines of wire in the state. The value of the property of any express company shall be apportioned by the auditor of state among the several counties in which the company does business, in the proportion that the gross receipts in each county bear to the entire gross receipts in the state. The auditor of state shall, on or after the fifteenth day of August, certify to the county auditor the amount apportioned to his county, and the county auditor, upon receiving such certificate, shall apportion the amount therein stated among the cities, villages, townships or other taxing districts, after the same method used for the apportionment of the valuation in the state among the counties; and the county auditor shall place the apportioned valuation on the tax duplicate, and taxes shall be levied and collected thereon at the same rate and in the same manner as taxes are levied and collected on other personal property in the taxing district in question. (May 10, 1894, 91 v. 223; April 27, 1893, 90 v. 332; February 24, 1863, 60 v. 11, § 1.)

§ 2780-7. Sec. 1. FREIGHT LINE AND EQUIPMENT COMPANIES DEFINED.

— Any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars, not otherwise listed for taxation in Ohio, for the transportation of freight, whether such freight be owned by such company, or any other person or company, over any railway line or lines in whole or part within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by some other name, shall be deemed to be a freight-line company; any person or persons, joint stock association or corporation, wherever organized, engaged in the business of furnishing or leasing cars, of whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partially within this state, such line or lines not being owned, leased or operated by such company, and such cars not being otherwise listed for taxation in Ohio, shall be deemed to be an equipment company. (March 30, 1896, 92 v. 89.)

§ 2780-8. Sec. 2. ANNUAL STATEMENTS OF SAME; BLANKS; EXEMPTIONS.— Every freight-line and equipment company defined in section one (1) (§ 2780-7) hereof, doing business or owning cars which are operated in this state shall, annually, between the first and thirty-first days of May, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the auditor of state a statement, in such form as the auditor of state may prescribe, containing the following facts:

1. The name of the company.
2. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.
4. The name and post office address of the president, secretary, auditor, treasurer, and superintendent or general manager.
5. The name and post office address of the chief officer and managing agent of the company in Ohio.
6. The number of shares of the capital stock.
7. The par value and market value, or, if there be no market value, the actual value of the shares of stock on the first day of May.

Taxation of Corporations — Freight Line, Equipment, § 2780-9.

8. A detailed statement of the real estate owned by the company in Ohio, where situate, and the value thereof as assessed for taxation.

9. The total value of the real estate owned by the company and situate outside of Ohio.

10. The whole length of the lines of railway over which the company runs its cars, and the length of so much of said lines as is without and is within the state of Ohio.

11. In the case of an equipment company, the whole number and value of the cars owned and leased by the company, classifying the cars according to kind; also, the whole length of the lines of railway, wherever located, operated by the companies (naming them), to which cars owned by such equipment (company) are leased, and the length of so much of said lines as is without and is within the state of Ohio, giving the name and location of the lines wholly or partially within the state of Ohio.

12. Such other facts and information as the auditor of state may require in the form of returns prescribed by him.

Blanks for making the above statement shall be prepared, and, on application, furnished any company by the auditor of state. Freight-line and equipment companies shall not be required to make returns, and shall not be governed by the provisions of section 2744 of the Revised Statutes. (March 30, 1896, 92 v. 89.)

§ 2780-9. Sec. 3. STATE BOARD OF APPRAISERS AND ASSESSORS; MEMBERS; OFFICERS; MINUTES; MEETING; RIGHT TO APPEAR, ETC.—The auditor of state, treasurer of state and attorney-general shall constitute a board named the state board of appraisers and assessors, of which board the auditor of state shall be ex officio president. In the absence or inability of the auditor, the board shall appoint one of its members president pro tempore. The board shall appoint a secretary and full minutes of its proceedings shall be kept. The board shall, annually, on the first Monday in June, meet in the office of the auditor of state, for the purpose of determining the amount and value of the proportion of the capital stock of freight-line and equipment companies representing capital and property of such companies owned and used in Ohio. On the meeting of the board, the auditor of state shall lay before it the statements and schedules returned to him under section two (2) (§ 2780-8) hereof. The board shall proceed to ascertain and determine, on or before the second Monday in July, the amount and value of the proportion of the capital stock of freight-line and equipment companies, representing capital and property of such companies owned and used in Ohio, and in determining the same, shall be guided in each case by the proportion of the capital stock of the company representing rolling stock, which the miles of railroad over which such company runs cars or its cars are run in Ohio bear to the entire number of miles in Ohio and elsewhere over which such company runs cars or its cars are run, and such other rules and evidence as will enable the board to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in the state of Ohio. The board may adjourn from time to time until the business before it is finally disposed of. In case any company fails or refuses to make the statement required by law, or furnish the board with any information requested, the board shall inform itself as best it may on the matters necessary to be known in order to discharge its duty under this act. At any time after the meeting of the board on the first Monday in June, and before the amount and value of the capital stock of any company representing capital and property owned and used in Ohio is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of determination. After fixing the amount and value of the capital stock of any company representing capital and property owned and used in Ohio, and before the certification to the auditor of state of such amount, as provided in section five (5) (§ 2780-11) hereof, the board may, on the application of any person or company interested, or on its own motion, review and

Taxation of Corporations — Freight Line, Equipment, §§ 2780-10-2780-11.

correct its action in such manner as it may deem just and proper. (March 30, 1896, 92 v. 89.)

§ 2780-10. Sec. 4. **PENALTY, RECOVERY AND DISPOSITION OF SAME.**— In case any company required to file a statement under the provisions of section two (2) (§ 2780-8) hereof fails to make and file such statement on or before the thirty-first day of May, such company shall be subject to a penalty of five hundred dollars and an additional penalty of one hundred dollars for each day's omission after the thirty-first day of May to file such statement, said penalty to be recovered by action in the name of the state, and on collection paid into the state treasury to the credit of the general revenue fund. The attorney-general, on the request of the auditor of state, shall institute such action against any company so delinquent, in the court of common pleas at Franklin county, or of any county into or through which any railroad line passes, over which the cars of such freight-line or equipment company are running. Service of summons may be made in the manner provided in section five (5) (§ 2780-11) of this act in suits for the collection of the tax against such company. The state board of appraisers and assessors shall have power to require the president, secretary, treasurer, receiver, superintendent or managing agent, or other officer, or employe or agent of any freight-line or equipment company, to attend before the board and bring with him, for the inspection of the board, any books or papers of such company in his possession, custody or control, and to testify under oath touching any matter relating to the organization, property and business of such company. Any member of the board is authorized and empowered to administer such oath. Any officer, employe or agent of such company who shall refuse to attend before the board when required to do so, or shall refuse to bring with him and submit, for the inspection of the board, any books or papers of such company in his possession, custody or control, or shall refuse to answer any question put to him by the board or any member thereof, touching the organization, business or property of such company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction, shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both; and any officer, employe or agent of such company so refusing as aforesaid, shall be deemed guilty of contempt of such board and may be confined by order of such board, in the jail of the proper county until he shall comply with the requirements of the board and pay the costs of the imprisonment. (March 30, 1896, 92 v. 89.)

§ 2780-11. Sec. 5. **ANNUAL REPORT; ASSESSMENT AND COLLECTIONS; PENALTY.**— The state board of appraisers and assessors shall, on the first Monday in August, report to the auditor of state the amounts fixed by it as the value of the capital stock representing capital and property of freight-line and equipment companies employed and used in Ohio; at the same time the board shall file with the auditor of state the statements of the various companies and other papers before it. It shall be the duty of the auditor of state, in the month of November, annually, to charge and collect from each freight-line and equipment company doing business or owning cars which are operated in this state, a sum, in the nature of an excise tax, to be computed by taking one per cent. of the amount fixed by the state board of appraisers and assessors as the value of the proportion of the capital stock representing the capital and property of such company, owned and used in Ohio, and certified to the auditor of state, after deducting the value of the real estate of the company in Ohio, assessed and taxed locally, if any there be. All taxes collected by the auditor of state, under the provisions of this act, shall be paid into the state treasury and be credited to the general revenue fund. If any freight-line or equipment company fails or refuses to pay said tax during the month of November, the auditor of state shall add to the tax due a penalty of fifty per centum thereon, and shall forthwith proceed to collect the tax and penalty by any means provided by law for the collection of taxes by county treasurers, and for his services shall be allowed fifty per centum on the amount of

Taxation of Corporations — Sleeping Car, §§ 2780-12-2780-13.

penalty collected, which he is authorized to retain out of such amount. It shall be the duty of the attorney-general or any prosecuting attorney, on request of auditor of state, to prosecute any proceeding for the collection of such tax, which officer shall be allowed for his services five per centum on the total amount collected, to be retained and paid to him by the auditor of state. The balance of the amount collected shall be paid into the state treasury. Suit for the collection of such tax and penalty may be brought in the name of the state, in the county of Franklin, or in any county into or through which passes any railroad line over which the cars of such freight-line or equipment company are running; and service of summons against a freight-line or equipment company may be made upon any officer or agent of such company named in section 5044 of the Revised Statutes; or if such officer or agent cannot be found, then upon any conductor or officer, agent or employe of such company, in charge of any car owned and used by such company in any county in this state in which any railroad line over which the cars of such freight-line or equipment company are running is located, or through which it passes. (March 30, 1896, 92 v. 89.)

§ 2780-12. Sec. 1. **SLEEPING-CAR COMPANY DEFINED.**— Any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars, not otherwise listed for taxation in Ohio, for the transportation, accommodation, comfort, convenience or safety of passengers, on or over any railway line or lines, in whole or part within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed sleeping, palace, parlor, chair, dining or buffet-cars, or by some other name, shall be deemed to be a sleeping car company. (May 21, 1894, 91 v. 408.)

§ 2780-13. Sec. 2. **ANNUAL STATEMENT.**— Every sleeping car company defined in section one (1) (§ 2780-12) hereof, doing business or owning cars which are operated in this state shall, annually, between the first and thirty-first days of May, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the auditor of state a statement, in such form as the auditor of state may prescribe, containing the following facts:

1. The name of the company.
2. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.
4. The name and post office address of the president, secretary, auditor, treasurer, and superintendent or general manager.
5. The name and post office address of the chief officer or managing agent of the company in Ohio.
6. The number of shares of the capital stock, and the name and post office address of each stockholder with the number of shares owned by each.
7. The par value and the market value, or, if there be no market value, the actual value of the shares of stock on the first day of May.
8. A detailed statement of the real estate owned by the company in Ohio, where situate and the value thereof as assessed for taxation.
9. The total value of the real estate owned by the company and situate outside of Ohio.
10. The whole length of the lines of railway over which the company runs its cars, and the length of so much of said lines as is without and is within the state of Ohio.

Blanks for making the above statement shall be prepared, and, on application, furnished any company by the auditor of state. Sleeping-car companies shall not be required to make returns, and shall not be governed by the provisions of section 2744 of the Revised Statutes. (May 21, 1894, 91 v. 408.)

Taxation of Corporations — Sleeping Car, §§ 2780-14-2780-15.

§ 2780-14. Sec. 3. STATE BOARD OF APPRAISERS AND ASSESSORS; MEMBERS; POWERS, ETC.—The auditor of state, treasurer of state and attorney-general shall constitute a board named the state board of appraisers and assessors, of which board the auditor of state shall be ex officio president. In the absence or inability of the auditor, the board shall appoint one of its members president pro tempore. The board shall appoint a secretary, and full minutes of its proceedings shall be kept. The board shall, annually, on the first Monday in June, meet in the office of the auditor of state, for the purpose of determining the amount and value of (the) proportion of the capital stock of sleeping-car companies representing capital and property of such companies owned and used in Ohio. On the meeting of the board, the auditor of state shall lay before it the statements and schedules returned to him under section two (2) (§ 2780-13) hereof. The board shall proceed to ascertain and determine, on or before the second Monday in July, the amount and value of the proportion of the capital stock of sleeping-car companies, representing capital and property of such companies, owned or used in Ohio, and in determining the same, shall be guided in each case by the proportion of the capital stock of the company representing rolling-stock, which the miles of railroad over which such company runs cars in Ohio bear to the entire number of miles in Ohio and elsewhere over which such company runs cars, and such other rules and evidence as will enable the board to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in the state of Ohio. The board may adjourn from time to time until the business before it is finally disposed of. In case any company fails or refuses to make the statement required by law, or furnish the board with any information requested, the board shall inform itself as best it may on the matters necessary to be known in order to discharge its duty under this act. At any time after the meeting of the board on the first Monday in June, and before the amount and value of the capital stock of any company representing capital and property owned or used in Ohio, is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of such determination. After the fixing of the amount and value of the capital stock of any company representing capital and property owned or used in Ohio, and before the certification to the auditor of state of such amount, as provided in section five (5) (§ 2780-16) hereof, the board may, on the application of any person or company interested, or on its own motion, review and correct its action in such manner as it may deem just and proper. (May 21, 1894, 91 v. 408.)

§ 2780-15. Sec. 4. PENALTY.—In case any company required to file a statement under the provisions of section two (2) (§ 2780-13) hereof, fails to make and file such statement on or before the thirty-first day of May, such company shall be subject to a penalty of five hundred dollars and an additional penalty of one hundred dollars for each day's omission after the thirty-first day of May to file such statement, said penalty to be recovered by action in the name of the state, and on collection paid into the state treasury to the credit of the general revenue fund. The attorney-general, on the request of the auditor of state, shall institute such action against any company so delinquent, in the court of common pleas of Franklin county, or of any county into or through which any railroad line passes, over which such sleeping-car company is running its cars. Service of summons may be made in the manner provided in section five (5) (§ 2780-16) of this act in suits for the collection of the tax against such company. The state board of appraisers and assessors shall have power to require the president, secretary, treasurer, receiver, superintendent or managing agent, or other officer, or employe or agent of any sleeping-car company, to attend before the board and bring with him, for the inspection of the board, any books or papers of such company in his possession, custody or control, and to testify under oath touching any matter relating to the organization, property and business of such

Taxation of Corporations — Sleeping Car, §§ 2780-16-2780-17.

company. Any member of the board is authorized and empowered to administer such oath. Any officer, employe or agent of such company who shall refuse to attend before the board when required to do so, or shall refuse to bring with him and submit, for the inspection of the board any books or papers of such company in his possession, custody or control, or shall refuse to answer any question put to him by the board or any member thereof, touching the organization, business or property of such company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined not more than five hundred dollars or imprisoned not more than thirty days or both; and any officer, employe, or agent of such company so refusing, as aforesaid, shall be deemed guilty of contempt of such board and may be confined, by order of such board, in the jail of the proper county, until he shall comply with the requirements of the board and pay the costs of his imprisonment. (May 21, 1894, 91 v. 408.)

§ 2780-16. Sec. 5. **REPORT; FILING OF STATEMENTS, ETC.; DISPOSITION OF TAX; SUIT TO COLLECT.**—The state board of appraisers and assessors shall, on the first Monday in August, report to the auditor of state the amounts fixed by it as the value of the capital stock representing capital and property of sleeping-car companies employed and used in Ohio; at the same time, the board shall file with the auditor of state the statements of the various companies and other papers before it. It shall be the duty of the auditor of state, in the month of November, annually, to charge and collect from each sleeping-car company doing business or owning cars which are operated in this state, a sum, in the nature of an excise tax, to be computed by taking one per cent. of the amount fixed by the state board of appraisers and assessors as the value of the proportion of the capital stock representing the capital and property of such company, owned or used in Ohio, and certified to the auditor of state, after deducting the value of the real estate of the company in Ohio, assessed and taxed locally, if any there be. All taxes collected by the auditor of state, under the provisions of this act, shall be paid into the state treasury and be credited to the general revenue fund. If any sleeping-car company fails or refuses to pay said tax during the month of November, the auditor of state shall add to the tax due a penalty of fifty per centum thereon, and shall forthwith proceed to collect the tax and penalty by any means provided by law for the collection of taxes by county treasurers, and for his services shall be allowed five per centum on the amount of penalty collected, which he is authorized to retain out of such amount. It shall be the duty of the attorney-general or any prosecuting attorney, on request of the auditor of state, to prosecute any proceeding for the collection of such tax, which officer shall be allowed for his services, five per centum on the total amount collected, to be retained and paid to him by the auditor of state. The balance of the amount collected shall be paid into the state treasury. Suit for the collection of such tax and penalty may be brought in the name of the state, in the county of Franklin, or in any county into or through which passes any railroad line over which such sleeping-car company is running its cars; and service of summons against a sleeping-car company may be made upon any officer or agent of such company named in section 5044 of the Revised Statutes, or, if such officer or agent cannot be found, then upon any conductor, or officer, agent or employe of such company, in charge of any car owned and used by such sleeping-car company in any county in this state in which any railroad line over which such sleeping-car company is running its cars is located, or through which it passes. (May 21, 1894, 91 v. 408.)

§ 2780-17. **ELECTRIC LIGHT, GAS, NATURAL GAS, PIPE-LINE, WATERWORKS, STREET, SUBURBAN OR INTERURBAN RAILROAD, EXPRESS, TELEGRAPH, TELEPHONE, MESSENGER OR SIGNAL, UNION DEPOT, AND RAILROAD COMPANIES DEFINED.**—That any person or persons, joint stock association or corporation, wherever organized or incorporated, when engaged in the

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business of supplying electricity for light, heat or power purposes to consumers within this state, shall be deemed to be an electric light company; when engaged in the business of supplying artificial gas for lighting or heating purposes to consumers within this state, shall be deemed to be a gas company; when engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state, shall be deemed to be a natural gas company; when engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially, within this state, shall be deemed to be a pipe-line company; when engaged in the business of supplying water, through pipes or tubing, or in a similar manner, to consumers within this state, shall be deemed to be a waterworks company; when engaged in the business of operating a street, suburban or interurban railroad, either wholly or partially within this state, whether the cars used in such business be propelled by animals, steam, cable, electricity, or other motor shall be deemed to be a street, suburban or interurban railroad company; when engaged in the business of conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate or other article, by express, not including the ordinary lines of transportation of merchandise and property in this state, shall be deemed to be an express company; when engaged in the business of transmitting to, from, through, or in this state, telegraphic messages, shall be deemed to be a telegraph company; when engaged in the business of transmitting to, from, through, or in this state, telephonic messages, shall be deemed to be a telephone company; when engaged in the business of supplying messengers or of signaling or calling by electrical apparatus, or in similar manner, for any purpose, shall be deemed to be a messenger or signal company; when engaged in the business of operating a union depot or station for railroad purposes, shall be deemed to be a union depot company; when engaged in the business of operating a railroad, either wholly or partially within this state, whether on rights of way acquired and held exclusively by such company or otherwise, shall be deemed to be a railroad company. (April 15, 1902, 95 v. 136; March 19, 1896, 92 v. 79.)

§ 2780-18. ANNUAL STATEMENTS OF SAME.— Every electric light, gas, natural gas, pipe-line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, and union depot company defined in section (1) one (§ 2780-17) hereof, doing business in this state shall, annually, between the first and thirty-first days of May, and every such railroad company shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the auditor of state a statement, in such form as the auditor of state may prescribe, containing the following facts:

First. The name of the company.

Second. The nature of the company, whether a person or persons, or association or corporation, and under the laws of what state or country organized.

Third. The location of its principal office.

Fourth. The name and post-office address of the president, secretary, auditor, treasurer and superintendent or general manager.

Fifth. The name and post-office address of the chief officer or managing agent of the company in Ohio.

Sixth. In the case of express companies the entire receipts (including all sums earned or charged, whether actually received or not) for business done within this state of each agent of such company doing business in this state (giving the name of the office) for the year then next preceding the first day of May, for and on account of such company, including its proportion of gross receipts for business done by such company within this state in connection with other companies; also, the total amount of such receipts for business done within this state.

Seventh. In the case of telegraph and telephone companies, the entire gross receipts (including all sums earned or charged, whether actually received or not) for the year then next preceding the first day of May, from whatever source derived,

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whether message, telephone tolls, rentals, or otherwise, for business done within this state of each office within this state (giving the name of the office) and the total gross receipts of the company for such period in Ohio from business done within Ohio.

Eighth. In the case of each railroad situated wholly within Ohio, the gross earnings from its operation, and in the case of each railroad located partly within and partly without Ohio, the gross earnings from the operation of the entire line, for the year ending the thirtieth day of June next preceding, with the miles of line within Ohio, and the miles of line without Ohio.

Ninth. In the case of each street, suburban or interurban railroad situated wholly within Ohio, the gross earnings from its operation and in the case of each street, suburban or interurban railroad located partly within and partly without Ohio, the gross earnings from the operation of the entire line, for the year ending the first day of May next preceding, with the miles of line within Ohio, and the miles of line without Ohio.

Tenth. In the case of companies, other than express, street, suburban and interurban railroads, and railroads, the entire gross receipts of the company (including all sums earned or charged, whether actually received or not) for business done within this state for the year then next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies.

Eleventh. Such other facts and information as the auditor of state may require in the form of return prescribed by him.

Blanks for making the above statement shall be prepared, and, on application, furnished any electric light, gas, natural gas, pipe-line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot and railroad company, by the auditor of state. (April 15, 1902, 95 v. 137; March 19, 1896, 92 v. 79.)

§ 2780-19. STATE BOARD OF APPRAISERS AND ASSESSORS; MEMBERS; OFFICERS; MINUTES; MEETING; RIGHT TO APPEAR, ETC.— The auditor of state, treasurer of state, attorney-general and secretary of state shall constitute a board, named the state board of appraisers and assessors, of which board the auditor of state shall be ex officio president. In the absence or inability of the auditor, the board shall appoint one of its members president pro tempore. The board shall appoint a secretary and full minutes of its proceedings shall be kept. The board shall, annually, on the first Monday in June, meet in the office of the auditor of state, and thereupon, or when received, the auditor of state shall lay before the board the statements and schedules returned to him under section 2780-18 of the Revised Statutes of Ohio. The reports made by railroad and telegraph companies to the commissioner of railroads and telegraphs may be regarded and treated by the board as reports made to it, and the board shall have power at any time to call upon such commissioner for information. The board may also consider the reports filed with the auditor of state by express, telegraph and telephone companies under the provisions of section twenty-seven hundred and seventy-eight, Revised Statutes, of Ohio. The board shall proceed to ascertain and determine, on or before the second Monday in July, the entire gross receipts of electric light, gas, natural gas, pipe-line, waterworks, express, telegraph, telephone, messenger or signal, and union depot companies for business done within Ohio, for the year then next preceding the first day of May, and the amounts ascertained by said board shall, in such instance, be held and deemed to be "the gross receipts of such electric light, gas, natural gas, pipe-line, waterworks, express, telegraph, telephone, messenger or signal, and union depot company, for business done within Ohio" for the year under consideration. The board shall further proceed to ascertain and determine, on or before the first Monday in October, the gross earnings from its operation within Ohio of each railroad company whose line is wholly or partially within this state, for the year then next preceding the thirtieth day of

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June, and the amount ascertained by said board shall be held and deemed to be "the gross earnings of such railroad company from its operation within Ohio" for the year under consideration. In ascertaining the gross earnings from its operation within Ohio of a railroad company whose line lies partly within and partly without this state, the gross earnings from its operation of the entire line or system, shall be divided by the total number of miles operated to obtain the average gross earnings per mile, and the gross earnings from the operation within this state shall be taken to be the average gross earnings per mile multiplied by the number of miles operated within this state. The board shall further proceed to ascertain and determine, on or before the second Monday in July, the gross earnings from its operation within Ohio of each street, suburban or interurban railroad company whose line is wholly or partially within this state, for the year then next preceding the first day of May, and the amount so ascertained by said board shall be held and deemed to be "the gross earnings of such street, suburban or interurban railroad company from its operation within Ohio" for the year under consideration. In ascertaining the gross earnings from its operation within Ohio of a street, suburban or interurban railroad company whose line lies partly within and partly without this state, the gross earnings from its operation of the entire line or system, shall be divided by the total number of miles operated to obtain the average gross earnings per mile, and the gross earnings from the operation within this state shall be taken to be the average gross earnings per mile, multiplied by the number of miles operated within this state. The board may adjourn from time to time, until the business before it is finally disposed of. In case of failure or refusal of any company to make the statement required by law, or furnish the board any information requested by it, the board shall inform itself, as best it may, on the matters necessary to be known, in order to discharge its duties under this act. And at any time, after the meeting of the board on the first Monday in June, and before the gross receipts of any company other than street, suburban or interurban railroad or railroad, for business done within Ohio, or the gross earnings from its operation within Ohio, of any street, suburban or interurban railroad or railroad company are determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of such determination. After the determination of the amount of the gross receipts of any company, other than railroad, for business done within Ohio, or of the gross earnings from its operation within Ohio, of any railroad company, and before the certification to the auditor of state of such amount, as provided in section five (5) (§ 2780-21) hereof, the board may, on the application of any person or company interested or on its own motion, review and correct its finding in such manner as may seem to it to be just and proper. (April 15, 1902, 95 v. 138; March 19, 1896, 92 v. 79.)

§ 2780-20. PENALTY; RECOVERY AND DISPOSITION OF SAME.—In case any company required to file a statement under the provisions of section 2780-18 of the Revised Statutes of Ohio fails to make and file such statement on or before the thirty-first day of May, such company shall be subject to a penalty of five hundred dollars, and an additional penalty of one hundred dollars for each day's omission after the thirty-first day of May to file such statement, said penalty to be recovered by action in the name of the state, and, on collection, paid into the state treasury to the credit of the general revenue fund. The attorney-general, on the request of the auditor of state, shall institute such action against any company so delinquent in the court of common pleas of Franklin county, or in any county in which such company does business and shall be allowed for his services five per centum on the amount collected, to be retained by him and the balance paid into the state treasury. The state board of appraisers and assessors shall have power to require the president, secretary, treasurer, receiver, superintendent or managing agent, or other officer, or employe or agent, of any electric light, gas, natural gas, pipe-line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot and railroad company to attend before the board, and bring with him

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for the inspection of the board, any books or papers of such company in his possession or control, and to testify under oath touching any matter relating to the organization or business of such company. Any member of the board is authorized and empowered to administer such oath. Any officer, employe, or agent of such company, who shall refuse to attend before the board when requested to do so, or shall refuse to bring with him and submit for the inspection of the board any books or papers of such company in his possession, custody or control, or shall refuse to answer any question put to him by the board or any member thereof, touching the organization or business of such company, shall be deemed guilty of a misdemeanor, and on conviction shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both, and any officer, employe or agent of such company so refusing, as aforesaid, shall be guilty of contempt of such board, and may be confined, by order of such board, in the jail of the proper county until he shall have complied with the requirement of the board and paid the cost of his imprisonment. (April 15, 1902, 95 v. 140; March 19, 1896, 92 v. 79.)

§ 2780-21. ANNUAL REPORTS; ASSESSMENTS AND COLLECTION; PENALTY.—The board of assessors and appraisers shall, on the first Monday in August, report to the auditor of state the amount of the gross receipts of electric light, gas, natural gas, pipe-line, waterworks, express, telegraph, telephone, messenger or signal and union depot companies for business done within the state of Ohio and the amount of the gross earnings from its operation within Ohio of each street, suburban or interurban railroad company, for the year then next preceding the first day of May, and on the first Monday in October, the board shall report to the auditor of state the amount of the gross earnings from its operation within Ohio of each railroad company for the year then next preceding the thirtieth day of June. At the same time the board shall file with the auditor of state the statements of the various companies and other papers before it. It shall be the duty of the auditor of state, in the month of November, annually, to charge and collect from each electric light, gas, natural gas, pipe-line, waterworks, express, telegraph, telephone, messenger or signal and union depot company doing business in this state, a sum, in the nature of an excise tax, to be computed by taking one per centum of the amount fixed by the state board of appraisers and assessors as the gross receipts of such company for business done within the state of Ohio for the year then next preceding the first day of May, and certified to the auditor of state; and from each street, suburban or interurban railroad company doing business in this state, a sum in the nature of an excise tax, to be computed by taking one per cent. of the amount fixed by the state board of appraisers and assessors as the gross earnings from its operation within Ohio of such company for the year then next preceding the first day of May and certified to the auditor of state; and from each railroad company doing business in this state a sum in the nature of an excise tax, to be computed by taking one per cent. of the amount fixed by the state board of appraisers and assessors as the gross earnings from its operation within Ohio of such company for the year then next preceding the thirtieth day of June, and certified to the auditor of state. Provided, nothing contained in this act shall exempt or relieve electric light, gas, natural gas, pipe-line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot and railroad companies from the assessment and taxation of their tangible property in the manner authorized and provided by law. All taxes collected by the auditor of state under the provisions of this act, shall be paid into the state treasury, and be credited to the general revenue fund. If any electric light, gas, natural gas, pipe-line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot and railroad company fails or refuses to pay said tax during the month of November, the auditor of state shall add to the tax due a penalty of fifty per cent. thereon, and shall forthwith proceed to collect tax and penalty with interest at the rate of six per cent. per annum by any means provided

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by law for the collection of taxes by county treasurers, and for his services shall be allowed five per cent. on the total amount collected, which he is authorized to retain. It shall be the duty of the attorney-general, or any prosecuting attorney, on request of the auditor of state, to prosecute any proceedings for the collection of such tax, which officer shall be allowed for his services five per cent. on the total amount collected, to be retained and paid to him by the auditor of state. The balance of the amount collected shall be paid into the state treasury. Suits for collection of such tax may be brought in the name of the state in Franklin county, or in any county in which such electric light, gas, natural gas, pipe-line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot and railroad company is doing business or the line of such street, suburban or interurban railroad company or railroad company is located. In case the tax herein authorized to be charged and collected against any class of companies defined in the first section (§ 2780-17) of this act, engaged in any class of business mentioned therein, shall, for any reason, be declared invalid, such invalidity shall in no wise affect the validity of the law as applicable to any other class or classes of companies defined in said section nor shall the abrogation or repeal of any section or clause of this act be held to abrogate or repeal any other section or clause thereof. (April 15, 1902, 95 v. 141; March 19, 1896, 92 v. 79.)

§ 2780-22. **EXEMPTION OF MUNICIPALITIES.**— This act shall not be construed so as to require any municipal corporation within the state to make any return or pay any taxes under any provision of this act. (April 15, 1902, 95 v. 143; March 19, 1896, 92 v. 79.)

§ 2780-23. **REPORTS WHERE FILED.**— During the month of October of each year, the auditor of state shall file with the secretary of state a written statement containing the name of each company which has complied with the provisions of this act during the year next preceding, and such facts respecting it within his knowledge, which are required by law to be annually filed with the secretary of state by corporations other than those included within the provisions of this act. (April 15, 1902, 95 v. 143.)

§ 2808. **STATE BOARD FOR BANKS; HOW CONSTITUTED.**— The governor, auditor of state, and attorney-general shall constitute a board for the equalization of the shares of incorporated banks, and also the shares of unincorporated banks whose capital is divided into shares, each of which shares is an aliquot part of the capital so divided, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of state, and examine the returns of said banks to the county auditors and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the state auditor. (March 26, 1902, 95 v. 71; March 9, 1883, 80 v. 54; April 13, 1880, 77 v. 191; R. S. 1880; April 12, 1877, 74 v. 88.)

Constitutionality and construction.

Cummings v. National Bank, 101 U. S. 153;
Whitbeck v. Mercantile Bank, 127 U. S. 193.

Powers, notice, records, adjournment, remedy.

See Euclid Avenue Bank v. Hubbard, 22 O. C. C. 20 (1901).

§ 2809. **POWERS OF BOARD.**— Said board shall hear complaints and equalize the value of said shares according to the rules prescribed by their title for valuing and equalizing the values of real and personal property, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such a per cent. as will equalize said shares to their true value in money; provided that said board shall not increase or

Taxation of Corporations — Banks, §§ 2810-2842.

reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum. (March 9, 1883, 80 v. 54; April 13, 1880, 77 v. 191; K. S. 1880; April 12, 1877, 74 v. 88, § 5.)

§ 2810. **STATE AUDITOR TO REPORT TO COUNTY AUDITORS.**—The auditor of state shall forthwith after such equalization shall have been made certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situated in such counties, which valuation shall be put on the proper tax-list. (March 9, 1883, 80 v. 54; April 13, 1880, 77 v. 191; R. S. 1880; April 12, 1877, 74 v. 88, § 6.)

§ 2811. **HOW CONSTITUTED, AND THEIR MEETING.**—The auditor of state, treasurer of state, commissioner of railroads and telegraphs and the attorney-general, shall also constitute a board of equalization of the values of the property of railroad companies as the same are fixed by the county auditors; and for this purpose they shall meet at the office of the auditor of state, on the Wednesday after the tenth day of June, annually, and examine the returns and documents sent to the auditor of state by the boards of county auditors in this behalf. (March 17, 1896, 92 v. 72; March 16, 1867, 64 v. 58, § 1.)

Board of equalization.

This board is not board of appraisal.—State ex rel. v. Annual Board, 65 Oh. St. 544 (1902).

§ 2812. **THEIR POWERS.**—The said board shall hear complaints and equalize said values by adding to the valuation of the property of such companies as have been undervalued, and deducting from the valuation of the property of such as have been overvalued: provided, that the board, in such equalization, shall not reduce the aggregate of the value of the property of railroad companies within the state below the amount returned by the board of county auditors. (March 16, 1867, 64 v. 58, § 1.)

§ 2839. **LIEN ON BANK SHARES; UNLAWFUL TO TRANSFER STOCK UNTIL DELINQUENT TAXES ARE PAID.**—Any taxes assessed on any shares of stock or the value thereof, of any bank or banking association, shall be and remain a lien on such shares from the first Monday of May in each year until such taxes are paid; and in case of the non-payment of such taxes at the time required by law by any shareholder, and after notice received of the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officer of such bank or banking association to transfer or permit to be transferred the whole or any portion of said stock, until the delinquent taxes thereon, together with costs and penalties, shall be paid in full; and no dividend shall be paid on any stock so delinquent, so long as such taxes, penalties, and costs, or any part thereof, remain due and unpaid. (April 16, 1867, 64 v. 204, § 6.)

§ 2840. **BANK MAY PAY TAXES AND DEDUCT AMOUNT FROM DIVIDEND.**—It shall be lawful for any such bank or banking association to pay to the treasurer of the county in which such bank or banking association may be located, the taxes that may be assessed upon its shares, as aforesaid, in the hands of its shareholders, respectively, and deduct the same from any dividends that may be due or may thereafter become due on any such shares, or deduct the same from any funds in its possession belonging to any shareholder, as aforesaid. (April 16, 1867, 64 v. 204, § 7.)

§ 2842. **AGENT OF EXPRESS OR TELEGRAPH COMPANY TO PAY TAXES OF THE COMPANY; ONE MAY PAY FOR ALL THE OFFICES OF THE COUNTY.**—The agent of every express or telegraph company shall retain in his hands for such company, and pay to the county treasurer, the amount of all taxes assessed against such company, and in case of the default of payment, the treasurer shall proceed to collect the same as in other cases of delinquent personal property tax: provided, that

Railroads — Lien, etc., on, § 3207.

where there is more than one such agent of the same company in one county, the agent thereof in the principal city, town, or village of such county, may assume the payment of such tax, and upon so doing, the other agents in the same county shall not be required to retain funds to pay the same. (May 1, 1862, 59 v. 91, § 6.)

§ 2843. UNLAWFUL TO ACT AS AGENT OF OR PERFORM SERVICES FOR CERTAIN COMPANIES WHEN TAXES DUE AND UNPAID FOR TWENTY DAYS; PENALTIES.—If the taxes assessed against any express company, telegraph company, telephone company, or insurance company, in any county in this state, shall remain due and unpaid to the treasurer of such county, for the period of twenty days after the time provided by law for the payment thereof, it shall be unlawful for any person or persons, or corporation, to act as agents, or do or transact any business for such company so in default to such county, until said tax, and interest, and penalty is fully paid; any person, or agent, manager or clerk of any corporation, who shall, after such default, directly or indirectly act as agent of, or do or transact any business whatever on account of or for the benefit of such company so in default, other than the payment of said tax, shall be held to be guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not less than one hundred nor more than five hundred dollars, or punished by imprisonment in the county jail, and fed on bread and water only, not exceeding thirty days, or both, at the discretion of the court; after such default, made as aforesaid, any railroad company which shall, directly or indirectly, convey or carry for said defaulting express, telegraph, telephone company or insurance company, any package of money, merchandise, or other articles, or transmit any telegraphic message, after having notice of such default, shall for every such offense, forfeit and pay a sum equal to the amount of such tax due and unpaid, with the interest and penalty thereon, to be recovered by an action in the name of the state, in the county where such tax is assessed, with costs of suit. (March 20, 1885, 82 v. 92; R. S. 1880; May 1, 1862, 59 v. 91, § 7.)

§ 3207. WHAT CONTRACTS FOR RAILROAD WORK SHALL STIPULATE; CLAIMS; ORDER OF PRIORITY.—Any person, association of persons, or corporation contracting for the construction of a railroad, depot buildings, water-tanks, or any part thereof, shall be liable to and shall pay to each person performing labor or furnishing materials stipulated for in the contract with the owner of the road, under a contract express or implied with the original contractor, or with any sub-contractor, for the whole or any part of the work stipulated in the original contract with the owner of the railroad; and the railroad company shall provide, in its contract with any person, association of persons, or corporation for the construction of its road, or any part thereof, that payments under its said contract shall be made in the following order of priority: First, to the persons performing labor or furnishing materials, or furnishing boarding on the order of any contractor or sub-contractor to persons employed by them, or either of them, in furnishing materials or labor for or in the construction of such railroad, without preference. Second, to any sub-contractor, any balance due under his contract after payment of his or their liabilities to persons performing labor or furnishing materials or boarding, under his or their contract. Third, to any contractor, or construction company intervening between a sub-contractor and the railroad company, in the order of such intervention from such sub-contractor upward to the owner of the railroad, any balance due after payment by the company, of amounts found due in the order of priority above stipulated. (April 6, 1883, 80 v. 99; R. S. 1880; March 31, 1874, 71 v. 51, § 1.)

Intent and meaning of act.

The true intent and meaning of §§ 3207–3211 is declared to be as follows: “Any person or persons who perform labor, or furnish material or boarding, under contract, express or implied, with such railroad company, or any of its authorized agents, for the

construction of such railroad, or any part thereof, is entitled to a lien for the payment of the same upon such railroad, as provided in § 3208 of the above recited act.”—Act of April 10, 1884, 81 v. 126.

Labor or liens on railroads.

See § 3398a et seq. and § 3231-1 et seq.

Railroads — Lien, etc., on, § 3208.

Mortgage has priority.

See Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296, 301; Feike v. Railroad Co., 12 O. C. C. 362 (1892); s. c., 5 C. D. 640; s. c., 14 O. C. C. 186 (1897); s. c., 7 C. D. 652.

Operation of act is prospective.

See Feike v. Railroad Co., 12 O. C. C. 362 (1892); s. c., 5 C. D. 640.

Mechanics' lien on railroads and railroad bridges under general act.

See Rutherford v. Cincinnati, etc., R. R. Co., 35 Oh. St. 559 (1880); Smith Bridge Co.

v. Bowman, 41 Oh. St. 37 (1884); Industrial, etc., Co. v. Supply Co., 1 O. F. D. 483 (1897); Bowman v. Springfield, etc., R. R. Co., 1 O. C. C. 64 (1885); s. c., 1 C. D. 39. See Cleveland, etc., Ry. Co. v. Trust Co., 86 Fed. 73 (1898); Industrial, etc., Co. v. Electrical, etc., Co., 58 Fed. 732 (1893).

Not applicable to street railroads.

Massillon Bridge Co. v. Cambria Iron Co., 59 Oh. St. 179 (1898).

See generally as to this law Scioto Valley Ry. Co. v. Cronin, 1 W. L. B. 315 (1876).

§ 3208. WHAT LIEN SHALL HAVE PRECEDENCE; HOW SUCH LIEN PERFECTED; PROCEEDINGS UNDER.—A person who performs labor or furnishes materials for or in construction of any railroad, depot buildings, water-tanks, or any part thereof, and a person who furnishes boarding on the order of any contractor or sub-contractor, to persons employed by them or either of them, in furnishing materials, or performing labor for or in construction of such railroad, depot buildings, water-tanks, or any part thereof, in addition to his rights under the preceding section shall have a lien for the payment of the same upon such railroad and such lien shall have and maintain precedence over any lien taken, or to be taken, and shall subsist for one year from the date of filing the attested account hereafter provided for; and if an action is brought to enforce the lien within that time, it shall continue in force until finally adjudicated. In order to perfect such lien, a person performing labor, or furnishing materials, or boarding, as herein specified, shall, within forty days from the date that such person ceased performing labor, or furnishing materials, or boarding, on or for the railroad file with the recorder of the county where the labor was performed, or materials, or boarding furnished, an affidavit containing an itemized statement of the kind and amount of materials furnished, or labor performed, the time when, the contractor or sub-contractor for whom, and the section and place where, on the line of the road the labor was performed, or materials furnished, and the amount due therefor, after crediting all payments and set-offs; and, in case of boarding furnished, such affidavit shall have attached thereto an itemized account of such board, showing the name of the contractor or sub-contractor on whose order it was furnished, the several persons to whom the same was furnished, the weekly rate of boarding, and the several amounts unpaid by each respectively. On filing the affidavit here provided for it shall be recorded in a separate book to be provided therefor, and shall then operate as a lien on said railroad, in the manner and subject only to the limitations here provided. The claimant shall, within ten days after filing his affidavit with the recorder, serve a notice in writing upon the secretary, or other officer or authorized representative of the railroad company, by delivering or leaving a copy thereof at his usual place of residence, or place of doing business, which notice shall contain a statement of the facts of his filing such affidavit, the county wherein filed, the amount of his claim, and whether for labor, materials or boarding furnished, and the contractor or sub-contractor for whom rendered. Provided, that when the notice in writing required to be served upon the secretary, or other officer or authorized representative of the railroad company, cannot be served in the county where said affidavit is filed, such notice shall be served by the recorder upon the representative of the railroad aforesaid by depositing in the post-office a letter containing such notice directed to his place of residence, or place of doing business, if known to such recorder. Any person failing to file his affidavit aforesaid, and serving the notice aforesaid, within the time herein prescribed, shall be deemed

Railroads — Lien, etc., on, §§ 3209, 3210.

and held to have waived all claim under this section, against the railroad company. (April 6, 1883, 80 v. 99; R. S. 1880; March 31, 1874, 71 v. 51, § 1.)

Notice.

Under this section a substantial compliance with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation.—*Railway Co. v. Cronin*, 38 Oh. St. 122 (1882).

Service of notice on director.

The service of a notice under this section on a director of the company to be affected by it is sufficient.—*Railway Co. v. McCoy*, 42 Oh. St. 251 (1884).

Mortgage covering after-acquired property not prior to lien.

See *Rouseulp v. Ohio Southern R. R. Co.*, 19 O. C. C. 436 (1899); s. c., 10 C. D. 621. See *Reed v. Ginsburg* (Sup. Ct.), 45 W. L. B. 161 (1901).

Effect of taking promissory notes.

Under this section the taking of a note does not waive or affect the right to a lien, nor is it necessary to refer to or describe the note in taking such lien.—*Rouseulp v. Ohio Southern R. R. Co.*, 19 O. C. C. 426 (1899); s. c., 10 C. D. 621.

Lien not lost by an extension of time.

Carnegie v. Lancaster, etc., Ry. Co., 1 N. P. 300 (1894); s. c., 3 Dec. 343.

Lien may be obtained for materials delivered out of state.

Carnegie v. Lancaster, etc., Ry. Co., 1 N. P. 300 (1894); s. c., 3 Dec. 343.

Electric light plant, when not part of railroad.

See *Industrial, etc., Co. v. Electrical, etc., Co.*, 58 Fed. 732 (1893).

§ 3209. **HOW ACTION MAY BE BROUGHT.**—Any person obtaining and holding a lien provided for in the foregoing section, may, in addition to his remedies, under section thirty-two hundred and seven, proceed by petition as in other cases of lien, against the owner of and all other persons interested, as lien-holders or otherwise, in any such railroad, and obtain such judgment as justice and equity may require; and for the purposes of such suit any number of lien-holders provided in the preceding section may join as parties plaintiffs, by separately stating and numbering their respective claims; provided, that if several liens be obtained by several persons on the same railroad under the provisions of section thirty-two hundred and eight, they shall have no priority among themselves, but payment thereon shall be made pro rata. (April 6, 1883, 80 v. 99; R. S. 1880; March 31, 1874, 71 v. 51, § 1.)

Remedy is by action for accounting.

Schneider v. Cincinnati, etc., Ry. Co., 20 W. L. B. 457 (1888).

§ 3210. **CONTRACTOR TO BE NOTIFIED OF TIME OF PAYMENT; DISPUTED CLAIMS AND HOW ADJUSTED.**—Each contractor or sub-contractor shall have at least five days' notice, in writing, of the time when the lien for labor, boarding or materials furnished under a contract with him will be paid, which may be served upon him personally or upon his authorized agent or foreman, by the owner of the railroad, or any officer or agent thereof, stating therein the time when such liens will be paid; and, on request of such contractor or sub-contractor he shall be permitted to examine such lien claims before they are paid, at any time after the notice has been given; provided, that if such notice cannot be served in the county where the lien is filed, the same may be given by publication in some newspaper of general circulation in such county for the period of two weeks, if he dispute any of the claims, the company or owner of the road shall withhold payment of the disputed claims until they are adjusted; and if the matter cannot be adjusted between the parties interested, it may be submitted to the arbitration of three disinterested persons, one to be chosen by each of the parties, and one by the two thus chosen; and their decision, or that of any two of them, shall, in the absence of fraud or collusion, be final and conclusive on the parties. If any claim be disputed and is not settled or submitted to arbitration, the claimant shall, in such case, be required to commence an action on his claim before the proper tribunal, within forty days after notice that his claim has been disputed, and prosecute the same to final judgment without delay. And the

 Railroads — Regulations as to Freight, §§ 3221-3223.

amount of any disputed claim thus ascertained or adjudicated shall then be paid by the railroad owner. Provided that, after notice given as above provided, if no objection is filed against such claim within ten days after the expiration of the term of service of notice as above specified, then the contractor or sub-contractor shall be held to have waived all objection to such claim, and the same shall be taken to be correct as against such contractor or sub-contractor. (April 6, 1883, 80 v. 99; R. S. 1880; March 31, 1874, 71 v. 51, § 2.)

Limitation.

The limitation of time applies to controversies arising between the contractor or sub-contractor and the person furnishing materials

or work, and not to right of action on the part of the latter against the owner of the road.—*Railway Co. v. Cronin*, 38 Oh. St. 122 (1882).

§ 3211. TO WHOM PRECEDING SECTIONS APPLY; THE WORD "OWNER" DEFINED.—The provisions of the four preceding sections shall apply to and include any person who furnishes grain, hay, merchandise, tools or implements, or who repairs any tools or implements, on the order of any contractor or sub-contractor, for their own use, or the use of persons employed by them or either of them, while furnishing materials or labor for or in construction of such railroad; provided, that the amount of such claim shall not exceed the wages of the person performing labor or furnishing materials, to whom furnished, or the amount found due such contractor, or sub-contractor, under the provisions of section thirty-two hundred and seven (;) and in every such case, the requirements of section thirty-two hundred and eight, as to filing affidavits and giving notices, shall be strictly complied with; and, provided further, that the aggregate of all liens taken and perfected under sections thirty-two hundred and seven, thirty-two hundred and eight, thirty-two hundred and ten and thirty-two hundred and eleven, shall not be in excess of the actual construction contract price of the railroad company. The word "owner," in these sections shall be held and considered as including any lessee, receiver, corporation, company, or persons owning, operating or managing any railroad with whom or in whose behalf the contracts herein have been made. (April 6, 1883, 80 v. 99; R. S. 1880; March 31, 1874, 71 v. 51, § 3.)

§ 3221. NOTICE TO OWNER OF RECEIPT OF FREIGHT.—All express companies, transportation companies, forwarding and commission merchants, common carriers, warehousemen, wharfingers, and railroad companies, doing business in this state, shall within thirty days after the receipt of any property in their warehouse, depot, station, store or other place of deposit or doing business, when such property is plainly marked with the owner's name and place of residence, or be otherwise known, notify the owner that such property is held by them subject to charges, either by leaving such notice at the usual residence or place of business of the owner, or by depositing the same, postage prepaid, in the proper postoffice, duly addressed to such owner. (January 26, 1875, 72 v. 17, § 1.)

§ 3222. REGISTER OF FREIGHT.—All such persons, associations, or companies, shall keep a register, in which shall be entered a list or inventory of all goods, wares, merchandise, baggage, or other property, with a pertinent description thereof by marks thereon, the size and weight, and the depot, warehouse, or other place where the same is deposited, the time when the same was received, and the amount of charges claimed thereon, which may be left in the possession of such person, association or company, by reason of the owner being unknown, or when such owner's residence is not known, or when such property has been refused, or the owner has neglected to receive the same. (January 26, 1875, 72 v. 18, § 2.)

§ 3223. WHEN PROPERTY MAY BE SOLD.—When any such property has been conveyed to any point in this state, and remains unclaimed for the space of six months at the place to which it was consigned, and the owner fails within that time to claim the same, and to pay the proper charges, if there be any against it, such person, asso-

Railroads — Regulations as to Freight, §§ 3224-3227.

ciation, or company, may sell such freight or other property, at public auction, offering each parcel separately. (February 23, 1877, 74 v. 17, § 3.)

§ 3224. NOTICE OF SALE OF PROPERTY TO BE GIVEN.—Such property may be offered for sale either in the place where the office, station, depot, or warehouse in which the same has been deposited for safe keeping, is located, or at any other place where such person, association, or company may deem best to insure a prompt sale thereof; at least thirty days' notice of the time and place of sale, containing a descriptive list of the several articles to be sold, with names, numbers, and marks thereon, shall be given, by posting such notice at the office, station, or depot of such person, association, or company in the county where the place to which such property was consigned is situated, or, if there be no such office, station, or depot, by posting such notice in three public places in such county; and, in addition to the posting at the place of consignment, such descriptive list must be posted at the place where the property is to be sold, and thirty days' notice of the time and place of the sale must be published in a newspaper of general circulation in the county where the property is to be sold. (February 23, 1877, 74 v. 18, § 4.)

§ 3225. DISPOSITION OF PROCEEDS OF SALE.—Such person, association, or company, from the proceeds of the sale of such property, shall pay all the necessary costs and expenses of the sale, and all proper charges for freight and storage of the property sold, apportioning such expenses and charges, as near as may be, among the articles sold, to the amount received for each, and hold the overplus, if any, subject to the order of the owner thereof, at any time within one year after such sale, upon proof of ownership by affidavit of the claimant or his attorney; and after the expiration of one year, all such sums unclaimed shall be paid into the state treasury, to be placed to the credit of the common schools; but any such article remaining unsold may be again offered as above provided, until sold. (February 23, 1877, 74 v. 18, § 4.)

§ 3226. SUIT TO SUBJECT FREIGHT TO PAYMENT OF COSTS, ETC.—Such person, association or company may bring suit before any court of competent jurisdiction for the amount of the freight, storage, and legal charges thereon, and subject such freight to the payment thereof, after ten days from the giving of the notice provided for in section thirty-two hundred and twenty-one unless such cost and charges are paid, if the owner or consignee is known or can be found in the county, but if such owner or consignee is unknown, a non-resident of the county, or his place of residence is unknown, then such notice shall be published for not less than ten days in a newspaper of general circulation in such county, and in such case the suit may be brought after ten days from the first publication; and the judgment obtained shall be a lien upon the freight, to satisfy which, with costs of suit, the same shall be sold. (February 23, 1877, 74 v. 17, § 3.)

§ 3227. STORAGE AND THE LIEN THEREFOR.—Such person, association, or company, after the expiration of ten days from the receipt of goods at the place to which they are consigned, may, upon giving or depositing the notice provided in section thirty-two hundred and twenty-one, and the expiration of ten days, charge a fair and reasonable cost for storage, which shall be a lien upon the goods so stored, and such person, association, or company may, after the expiration of said ten days, deliver such goods to any warehouseman or storage merchant, at the point of destination of such goods or merchandise, or in case there be no responsible warehouseman or storage merchant at such point willing to receive the goods, then at the most convenient point where storage can be effected, and receive from such warehouseman the freight and charges due such railroad or other company upon the same, notifying the owner or consignee of such storage, when known, in the manner provided in section

 Railroads — Regulations as to Freight, §§ 3228-3231.

thirty-two hundred and twenty-one, and the advances made, and all reasonable charges for storage shall be a lien upon the goods so stored. (February 23, 1877, 74 v. 17, § 3.)

§ 3228. **COPY OF NOTICE, SALE BILL, ETC., TO BE KEPT.**—Such person, association, or company shall keep a copy of the notice, a copy of the sale bill, and the expenses thereof, proportional to each article sold, and also the oath of the claimant of the residue of the proceeds as aforesaid, and shall furnish an inspection of the same, and, if required, copies thereof, to any one, on payment of the proper charges therefor. (January 26, 1875, 72 v. 19, § 5.)

§ 3229. **SALE OF PERISHABLE ARTICLES.**—If any perishable property be so conveyed as freight, and remain unclaimed until in danger of great depreciation, or the same be refused, or the owner thereof cannot be found, then such person, association or company may sell the same at private sale, or auction, without giving notice, for the best price it will bring, and apply the proceeds as aforesaid. (January 26, 1875, 72 v. 19, § 6.)

Live stock is perishable.

Trustees v. Brighton Stock Yards Co., 27 Oh. St. 435 (1875).

§ 3230. **WITHIN WHAT TIME PROPERTY MAY BE CLAIMED.**—If the owner of any such property, at any time within five years, reclaim the same, and produce satisfactory evidence to the auditor of state of his ownership thereof, the auditor shall draw his warrant in favor of such person upon the treasurer of state for the amount paid into the state treasury. (January 26, 1875, 72 v. 20, § 9.)

§ 3231. **PENALTY FOR NEGLIGENCE TO COMPLY WITH PROVISIONS.**—Any such person, association or company who refuses or neglects to perform any of the duties required by this chapter, with the intent to avoid the provisions thereof, shall forfeit and pay a sum not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the court, to be recovered for the use of common schools in the county in which the principal office of such person, association, or company is located, and shall, moreover, be liable to any person injured thereby in double the value of the property. (January 26, 1875, 72 v. 20, § 7.)

§ 3231-1. [Sec. 1.] **LIEN UPON RAILROAD, FOR LABOR OR MATERIAL FURNISHED.**—Any person who shall have performed common or mechanical labor upon, or furnished supplies to any railroad, street railroad, or railroad operated wholly or in part by electric motor power, turn-pike, plankroad, canal or on any public structure being erected, or on any abutment, pier, culvert or foundation for same, or for any side-track, embankment, excavation, or any public work, protection, ballasting, delivering or placing ties, or track-laying, whether the labor is performed for, or the supplies or material is furnished to any company, corporation, contractor, or sub-contractor, construction company, or any individual, shall have a first immediate and absolute lien on the whole of the property on which said work is done, and to which said supplies have been contributed, and on any fund arising from the sale thereof or any part thereof under an order of any court, and shall hold the railroad, street railroad, or railroad operated wholly or in part by electric motor power, canal, turnpike, plank road, or structure, to the creation or construction of which the said labor or supplies has been contributed, or so much thereof as may have been in whole or in part created by said labor or supplies, to the exclusion of any such railroads, canal, turnpike, plank road, public work or structure, as to operation, occupation or use, until the claim for such labor or supplies is properly adjusted and paid in full. This act shall apply to all work now being constructed, or material now being fur-

Railroads — Lien, etc., on, §§ 3231-2-3231-5.

nished, and to all work hereafter constructed and material hereafter furnished. (May 12, 1902, 95 v. 608; March 20, 1889, 86 v. 120.)

Not applicable to street railroads.

Massillon Bridge Co. v. Cambria Iron Co., 59
Oh. St. 179 (1898); New England Engine Co.
v. Railway Co., 75 Fed. 162 (1896).

Construction of act.

New England Engine Co. v. Railway Co.,
supra.

§ 3231-2. Sec. 2. **HOW LIEN OBTAINED.**— When it shall be deemed necessary for any construction company, contractor, sub-contractor, mechanic, laborer, or person contributing supplies or material to secure their claim against any railroad, canal, turnpike, plankroad, public work or public structure, either for work done or material furnished, they shall file a sworn itemized statement, within thirty days after said work was performed or materials furnished, of the amount of work done or material furnished, showing the balance due and claimed for labor or material furnished, with the recorder of the county or counties within which said work was done or materials furnished. And if several liens be obtained by several persons on the same job, in the manner prescribed by this act, they shall have no priority among themselves, but payments thereon shall be made pro rata. (March 20, 1889, 86 v. 120.)

§ 3231-3. Sec. 3. **BOND; WHEN INJUNCTION MAY ISSUE.**— Any construction company, contractor, mechanic, laborer or person contributing supplies or material to any work named in section one (1) of this act, shall at the time of filing the sworn statement of account as provided in section two (2) of this act, file a good and sufficient bond of indemnity for an amount equal to the amount claimed, which bond shall be approved by the probate judge, and shall be so conditioned as to save and protect the defendant in any case arising under this act, and shall then be entitled to a decree of the common pleas court, enjoining and prohibiting the operation, use or occupancy of the property created in whole or in part by the party or parties asking for said injunction; and the said injunction shall not be dissolved until the court is satisfied that the claim has been adjusted and paid in full. (March 20, 1889, 86 v. 120.)

§ 3231-4. Sec. 4. **ENGINEER TO MAKE MEASUREMENTS; ESTIMATES, ETC.**— Any civil engineer who shall be employed as chief or assistant engineer in the surveying, platting or cross-sectioning of any railroad, canal, turnpike, plank road or other public road, shall, before the work is commenced, make an accurate measurement of the same, and shall prepare a profile of each section of one mile or less of said work, showing quantities of each and every class of work to be done on said mile or less; and shall also designate the nearest benchmark or point from which measurements are made, and shall drive stakes at top of slope, at foot of embankments, at sides and center of grade and around every burrow pit for each one hundred feet, showing in plain figures by feet and tenths of a foot the depths of cut or height of fill or embankment, together with a correct showing of the quantity of overhaul beyond a given number of feet, in cubic yards, for each section of a mile or less; and it shall be the duty of such chief or assistant engineer to furnish, on demand, when any work is finished, to any company, contractor, sub-contractor or person a final statement of quantities in each class of work done or supplies of material furnished by parties interested. (March 20, 1889, 86 v. 120.)

§ 3231-5. Sec. 5. **PENALTY.**— Any civil engineer or assistant engineer, whose duty it is to ascertain quantities from actual measurement, and on which final estimates are to be made, who shall knowingly give other than the true quantities, with intent to defraud the construction company, contractor, sub-contractor, laborer or person furnishing supplies or material, shall, if the amount of the discrepancy exceed at the contract price, thirty-five dollars, be deemed guilty of a felony, and shall be punished by a fine not less than the amount at contract price of all work done or material furnished and not included in his final estimate, or be confined in the penitentiary for not less than one or more than five years. (March 20, 1889, 86 v. 120.)

PART III.

GENERAL CORPORATION LAWS.

- § 3232. By what laws corporations shall be governed.
- § 3233. What corporations may accept the provisions of this title.
- § 3233-1. Special charters not accepted or acted on, repealed.
- § 3233-2. Loss of certificate of incorporation of religious society.
- § 3233-3. Prima facie evidence of incorporation of religious society.
- § 3234. Application of existing laws to corporations created prior to 1851. Provision as to insurance companies.
- § 3235. For what purpose corporations may be formed; sanitarium companies, real estate companies.
- § 3235a. May have common and preferred stock; provisions.
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- § 3269-2. Unpaid interest due corporation not to be included in profits.
- § 3269-3. Surplus profits; how ascertained; prohibiting advertisement of capital not subscribed and paid in.
- § 3269-4. Penalty for violating section.

§ 3232. **BY WHAT LAWS CORPORATIONS SHALL BE GOVERNED.** — Corporations created before the adoption of the present constitution, and which have not, by election or some other act, come to be governed by laws since passed, shall be governed and controlled by the laws then in force, and the valid modifications thereof since or herein enacted; other corporations now existing or hereafter created shall be governed and controlled by the provisions of this title.

Effect of general laws.

A general law of the state will affect companies incorporated under special acts, as to which there was a reserved power of amendment or repeal. — *State ex rel. v. Cincinnati Gas, etc., Co.*, 18 Oh. St. 262 (1868).

Laws reducing freight rates.

Railroad companies organized under the act of 1848, before the adoption of the present constitution, and which have not relinquished their right to be governed by said act, are not

bound by later acts reducing the rates of freight. — *Iron R. R. Co. v. Lawrence Furnace Co.*, 29 Oh. St. 208 (1876).

Boards of Trade under act of 1866.

The Association of the Tobacco Trade of Cincinnati, a corporation formed under the act of April 3, 1866 (S. & S. 182), since the repeal of that act, is under this section governed by the provisions of title 2 of the Revised Statutes. — *State ex rel. v. Casey*, 38 Oh. St. 555 (1883).

§ 3233. **WHAT CORPORATIONS MAY ACCEPT THE PROVISIONS OF THIS TITLE.** — A corporation created before the adoption of the present constitution, and now actually doing business, may accept any of the provisions of this title, and when a certified copy of such acceptance is filed with the secretary of state, so much of its charter as is inconsistent with the provisions of this title is hereby repealed. (May 1, 1852; 50 v. 274, § 71.)

Partial acceptance.

Partial or conditional acceptance of a charter or of an amendment of a charter is, in the absence of statute, impossible. — *Marietta, etc., R. R. Co. v. Elliott*, 10 Oh. St. 57, 60 (1859); *Baldwin v. Hillsborough, etc., R. R. Co.*, 10 W. L. J. 337 (1853).

Effect on railroad companies making leases.

Railroad companies incorporated prior to the adoption of the constitution of 1851, and

which avail themselves of the general corporation act by taking or making leases of their roads, are to be regarded as thereby accepting a provision of said act, within the meaning of this section, and relinquishing all rights inconsistent with the provisions of said act. — *Cincinnati, etc., R. R. Co. v. Cole*, 29 Oh. St. 126 (1876).

Necessity of formal acceptance.

In order to work a repeal of charter rights inconsistent with the provisions of the general

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corporation act, the filing of a certificate of acceptance with the secretary of state is not indispensable. It is the fact of acceptance which binds; the certificate being merely evidence, and the company cannot profit by its failure to file a certificate. — *Dayton, etc., R. R. Co. v. Hatch*, 1 Dis. 84 (1855); *Zabriskie v. Cleveland, etc., R. R. Co.*, 23 How. (U. S.) 381 (1860); *Cincinnati, etc., R. R. Co. v. Cole*, supra; *Owen v. Purdy*, 12 Oh. St. 73 (1861).

Transfer of special rights.

Special privileges conferred on a railroad company by a private charter granted under the constitution of 1802, do not so inhere in the road constructed under the charter as necessarily to pass to any corporation which may have acquired, under subsequent legislation the right to operate the same. — *Pittsburg, etc., Ry. Co. v. Moore*, 33 Oh. St. 384 (1878). See forms for certificate of acceptance.

§ 3233-1. SPECIAL CHARTERS NOT ACCEPTED OR ACTED ON, REPEALED.

— All special acts of incorporation in force in this state, which have not been accepted, or acted upon, be and the same are hereby repealed. (February 12, 1861, 58 v. 12.)

A special charter, being regarded as merely an offer on the part of the state until acceptance, may be revoked and repealed at any time before acceptance. — *State v. Dawson*, 16 Ind. 40 (1861).

Judicial notice of private charters.

Courts cannot take judicial notice of a private or special statute creating a corporation, unless it be specially pleaded at least by a reference to its title and the day of its passage, according to § 5092. — *Pittsburgh, etc.,*

Ry. Co. v. Moore, 33 Oh. St. 384 (1878). *Contra, Brown v. State*, 11 Oh. 276 (1842). See *Railroad Co. v. Hoffhines*, 46 Oh. St. 643 (1889); *Beatty v. Lessee of Knowles*, 4 Pet. (U. S.) 152 (1830). See *State v. Granville Society*, 11 Oh. 1, 9 (1841).

Effect of new constitution on unaccepted special charters.

See *State ex rel. v. Roosa*, 11 Oh. St. 16 (1860); *Citizens' Bank v. Wright*, 6 Oh. St. 318 (1856).

§ 3233-2. LOSS OF CERTIFICATE OF INCORPORATION OF RELIGIOUS SOCIETY. — Whenever it shall be made to appear to the satisfaction of the secretary of state that any religious society or corporation heretofore organized or incorporated under the laws of this state has lost its charter or certificate of incorporation, or that the same has been destroyed, it shall be the duty of the secretary of state to issue a new certificate of incorporation of such religious society or corporation theretofore issued, and the time as near as may be ascertained of issuing such lost or destroyed certificate as shall be made to appear to him; and thereupon all deeds, mortgages, or other instruments of writing for the conveyance of land, as well as all acts done by such religious society or corporation by virtue of such certificate or charter theretofore lost, shall be binding and of full force in law and in equity: Provided, that nothing in this act shall be so construed as to make valid any act not authorized under the laws of this state which heretofore have been in force. (March 25, 1878; 75 v. 77.)

§ 3233-3. PRIMA FACIE EVIDENCE OF INCORPORATION OF RELIGIOUS SOCIETY. — The fact that a religious society for not less than thirty years, claiming to have been duly and legally incorporated as such, and performing during such time duties and exercising rights as such, shall be prima facie evidence of the original issue of such charter or certificate of incorporation as claimed by such society. (March 25, 1878; 75 v. 77.)

See *Congregational Church v. Webber*, 54 Mich. 571 (1884).

§ 3234. APPLICATION OF EXISTING LAWS TO CORPORATIONS CREATED PRIOR TO 1851. PROVISIO AS TO INSURANCE COMPANIES. — Corporations created before the adoption of the present constitution, which take any action under or in pursuance of this title, shall thereby and thereafter be deemed to have consented, and shall be held to be a corporation, and to have and exercise all and singular its franchises under the present constitution and the laws passed in pursuance thereof, and not otherwise; provided, that any fire insurance company so created, complying with the requirements of sections three thousand six hundred and fifty-four and three thousand six hundred and fifty-five, or of any police regulation contained in

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chapter eleven of this title, or in chapter eight of title three, part first, shall not be deemed to have consented, and shall not be affected by the provisions of this section by reason of such compliance. (R. S. 1880; May 18, 1886, 83 v. 201; March 8, 1892, 89 v. 73.)

Loss of rights by change of time of election.

Where a corporation created before the constitution of 1851 had a definite time and term fixed for the election of directors, it cannot change the time of such elections except under section 3246, and having made such change, it becomes in all respects a corporation under the present constitution and laws. — State ex rel. v. Lakamp, 4 O. C. C. 257 (1889); s. c. 2 C. D. 533.

Loss by issuing new policies.

A fire insurance company created prior to the constitution of 1851, by issuing policies not authorized by its charter but only by the general corporation act, thereby becomes subject to such act. — Knox Co. Mutual Ins. Co. v. Bowersox, 6 O. C. C. 275 (1892); s. c. 3 C. D. 451.

Loss by accepting new charter.

A corporation will be deemed to have accepted a charter by using the privileges therein granted. — Cincinnati, etc., R. R. Co. v. Cole, 29 Oh. St. 126 (1876); Shields v. State, 26 Oh. St. 86 (1875); Goodin v. Evans, 18 Oh. St. 150 (1868); Owen v. Purdy, 12 Oh. St. 73 (1861).

Acceptance by directors.

Where an amendment to a charter provides for acceptance by the corporation, the board of directors have authority to accept. — Goodin v. Evans, 18 Oh. St. 150, 167 (1868).

Change by vote of majority.

Whether a change in a corporate charter can be made otherwise than by unanimous vote of the stockholders must depend upon the facts of each case; the original powers of the corporation and the proposed change. — Ireland v. Palestine, etc., Turnpike Co., 19

Oh. St. 369 (1869); Marietta, etc., R. R. Co. v. Elliott, 10 Oh. St. 57 (1859); Milford, etc., Turnpike Co. v. Brush, 10 Oh. 111 (1840); Dayton, etc., R. R. Co. v. Hatch, 1 Disney, 84 (1855); Baldwin v. Hillsborough, etc., R. R. Co., 10 W. L. J. 337 (1853); Zabriskie v. Cleveland, etc., R. R. Co., 23 How. (U. S.) 381 (1859).

Stockholders may become estopped.

A non-assenting stockholder may become bound by his failure to resist an action of the majority in accepting an amendment and by acquiescing therein. — Owen v. Purdy, 12 Oh. St. 73 (1861); Goodin v. Evans, 18 Oh. St. 150 (1868).

Acquiescence must be proved.

The acquiescence of a stockholder in the action of the majority will not be presumed, but must be proved. — Ireland v. Palestine, etc., Turnpike Co., supra.

Corporation acting after expiration of charter.

A corporation chartered under a special statute for a certain number of years, but which, after the expiration of the time for which it was so chartered, continues to exercise its corporate powers, may still be treated as a corporation. — Myers v. Lucas, 16 O. C. C. 545 (1898); s. c. 8 C. D. 431. See note to § 3235 on real estate companies.

Provision as to insurance companies.

Under the provision of this section relating to insurance companies, unless a corporation created by special act is clearly granted exemption by its charter, it must comply with the police regulations of § 3654 and § 3655. — State ex rel. v. Eagle Ins. Co., 50 Oh. St. 252 (1893); Eagle Ins. Co. v. State, 153 U. S. 446 (1894).

§ 3235. FOR WHAT PURPOSES CORPORATIONS MAY BE FORMED; SANITARIUM COMPANIES, REAL ESTATE COMPANIES.—Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business; but nothing in this section shall prevent the formation of corporations for the purpose of erecting, owning and conducting sanitariums for the receiving of and caring for patients and for the medical, surgical and hygienic treatment of the diseases of such patients, and for instruction of nurses in the treatment of diseases and in hygiene; provided, that the articles of incorporation formed for the purpose of buying or selling real estate shall expire by limitation in twenty-five years from the date of being issued by the secretary of state. In case any real estate owned by any such corporation is not sold or disposed of by any such corporation within twenty-four years from the date of [that] their respective articles of incorporation are issued, it shall be forthwith the duty of the board of directors of such corporation to institute action against the corporation and owners of liens upon or against such real estate proposed to be sold, by filing a petition in the court of common pleas in the county where such real estate is situated, praying for a sale of the real estate in the peti-

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tion described; and should any of such board of directors refuse to direct any officer to institute action as hereinbefore mentioned, and should such action not be instituted within sixty days after the expiration of the twenty-four years hereinbefore mentioned, it shall be the duty of the prosecuting attorney of the county wherein such real estate is situated, upon the expiration of said sixty days, to institute such action. Service of summons upon the defendants, appraisal and sale of such real estate, and distribution of the proceeds of the sale shall be made as provided in actions of foreclosure of mortgages and marshaling liens; provided, however, the court may allow the plaintiff, in case he be the prosecuting attorney, a just and proper attorney fee which shall be taxed with the costs of the action. (May 12, 1902, 95 v. 623; March 22, 1900, 94 v. 65; April 6, 1894, 91 v. 126; April 20, 1893, 90 v. 205; R. S. 1880.)

Insurance companies.

This section must be construed as not authorizing the incorporation of insurance companies, as the organization of such companies is specially provided for in chapters 10 and 11 of title 2.—*State v. Pioneer Live Stock Co.*, 38 Oh. St. 347 (1882).

Agricultural fair company.

A company may be organized to conduct an agricultural fair for profit under this section.—*State v. Long*, 48 Oh. St. 509 (1891).

What corporations are for profit.

Corporations for profit within the meaning of the statute are those which are formed for the prosecution of business enterprises with a view to realizing gains to be distributed as dividends among the shareholders in proportion to their contributions to the capital stock.—*Snyder v. Chamber of Commerce*, 53 Oh. St. 1, 11 (1895).

Corporations not for profit.

It seems the secretary of state may refuse to file the articles of a corporation not for profit when they show on their face that the company is for profit.—*People ex rel. v. Rose*, 59 N. E. (Ill.) 432.

Purposes not authorized.

Under statutes similar to ours it has been held illegal to incorporate for the purpose of:

Manufacturing articles infringing patents.—*See Clemshire v. Boone Co. Bank*, 53 Ark. 512 (1890).

Creating a lottery.—*See Peltz v. Supreme Chamber, etc.*, 19 Atl. (N. J.) 668 (1890); *Le Warne v. Meyer*, 38 Fed. 191 (1889).

Improperly restraining trade.—*In re Richmond Coal Co.*, 20 Phila. 251 (1893); s. c., 9 Pa. Co. Ct. Rep. 172.

Forming a military company of foreigners, presumably for an improper purpose.—*Russian American Guards Charter*, 3 Pa. Dist. 673 (1893); s. c., 13 Pa. Co. Ct. Rep. 148.

Assisting in war against the United States.—*Chicora Co. v. Crews*, 6 S. C. 243 (1874); *United States v. Insurance Co.*, 22 Wall. (U. S.) 99 (1874); *Importing Co. v. Locke*, 50 Ala. 332 (1876).

Arranging marriages for compensation.—*In re Mutual Aid Ass'n*, 15 Phila. 625 (1881); *In re Helping Hand Ass'n*, 15 Phila. 644 (1881).

Resisting temperance laws.—*Detroit, etc., Bund v. Detroit, etc., Verein*, 44 Mich. 313 (1880).

Manipulating stocks of other corporations and thereby creating a trust.—*People ex rel. v. Gas Trust*, 130 Ill. 268 (1889).

Purchasing franchises of corporations.—*Opinion of Atty.-Gen'l Watson*, 24 W. L. B. 269 (1890).

Promoters of corporations, duty, liability, and actions.

Yeiser v. U. S. Board, etc., Co. (U. S. C. C. A.), 12 O. F. D. 678 (1901); *Second Nat. Bank v. Greenville, etc., Post Co.*, 23 O. C. C. 274 (1899).

Secret intent of incorporators.

The legality of the purpose of the incorporation, so far as the filing of articles and the creation of the company is concerned, can only be judged by the statements contained in the articles, and not by the possibility or secret intention of illegal user.—*See State ex rel. v. Taylor*, 25 Oh. St. 279 (1874); *Cronin v. Potter's Co-operative Co.*, 29 W. L. B. 52, p. 55 (1892).

Discretion of secretary of state.

The discretion to be exercised by the secretary of state does not reach to the merits of an application for articles of incorporation, although it may be exercised as to matters of form. The formation of corporations in this state is regulated by general laws, and when the proposed incorporation shows compliance with those laws it is entitled to articles of incorporation; if it fails to so comply the application is to be refused upon that ground, and that is sufficient.—*State ex rel. v. Taylor*, 55 Oh. St. 61 (1896).

Power when purpose of, clearly illegal.

It seems that when the articles show prima facie the object of the proposed company to be illegal, the secretary of state would have power to refuse to file them; as where the articles show the purpose to be bookmaking or gambling on races.—*See In re New York Booking Co.*, N. Y. L. J. Apr. 29 (1892).

Wharf-boat companies.

Under a statute permitting corporations to be formed for the purpose of building and repairing steamboats and other water craft, a

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company may be formed to build and repair wharf boats. — *Gaff v. Flesher*, 33 Oh. St. 453 (1878).

Can be but one main purpose.

The use of the word "purpose" and not "purposes" implies a limitation. A corporation may, except where distinct provision is made, be organized for one main purpose and no more. — *State ex rel. v. Taylor*, 55 Oh. St. 61 (1896).

Statute commented upon.

Ehrman v. Union, etc., Ins. Co., 35 Oh. St. 324, 342 (1880); *Larwell v. Hanover Savings Fund Society*, 40 Oh. St. 274, 282 (1883).

Mutual protection associations.

Corporations formed under § 3630 are corporations not for profit under this section. — *State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882).

Real-estate company is for profit.

Companies incorporated under this section for the purpose of dealing in real estate are necessarily for profit, and must be so organized. — *State ex rel. v. Home Co-op. Union*, Sup. Ct. Dec. 1900.

Expiration of charters of real-estate companies.

Real estate companies are subject to a limitation of twenty-five years' existence, at the expiration of which time they are ipso facto dissolved, and must be wound up according to § 5675 et seq. — *People v. Anderson, etc., Road Co.*, 76 Cal. 190 (1888); *La Grange, etc., R. Co. v. Rainey*, 7 Colw. (Tenn.) 420, 432 (1870); *Scanlan v. Crawshaw*, 5 Mo. App. 337 (1878). See *Myers v. Lucas*, 16 O. C. C. 545 (1898); s. c., 8 C. D. 431.

Sale of property by directors.

The directors may sell all property without a vote of the stockholders, even if made three days before the expiration of a charter. — *Stetson v. Bank*, 12 Oh. St. 577 (1861).

Limit on amount of land.

There is no limit on the amount of land a real estate company may hold. — See *Market St. Ry. Co. v. Hellman*, 109 Cal. 571 (1895).

Leases for more than twenty-five years.

See *Beckett Paper Co. v. Hamilton, etc., Hydraulic Co.*, 18 O. C. C. 200 (1898); s. c., 10 C. D. 57.

Power of corporations to deal in land under common law.

At common law corporations had the capacity to purchase and sell lands unless restrained by statute. — See *Lessee of Overmeyer v. Williams*, 15 Oh. 31 (1846).

Stock in corporation not for profit.

A corporation not for profit may have a capital stock under this section. — *Snyder v. Chamber of Commerce*, 53 Oh. St. 1 (1895).

Agreement for preference.

The existing stockholders of a corporation may, for the purpose of inducing others to subscribe to the unissued stock, agree that the new subscribers shall be paid a stipulated annual dividend, out of the net earnings of the corporation, before any dividends are paid to stockholders then existing. — *Painesville Nat. Bank v. King Varnish Co.*, 8 O. C. C. 563 (1894); s. c., 4 C. D. 511.

Preferred stock may be made a lien on property.

In the absence of a statute to the contrary, a corporation may issue preferred stock which shall be a lien on its property and earnings second only to existing mortgages and entitled to preference as to capital and profits. — *Hamlin v. Toledo, etc., R. R. Co.*, 78 Fed. 664 (1897); *Continental Trust Co. v. Toledo, etc., R. R. Co.*, 86 Fed. 929 (1898); *Toledo, etc., R. R. Co. v. Continental Trust Co.*, 95 Fed. 497 (1899). See *Continental Trust Co. v. Toledo, etc., R. R. Co.*, 72 Fed. 92 (1896).

Construction of issue of stock having characteristics of loan.

An issue of preferred stock will be construed to be what it purports and was intended to be, if possible, even though the stockholders are deprived of the right to vote, and have their dividends guaranteed and secured by a mortgage. — *Miller v. Ratterman*, 47 Oh. St. 141 (1890); s. c., 22 W. L. B. 99 (1889); *Ryan v. Miami, etc., Ry. Co.*, 10 A. L. R. 263 (1881). See *Hamlin v. Toledo, etc., R. R. Co.*, 78 Fed. 664 (1897).

Preferred stock when construed to be loan.

An apparent issue of preferred stock will be construed to be a loan, if the statute authorizing the issue would otherwise be unconstitutional as violating the special liability clause of the constitution. — *Burt v. Rattle*, 31 Oh. St. 116 (1876).

Preferred stock without voting power.

The right to vote preferred stock may be withheld. — *Miller v. Ratterman*, supra; *Ryan v. Miami, etc., Ry. Co.*, supra.

Security for dividends on preferred stock.

A mortgage given to secure the payment of dividends on preferred stock is subject to the condition that dividends must be earned, although such condition may be apparently inconsistent with the mortgage. — *Miller v. Ratterman*, supra; *Warren v. King*, 108 U. S. 389 (1883).

Preferred stock, other sections with reference to.

See §§ 3263, 3309, 3309b.

Guaranty of dividends on preferred stock.

A guaranty of dividends on preferred stock is nothing more than a guaranty of payment

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if dividends are earned.—*Miller v. Ratterman*, supra.

Enforcement of rights of one class of stockholders against others.

See *Port Clinton R. R. Co. v. Cleveland*, etc., R. R. Co., 13 Oh. St. 544 (1862).

Endowment stock.

See *Bryant v. Ohio College*, etc., 1 C. S. C. 67, 307 (1871). *Contra*, *Ohio College v. Rosenthal*, 45 Oh. St. 183 (1887).

Contracts to form corporations.

A provision of a preliminary agreement to form a corporation which is in conflict with the certificate of incorporation or charter obtained is deemed waived and abandoned by all parties who accept such charter and organize under it; such preliminary contract being

merged into the statutory contract or charter. — *Cronin v. Potter's Co-op. Co.*, 29 W. L. B. 52, 56 (1892).

Contracts to form corporations.

Where one, who is the owner of certain property, enters into a contract with a number of others whereby the parties agree to form a corporation to take over and operate the property, and the owner agrees to sell his property at a stated price, and take his pay therefor partly in cash and partly in stock of the corporation to be formed, and the property is thereupon turned over to the parties to the contract, who operate it, but abandon the effort to form the corporation, the contract will be treated not as one between the vendor and a corporation not formed, but between the individuals who entered into it.—*Mosier v. Parry*, 60 Oh. St. 388 (1899).

§ 3235a. CORPORATION MAY HAVE COMMON AND PREFERRED STOCK.

— If the organization is for profit, it must have a capital stock. Such stock may consist of common and preferred, or of common only, but at no time shall the amount of preferred stock exceed two-thirds of the actual capital paid in in cash or property; and if both common and preferred it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to dividends not exceeding eight per cent. per annum, payable quarterly, half yearly, or yearly, out of the surplus profits of the company each year in preference to all other stockholders, and such dividends may be made cumulative. Every corporation issuing both common and preferred stock may create such designations, preferences, and voting powers, or restriction or qualification thereof, as shall be stated and expressed in the certificate of incorporation, and such preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in stock certificate thereof. In case of the insolvency of the corporation no holder of preferred stock shall be liable for the debts of the corporation until after the remedy against the common stockholders upon their double liability, as provided by law, shall have been pursued and exhausted, and then only for such amount as remains unpaid; but such liability shall in no event exceed the liability fixed by law for the common stock of such corporation. In case of the insolvency or dissolution of the corporation, the holders of the preferred stock shall be entitled to receive from the assets remaining after paying its debts and liabilities, the full payment of the par value of the stock, before anything is paid to the common stock. (May 12, 1902, 95 v. 623.)

§ 3236. ARTICLES OF INCORPORATION; WHAT TO CONTAIN.— Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge, before an officer authorized to take acknowledgments of deeds, articles of incorporation, the form of which shall be prescribed by the secretary of state, which must contain:

1. The name of the corporation, which shall begin with the word "The" and end with the word "Company," unless the organization is not for profit.
2. The place where it is to be located, or where its principal business is to be transacted.
3. The purpose for which it is formed.
4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which the stock is divided.
5. Provided, any association of five or more persons, who are residents of the

Articles of Incorporation, § 3236.

state of Ohio, and who are associated, not for profit, and as the principal or ruling organization over subordinate organizations, associated, not for profit, and having a definite location or place of business in the state of Ohio, may be incorporated, having its location or principal place of business in the state of Ohio, and without naming, in its articles of incorporation, a permanent place where it is to be located, or where its principal business is to be transacted. But such association must name, in its articles of incorporation, the place where it is to be located, or where its principal business is to be transacted, at the time of its incorporation, with the name and place of residence of its then principal officers. And when such association changes its place where located, or the place where its principal business is transacted, it shall be the duty of its principal officer, under its seal, if it has one, countersigned by the officer acting as secretary of such association, to certify to the secretary of state of Ohio, the place then selected by such association, as its location, or where its principal business is to be transacted, with the name of its principal officers, and their places of residence, which certificate the secretary of state shall record for public use in the records of his office. (April 10, 1889, 86 v. 224; April 16, 1885, 32 v. 134; Rev. Stat. 1880.)

Articles must substantially comply with law.

Mere irregularities in organizing under a charter will not deprive the officers and stockholders of the corporation of its benefit, but on the other hand the provisions of the act of incorporation must be substantially complied with. The filing of articles of incorporation substantially complying with the law is a condition precedent to corporate existence.—Trust Co. v. Floyd, 47 Oh. St. 525, 541 (1890); Bartholomew v. Bentley, 1 Oh. St. 37 (1852). See Nugent v. Cincinnati, etc., R. R. Co., 2 Dis. 302, 304 (1858); Harris v. McGregor, 29 Cal. 124 (1865); State v. Beck, 81 Ind. 500, 506 (1882); Hughes v. Antietam Mfg. Co., 34 Md. 316, 324 (1870); Rogers v. Danby Society, 19 Vt. 187 (1847).

Articles should be signed and acknowledged in this state.

It is a well-settled rule of law that the acceptance of a charter and the organization of the corporation must occur in the state creating it.—See Myers v. Manhattan Bank, 20 Oh. 283 (1851); Smith v. Silver, etc., Co., 64 Md. 85 (1885); Freeman v. Machias, etc., Co., 38 Me. 343 (1854); Heath v. Silverthorn, etc., Co., 39 Wis. 146 (1875).

What officers authorized to take acknowledgments.

Notaries Public, § 118, § 4106; Probate Judges, § 526, § 4106; Justices of the Peace, § 583, § 4106; Police Judges, § 1787; County Surveyors, § 1175, § 4106; County Auditors, § 4106, § 1019; Mayors, § 4106; Judges and Clerks of Courts of Record, § 1247, § 4106.

Acknowledgment under the old law.

See State ex rel. v. Lee, 21 Oh. St. 662 (1871); Spinning v. Home Ass'n, 26 Oh. St. 483 (1875); Warner v. Callender, 20 Oh. St. 190 (1870); Lucas v. Building Ass'n, 22 Oh. St. 339 (1872); Griffin v. Clinton, etc., R. R. Co., 1 W. L. M. 31 (1859); Clarke v. Thomas,

34 Oh. St. 46, 59 (1877); Hagerman v. Building Ass'n, 25 Oh. St. 186, 200 (1874).

Absence of acknowledgment.

A total want of acknowledgment will render the articles void.—Doyle v. Mizner, 42 Mich. 332 (1879).

Signing and acknowledgment of articles.

Articles of incorporation must be signed and acknowledged in due form.—Insurance Co. v. Cram, 43 N. H. 636 (1862); Kaiser v. Lawrence Bank, 56 Ia. 104 (1881); Indianapolis Furnace Co. v. Herkimer, 46 Ind. 142 (1874).

At least five must sign and acknowledge.

Although more than five persons or corporations may sign and acknowledge the articles, there must be at least five or they will be void.—State ex rel. v. Critchett, 37 Minn. 13 (1887); People v. Montecito Water Co., 97 Cal. 276 (1893). See Lorillard v. Clyde, 86 N. Y. 384 (1881).

Signing by initials.

Articles may be signed by initials instead of the full phenomenon.—State ex rel. v. Beck, 81 Ind. 500 (1882).

Signing blank or incomplete articles.

The articles must be complete before the signing thereof, and if signed while blank, and subject to future agreement, they will not be binding upon the corporators, disaffirmance being made in due time. Each corporator's assent to each statement in the articles is essential.—Dutchess R. R. Co. v. Mabbett, 58 N. Y. 397 (1874); Richmond R. R. Co. v. Reed, 83 Ind. 9 (1882).

Designation of principal place.

The failure to describe the place designated as the principal place of business is immaterial.—In re Spring Valley Water Works, 17 Cal. 132 (1860).

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Designation of place of business is conclusive.

The designation of a principal place of business is conclusive as to the location of such office, and is not in any way determined by the proportion of business done there. The place so fixed is the situs of the company for the purpose of taxation, commencing suits, etc.—*Pelton v. Transportation Co.*, 37 Oh. St. 450 (1882); *Mercantile Trust Co. v. Ætna Iron Works*, 4 O. C. C. 579, 585 (1890); s. c., 2 C. D. 718, 722. See *Pomeroy Salt Co. v. Davis*, 21 Oh. St. 555 (1871); *Blumenthal v. Hudson River Co.*, 15 N. Y. Supp. 826 (1891); *Booth v. Wonderly*, 36 N. J. L. 250 (1873); *Rothchild v. Dithridge Co.*, 20 N. Y. Supp. 373 (1892).

Place of business for attachment in justice court.

A corporation may be attached in a justice court in any county other than that of its principal place of business.—*Champion Machine Co. v. Huston*, 24 Oh. St. 503 (1874). See *Boley v. Ohio, etc., Trust Co.*, 12 Oh. St. 139 (1867).

Change of place of business.

A corporation may change its principal place of business so long as it keeps within the limits of the designated place, otherwise a change cannot be made except by amendment of its articles.—*Pelton v. Transportation Co.*, supra; *Mercantile Trust Co. v. Ætna Iron Works*, supra. See *Booth v. Wonderly*, supra. See § 3855 and § 3238a, § 3311 and § 3385.

Statement of capital stock.

The amount and division of the capital stock, if the company is to have a capital stock, must be clearly stated; but articles will not be invalidated by a clerical error in the statement of the number or amount of the shares if the amount of the capital stock is correctly stated.—*Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870).

Purpose must be clearly stated.

The purpose for which a company is formed must be stated with clearness. The statute requires the specification of the business, and it is not a compliance with the law to state that the company is formed to do any business it may find profitable.—*In re Crown Bank*, L. R. 44 Ch. Div. 634 (1890). See *State ex rel. v. Central, etc., Ass'n*, 29 Oh. St. 399 (1876).

One main purpose.

Only the one main purpose may be stated as a corporation cannot be organized for two or more purposes.—*State ex rel. v. Taylor*, 55 Oh. St. 61 (1896).

Effect of claiming more than law allows.

If more is claimed in the articles than the law allows, the articles are only affected pro tanto.—*Toledo, etc., Ry. Co. v. Toledo Electric Co.*, 6 O. C. C. 362, 391 (1892); s. c., 3 C. D. 493, 507.

Provisions not responsive to law.

Any provision in the articles not responsive to some specification of general law is a nullity.—*O'Brien v. Cummings*, 13 Mo. App. 197 (1883); *People v. Chicago Gas Trust*, 130 Ill. 268 (1889).

Incidental powers not to be stated.

It is improper to state under the head of the purposes of the company all the incidental powers, such as it would necessarily have by general law.—*People ex rel. v. Peabody*, 130 Ill. 268 (1889); *Wendell v. State*, 62 Wis. 300 (1885); *In re McCrurg Gas Co.*, 4 Pa. Dist. Rep. 349 (1895).

Mistake in articles—reformation.

The articles of incorporation constitute the charter, or part of it, granted by the state, and the provisions contained therein cannot be changed, added to, or detracted from by a court because of a mistake.—*Cronin v. Potter's Co-op. Co.*, 29 W. L. B. 52 (1892).

Articles not in conformity with law.

Articles not in strict conformity with law by reason of defects, omissions, etc., may be corrected under § 5867 et seq.

Previous agreements merged in articles.

Where the incorporators of a company execute articles of incorporation they abandon and waive all provisions of previous contracts to form the corporation which are in conflict with the article as drawn.—*Cronin v. Potter's Co-op. Co.*, 29 W. L. B. 52, 56 (1892).

Secret intention of incorporators.

The articles are not vitiated by a secret intention on the part of the incorporators to do business in a foreign state.—*State ex rel. v. Taylor*, 25 Oh. St. 279 (1874).

When a corporation de facto exists.

Where an attempt is made by colorable proceedings which are followed by bona fide user, a corporation de facto exists, and its capacity can only be challenged by the state.—*Society Perun v. Cleveland*, 43 Oh. St. 481 (1885). See *Griffin v. Clinton, etc., R. R. Co.*, 3 O. F. D. 441 (1858); s. c., 1 Mo. (U. S.) 31.

No de facto existence without articles of incorporation.—*Abbott v. Omaha Smelting Co.*, 4 Neb. 416 (1876); *Capps v. Hastings Co.*, 40 Neb. 470 (1894); *Utely v. Union Tool Co.*, 11 Gray (Mass.) 139 (1858).

Proof of de facto existence.

The de facto existence of a corporation may be proved by evidence of attempted and colorable incorporation followed by bona fide user, even as against a party not estopped to deny its corporate existence.—*Society Perun v. Cleveland*, supra.

Possibility of de jure existence is essential to de facto existence.

There must be authority in law for the proceedings, that is, there must be a law author-

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izing the formation of corporations to exercise such powers as the de facto company claims.—*Gaff v. Fleisher*, 33 Oh. St. 107 (1877); *Racoon River Nav. Co. v. Eagle*, 29 Oh. St. 238 (1876); *Society Perun v. Cleveland*, supra.

Want of legal organization — how pleaded.

See *Methodist Church v. Wood*, 5 Oh. 283 (1831); *Lewis v. Bank*, 12 Oh. 132, 148 (1843); *Brady v. National Supply Co.*, 45 W. L. B. 176 (1901).

A party dealing with a corporation is estopped to deny its existence.

Second Nat. Bank v. Hall, 35 Oh. St. 158 (1878); *Lattimer v. Mosaic Glass Co.*, 13 O. C. C. 163 (1896); s. e., 7 C. D. 430; *Hatry v. Painesville, etc., Ry. Co.*, 1 O. C. C. 426 (1886); s. e., 1 C. D. 238; *Beebe v. Thomas*, 2 W. L. B. 107 (1877); *Continental Trust Co. v. Toledo, etc., R. R. Co.*, 82 Fed. 642 (1897).

A debtor of a corporation cannot deny its existence.

Peeckham Iron Co. v. Harper, 41 Oh. St. 100 (1884); *Newburg, etc., Co. v. Weare*, 27 Oh. St. 343 (1875); *Hagerman v. Ohio Building Ass'n*, 25 Oh. St. 186, 200 (1874); *Lucas v. Greenville Ass'n*, 22 Oh. St. 339 (1872); *Receivers v. Renick*, 15 Oh. 322 (1846); *Durrell v. Belding*, 9 O. C. C. 74 (1894); s. e., 4 C. D. 263; *Elektron Mfg. Co. v. Jones Bros. Co.*, 8 O. C. C. 311 (1894).

The corporation is estopped to deny its legal existence.

Callender v. Painesville, etc., R. R. Co., supra.

§ 3237. **WHAT ARTICLES MUST STATE IN CERTAIN CASES.**—When the organization is for a purpose which includes the construction of an improvement which is not to be located at a single place, the articles of incorporation must also set forth:

1. The kind of improvement intended to be constructed.
2. The termini of the improvement, and the counties in or through which it or its branches shall pass. (R. S. 1880.)

Validity of designation "in or near."

Articles of incorporation are not invalid because the terminus of the proposed improvement is designated as "in or near the town of Lima, Allen County, State of Ohio, at a point on the Cleveland and St. Louis Railroad;" for the words "in or near" are sufficiently definite for such purpose, meaning substantially "in." They authorized the building of no road not substantially in the town named.—*Warner v. Callender*, 20 Oh. St. 190 (1870); *Central R. R. Co. v. Penn. R. Co.*, 31 N. J. Eq. 475 (1879).

Statement of county sufficient.

Articles of incorporation are not void for want of certainty where they provide that the road shall "commence at some point to be

Stockholders are estopped to question the existence of the corporation collectively.

Clarke v. Thomas, 34 Oh. St. 46, 59 (1877); *Gaff v. Fleisher*, 33 Oh. St. 107, 113 (1877); *Callender v. Painesville, etc., R. R. Co.*, 11 Oh. St. 516 (1860); *Voorhees v. Bank*, 19 Oh. 463 (1850); *Trumbull County, etc., Co. v. Horner*, 17 Oh. 407 (1848); *Second, etc., Bank v. Lovell*, 2 C. S. C. 397 (1873); *Benninger v. Gail*, 1 C. S. C. 331 (1871); *Ryan v. Miami, etc., Ry. Co.*, 10 A. L. R. 263 (1881); *Mansfield v. Woods*, 29 W. L. B. 111 (1893); *Farmers', etc., Trust Co. v. Toledo, etc., Ry. Co.*, 67 Fed. 49 (1895); s. e., 9 O. F. D. 230. See *Racoon River Nav. Co. v. Eagle*, 29 Oh. St. 238 (1876).

Existence of company attempting to condemn land.

A company attempting to exercise the power of eminent domain must prove its legal existence, and the owner of land sought to be condemned may attack such existence.—*Atlantic, etc., R. R. Co. v. Sullivan*, 5 Oh. St. 276 (1855); *Atkinson v. Marietta, etc., R. R. Co.*, 15 Oh. St. 21 (1864).

Retroactive effect of ouster.

A judgment of ouster against a corporation adjudging it not to be a de jure corporation can have no retroactive effect upon the rights of the corporation, and of parties who dealt with it during its de facto existence, and stockholders do not become liable as partners.—*Society Perun v. Cleveland*, supra; *Rowland v. Meader Furn. Co.*, 38 Oh. St. 271 (1882).

For Forms of Articles of Incorporation, see Appendix.

hereafter designated in the township of Hudson, in the County of Summit, passing through the County of Portage or Cuyahoga, also through the Counties of Geauga and Lake to terminate at some point to be designated in the township of Painesville, in the County of Lake."—*Callender v. Painesville, etc., R. R. Co.*, 11 Oh. St. 516 (1860).

Only reasonable certainty required.

The rule only requires reasonable certainty, and the description of the termini and course may be somewhat indefinite in the articles of incorporation, if defined by location. The location must be made with reasonable compliance with the description in the articles of incorporation. To require a greater degree of certainty in the articles of incorporation to

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ensure validity would necessarily defeat the object of the statute in many, if not most, cases. Reasonable latitude must be allowed, for it is by force of such description that a company may send its engineers upon the lands of others to locate the route definitely.—See *Callender v. Painesville, etc., R. R. Co.*, supra: *Cleveland, etc., R. R. Co. v. Prentice*, 13 Oh. St. 373, 379 (1862).

Route stated in alternative.

Contiguous counties may be named in the alternative and the terminus may be an undesignated point in a township. The sufficiency of the description depends on the circumstances of each case.—See *Callender v. Painesville R. R. Co.*, supra.

What description too uncertain.

The description of the termini and course of a road "from a point on the Ohio and Pennsylvania State line in the County of Trumbull, in said State of Ohio, to a point on the Ohio River in same State in the County of Brown or Adams," has been held too uncertain to support condemnation proceedings.—*Atlantic, etc., R. R. Co. v. Sullivant*, 5 Oh. St. 276 (1855).

Route may be partially in foreign state.

Where the termini are in the state, the articles are not invalid because the described route takes in part of a foreign state.—*Piedmont, etc., Ry. Co. v. Speelman*, 67 Md. 260 (1887).

Indefinite descriptions — how cured.

Indefiniteness of descriptions in articles of incorporation may be cured by legislative recognition or by actual location, construction and operation.—*Cayuga R. R. Co. v. Kyle*, 5 Thomp. & C. (N. Y.) 659 (1875).

Belt roads.

The required statement of termini and course does not preclude the building of a circular or belt road, nor a road located in but one county.—*State v. Marvin*, 51 Kan. 462 (1893).

A whole road may be located in a single city.

Long Branch Com'rs v. West Line R. R. Co., 29 N. J. Eq. 566 (1878); *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755 (1880).

Description "from."

A description "from" a city or other point includes any point in such city.—See § 3270; *Colorado, etc., Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. Rep. 293 (1890); *Comm. v. Erie, etc., R. R. Co.*, 27 Pa. St. 339, 352 (1856); *Chicago, etc., Ry. Co. v. Chicago, etc., Ry. Co.*, 112 Ill. 589 (1884); *St. Louis, etc., Ry. Co. v. Hannibal, etc., Co.*, 28 S. W. Rep. (Mo.) 483 (1894). Contra, *Northeastern R. R. Co. v. Payne*, 8 Rich. L. (S. C.) 117 (1855).

Description "to."

A description "to" a certain place is inclusive.—See § 3270; *Rio Grande R. R. Co. v. Brownsville*, 45 Tex. 88 (1876); *Mason v. Brooklyn, etc., R. R. Co.*, 35 Barb. (N. Y.) 373 (1861). See *Hattr v. Painesville, etc., Ry. Co.*, 1 O. C. C. 426, 433 (1886); s. c., 1 C. D. 238, 242.

Description "at."

A description "at" a certain town is inclusive.—See § 3270; *Mohawk Bridge Co. v. Utica, etc., R. R. Co.*, 6 Paige Ch. (N. Y.) 554 (1837).

Description "between."

A description "between" certain points is inclusive.—*Morris, etc., R. R. Co. v. Central, etc., R. R. Co.*, 31 N. J. L. 205 (1865).

What description sufficient.

Articles of association of a road corporation describe the termini of the projected road with sufficient certainty when the description can be rendered certain, as where the road is made to start at a point definitely described to run specified courses and distances to an end, the whole length of road being given.—*Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51 (1875).

Statute of limitations — effect.

Where the articles of incorporation of a railroad company are defective in not specifying with sufficient certainty the terminus of the road, but are properly filed in the office of the secretary of state, such filing is notice to the state of such defect, and if the state neglects for five years (§ 6789, Ohio R. S.) to take advantage thereof by quo warranto or otherwise the right is lost.—*State v. Bailey*, 19 Ind. 452 (1862).

For articles of incorporation of railroad company, see Appendix.

§ 3238. ARTICLES CERTIFIED, FILED WITH SECRETARY OF STATE, AS TO SAME OR SIMILAR NAME.—The official character of the officer before whom the acknowledgment of articles of incorporation is made shall be certified by the clerk of the court of common pleas of the county in which the acknowledgment is taken, and the articles shall be filed in the office of the secretary of state, who shall record the same, and a copy duly certified by him shall be prima facie evidence of the existence of such corporation, and all certificates thereafter filed in the office of the secretary of state relating to the corporation shall be recorded; but the secretary of state shall not in any case file or record any articles of incorporation in which the name of the corporation is such as is likely to mislead the public as to the character or purpose of the business authorized by its charter, or is the same as one already

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adopted or appropriated by an existing corporation of this state or so similar to the name of such existing corporation as to be likely to mislead the public, unless the written consent of such prior existing corporation, signed by its president and secretary, be at the same time filed with such articles of incorporation. (March 31, 1902, 95 v. 76; April 27, 1896, 92 v. 320; R. S. 1880.)

Time of filing.

The act of filing the articles, and not the file marks made by the secretary of state, determine the time of filing. So if the secretary antedates the filing, the corporation cannot be injured.—*State v. Foulkes*, 94 Ind. 493 (1883). See *King v. Penn.* 43 Oh. St. 57 (1885); *Haines v. Lindsey*, 4 Oh. 88 (1829).

Copies as evidence.

Certified copies of articles cannot be used as evidence of the existence of a corporation, if they are prima facie invalid. Articles to be so used must show a substantial compliance with the law.—*Doyle v. Mizner*, 42 Mich. 332 (1879); *Baptist Church v. R. R. Co.*, 4 Mackey (D. C.) 43 (1885); *McCallou v. Hybernian Society*, 70 Cal. 163 (1886); *People v. Selfridge*, 52 Cal. 331 (1877); *Harris v. McGregor*, 29 Cal. 127 (1865).

Proof of performance of conditions precedent.

Where a condition precedent to the right of incorporation is prescribed by law, it is not error to reject as evidence the certificate of incorporation in due form, in the absence of testimony tending to show that the condition has been fulfilled.—*Racoon River Nav. Co. v. Eagle*, 29 Oh. St. 238 (1876).

Articles evidence though purporting to confer unauthorized powers.

Where articles of incorporation are offered in evidence they are not objectionable because they purport to confer powers in excess of those authorized by law, for they are legal as to the powers lawfully granted. The remedy for the attempted exercise of the powers not lawfully granted is by quo warranto.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. 362, 391 (1892); s. c., 3 C. D. 493, 507.

Evidence aliunde.

Imperfect articles cannot be aided, varied or contradicted by evidence aliunde.—*Attorney-General v. Lorman*, 59 Mich. 157 (1886); *Hallett v. Harrower*, 33 Barb. (N. Y.) 537 (1860).

Certificate of secretary of state.

The certificate of the secretary of state to a copy of the articles can only be as to the correctness of the copy. He cannot certify that regular and valid steps have been taken to perfect the articles and that valid articles have been filed.—*Doyle v. Mizner*, 42 Mich. 332 (1879).

Existence of corporation—proof by best evidence.

The existence of a corporation cannot be proved by offering in evidence a pleading of

such company verified by a superintendent. The best evidence should be offered. The practice of making denials of corporate existence when there is good reason to believe the party is a corporation is discouraged by the courts.—*Memphis, etc., Packet Co. v. Fogarty*, 9 O. C. C. Rep. 418 (1895); s. c., 6 C. D. 375.

Discretion of secretary of state as to filing.

The duty of the secretary of state, on presentation of articles of incorporation and tender of fees, to file and record such articles, and upon request issue a duly certified copy thereof, is controlled by the statutes of the state, and not by the discretion of the officer except as to matters of form.—*State ex rel. v. Taylor*, 55 Oh. St. 61 (1896).

Discretion of secretary of state as to name.

The secretary of state must exercise his discretion in determining whether a company asking of him a certificate of incorporation has adopted a name that is the same as or an imitation of that of an existing corporation, and he will not be compelled by mandamus to issue a certificate until it appears that the law has been complied with by the adoption of a name.—*State ex rel. v. McGrath*, 92 Mo. 355 (1887).

Action of secretary of state not conclusive.

The action of the secretary of state cannot be conclusive as to another corporation having a similar name.—*Cincinnati Vei Shoe Co. v. Cincinnati Shoe Co.*, 7 N. P. 135 (1899).

Object of law to protect names.

It is the evident purpose of the statute to protect to some extent the common-law rights both as to the company first adopting a name and as to the public, which may be misled. Where the names so far resemble each other that a person using that care, caution and observation which the public uses, and may be expected to use, would mistake one for the other, then the new name is to be regarded as an imitation of the former. The character of the business and the location of the two corporations must be considered.—*State ex rel. v. McGrath*, supra.

Deceptive use of one's own name.

If a person permits a corporation to use his name as a part of its name, he cannot thereafter permit another corporation to make use of his name in any way likely to deceive or confuse the public.—*Thayer, etc., Co. v. Thayer Co.*, 6 N. P. 300 (1899); s. c., 9 Dec. 288.

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Similarity of names.

The name "The George A. Thayer Co." is an imitation of "The George A. Thayer Carpet Cleaning and Rug Manufacturing Co."—Thayer, etc., Co. v. Thayer Co., 6 N. P. 300 (1899); s. c., 9 Dec. 288.

The name "The Kansas City Real Estate Exchange" is an imitation of "The Kansas City Real Estate and Stock Exchange Co."—State ex rel. v. McGrath, supra.

The name "The Holmes, Booth & Atwood Mfg. Co." is an imitation of "Holmes, Booth & Hayden."—Holmes, etc. v. Holmes, etc., Co., 37 Conn. 278 (1870).

If the places of business are great distances apart, and the business will not conflict, two companies may have the same name, e. g., "The Nebraska Loan & Trust Co."—Nebraska Loan, etc., Co. v. Nina, 27 Neb. 507 (1889).

The name "United States Commercial Agency & Collecting Co." is an infringement of "United States Mercantile Reporting Co."—In re U. S. Mercantile Co., 4 N. Y. Supp. 916 (1889).

See generally Newby v. Oregon, etc., Ry. Co., 1 Deady (U. S.) 609 (1869); Richardson, etc., Co. v. Richardson, etc., Co., 8 N. Y. Supp. 52 (1889); Farmers' Loan, etc., Co. v. Farmers' Loan, etc., Co., 1 N. Y. Supp. 44 (1888); Snyder Mfg. Co. v. Snyder, 54 Oh. St. 86 (1896); Ex parte Walker, 1 Tenn. Ch. 97 (1873); Lehigh Valley Coal Co. v. Hamblen, 23 Fed. 225 (1885); Adams v. Brown, 16 Oh. St. 75 (1865).

When corporation is created.

The making and filing, for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. No company exists within the meaning of the statute until the requisite stock has been subscribed and paid in, and the directors chosen.—State ex rel. v. Insurance Co., 49 Oh. St. 440 (1892). See § 3239, note.

Forgery of charter.

See § 7091.

For forms of certificates, see Appendix.

§ 3238a. **AMENDMENTS, HOW MADE, PROVISIO, RECORD, NOTICE, WAIVER, FEE.**—Any corporation incorporated under the general corporation laws of the state, may, at any meeting of its members or stockholders, of which, and of the business to come before said meeting thirty days' notice has been given by a majority of the directors or trustees of said corporation in a newspaper published and of general circulation in the county where the principal place of business of said corporation is located, by a vote of the owners of at least three-fifths of its capital stock then subscribed, in the case of corporations having a capital stock, or by a vote of at least three-fifths of its members of corporations having no capital stock, amend its articles of incorporation so as to change its corporate name, or the place where it is to be located, or where its principal business is to be transacted; or so as to modify, enlarge or diminish the objects or purposes for which it is formed; or so as to add thereto anything omitted from, or which might lawfully have been provided for in such articles originally; provided, however, that nothing in this supplementary section contained shall authorize a corporation, by amendment, to increase or diminish the amount of its capital stock; nor shall any corporation, by amendment, change substantially the original purposes of its organization. When adopted, a copy of such amendment, with a certificate thereto affixed, signed by the president and secretary of the corporation, and sealed with the corporate seal, if any there be, stating the fact and date of the adoption of such amendment, and that such copy is a true copy of the original, shall be recorded in the office of the secretary of state, who shall note on the margin of the record of the original articles of incorporation of said corporation, and on the margin of the index thereto, the volume and page where such amendment is recorded; and no such amendment shall take effect until filed for record with the secretary of state as herein provided, and until the secretary of the corporation shall have given notice for three consecutive weeks, in some newspaper of general circulation in the county where the principal office of the corporation is situated, of such amendment; provided, however, that any or all of the notices required by this section may be waived whenever the holders of all of the capital stock, of a corporation having a capital stock, or all the members of a corporation having no capital stock, consent thereto in writing. But no corporation shall change its name to one already appropriated, or to

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one likely to mislead the public; nor shall any corporation, by amendment, provide for a purpose which is unlawful. For recording such amendments and for furnishing a certified copy, the secretary of state shall receive a fee of twenty cents a hundred words, to be in no case less than five dollars. (May 18, 1886, 83 v. 193.)

Original purpose must not be changed.

The authority to amend articles of incorporation given by this section is controlled by the proviso which denies the right to change substantially the original purpose of the organization, so a company organized to furnish gas and electricity for light, heat and power cannot amend its articles so as to empower it to own and operate a street railway for the conveyance of passengers, freight, express and mail matter.—State ex rel. v. Taylor, 55 Oh. St. 61 (1896).

Discretion of secretary of state.

The discretion to be exercised by the secretary of state does not reach to the merits of an application for articles of incorporation, or of an amendment to articles, although it may be exercised as to matters of form.—State ex rel. v. Taylor, supra.

Gas and electric company.

A corporation organized to manufacture and furnish gas to light the streets, etc., may amend its charter so as to authorize it to manufacture and furnish electricity in addition to gas for the purpose of lighting, without changing substantially the original purposes of its organization.—Picard v. Hughey, 58 Oh. St. 577 (1898).

Validity of corporate act after change of purpose.

If a corporation amends its charter under this section so as to substantially change its original purposes, any bonds it may execute and issue to further the objects of such illegal amendment will be void in the hands of holders with notice.—See Picard v. Hughey, supra, p. 595.

Incidental amendments.

An amendment may be said to be incidental and auxiliary when it merely grants new powers or authorizes new methods and new plans for the purpose of carrying out the original plan and effecting the real object of that plan.—See Dayton, etc., R. R. Co. v. Hatch, 1 Dis. 84 (1855).

When assent of all stockholders necessary.

An amendment of the charter of a railway company authorizing it to engage in the transportation of passengers and goods by water is a fundamental change, and must be assented to by all the stockholders.—Marietta, etc., R. R. Co. v. Elliott, 10 Oh. St. 57 (1859).

Stockholders' rights lost by laches.

Assuming that the legislature has no power to authorize a company to embark in new enterprises and make fundamental changes in its charter without the consent of all its stockholders, nevertheless, before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the corporation, he must have shown himself prompt and vigilant in the assertion of his rights as such stockholder. It will not do for him to wait until the mischief is accomplished, or he will be held to have acquiesced in the change.—Chapman v. Mad River, etc., R. R. Co., 6 Oh. St. 119 (1856); Owen v. Purdy, 12 Oh. St. 73 (1861).

Effect of §§ 3866 and 3311.

A mining or other company, having built a railroad under § 3866, can only change the office of its railroad, not its general office, under § 3311.—State v. Coal Co., 4 N. P. 115 (1897); s. c., 6 Dec. 178.

Proof of change of name.

The question whether the terms of a statute authorizing a change of name on the part of a railroad company upon the making of certain subscriptions authorized by the same act, has been complied with or not, is, where pertinent, a proper subject of allegation and proof, and courts will not take judicial notice of a statement in a report of the commissioner of railroads to the effect that the terms of the statute have been complied with, and the name of the company changed.—Railroad Co. v. Hoffhines, 46 Oh. St. 643 (1889).

General notes on amendments.

See notes to § 3234.

For forms of certificate, notice and waiver, see Appendix.

§ 3239. CORPORATION CREATED, GENERAL POWERS.—Upon such filing of the articles of incorporation, the persons who subscribe the same, their associates, successors, and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession, and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do all need-

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ful acts to carry into effect the objects for which it was created. (May 1, 1852, 50 v. 274, § 3.)

When corporate existence begins.

As soon as articles of incorporation are duly filed the signers thereof become a body corporate, with power to act as pointed out in the statutes. Under the restrictions imposed, the powers fall into two classes—such as may be exercised before and such as cannot be until after the election of directors. The corporators may receive subscriptions to stock and elect directors, but the business for the transaction of which the company was formed cannot be done until after the election of directors. Although a corporation exists from the time of filing the articles, the general effect of the filing is to give the corporators nothing more than authority to form and organize a corporation.—*State ex rel. v. Ins. Co.*, 49 Oh. St. 441 (1892); *Ashley v. Ryan*, 49 Oh. St. 504, 524 (1892); *Powers v. Hazelton, etc.*, Ry. Co., 33 Oh. St. 429 (1878); *Ashtabula, etc., R. R. Co. v. Smith*, 15 Oh. St. 328 (1864); *State ex rel. v. Robinson*, 12 W. L. B. 269 (1884). See *Benninger v. Gall*, 1 C. S. C. 331 (1871); *Hanna v. International, etc., Co.*, 23 Oh. St. 622-625 (1873).

Preliminary organization for purpose of incorporation does not continue as independent organization after incorporation.

Every corporation is affected after preliminary meetings have been held for the consideration of the subject in the interests of which it is desired to organize a corporation; and it cannot be held that after such preliminary meetings have been held, articles of incorporation prepared and forwarded to the secretary of state, and after such articles have been returned, properly certified, and adopted by the organization, that the preliminary organization continues as a separate and distinct organization from the corporation.—*Muhlhauser v. The Cleveland Hospital*, 21 O. C. C. 88 (1900).

Promoter may agree to secure an office in a corporation to be formed.

The rule which forbids a director of a corporation from agreeing to secure a person an office in the corporation, does not apply to a promoter, and a recovery can be had for a breach.—*Magill v. Rendigs*, 12 Dec. 558 (1902).

Liability of promoters for secret profits.

See *Yeiser v. U. S. Board, etc., Co.* (U. S. C. C. A.), 12 O. F. D. 678 (1901).

Contracts with corporations before existence.

An agreement made with a company before it is incorporated is void for want of mutuality.—*Dayton, etc., Turnpike Co. v. Coy*, 13 Oh. St. 84 (1861).

Same subject, exception.

Where the promoters of a corporation go forward in good faith and contract debts which are necessary to the creation and advancement of the corporation, and the corporation afterward avails itself of the benefit of those acts, it is liable. Thus it is liable for professional services in preparing its articles of incorporation.—*City Bldg. Ass'n v. Zahner*, 6 W. L. B. 389 (1881); *Taussig v. St. Louis, etc., Ry. Co.*, 65 S. W. Rep. (Mo.) 969 (1901).

Same subject, bequest to unformed corporation.

See *Trustees v. Zanesville, etc., Mfg. Co.*, 9 Oh. 203 (1839).

Associates.

For the meaning of the word "associates" in an act of incorporation, see *State v. Sibley*, 25 Minn. 387 (1879); *Lechmere Bank v. Boynton*, 11 Cush. (Mass.) 369 (1853).

Powers outside of this state.

An Ohio corporation can exercise no greater powers outside of this state than it can here, for the reason that its charter is in all cases the source and limit of its powers. So a bank authorized to loan money at a fixed rate in this state cannot loan at a greater rate in another state, notwithstanding such greater rate may be legal there.—*Ewing v. Toledo Savings Bank*, 43 Oh. St. 31 (1885). See *Kit Carter Cattle Co. v. McGillin*, 21 O. C. C. 210 (1901).

Powers of corporations, general rule.

The general rule is to consider corporations as having such powers as are specifically granted by the act of incorporation or as are necessary for the purpose of carrying into effect the powers expressly granted and not as having any other.—*Bonham v. Taylor*, 10 Oh. 108 (1840); *Bank v. Swayne*, 8 Oh. 257, 286 (1838); *State v. Granville, etc., Society*, 11 Oh. 1, 12 (1848); *Straus v. Eagle Ins. Co.*, 5 Oh. St. 59 (1855); *Lessee of Overmeyer v. Williams*, 15 Oh. 26-31 (1846); *Franklin Bank v. Commercial Bank*, 36 Oh. St. 350 (1881); *Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887); *Brush Electric Light Co. v. Jones Bros., etc., Co.*, 23 W. L. B. 329, 331 (1890); *Central, etc., Fuel Co. v. Capital, etc., Dairy Co.*, 60 Oh. St. 96, 104 (1899); *State ex rel. v. Eagle Ins. Co.*, 50 Oh. St. 252, 267 (1893); *State v. Washington, etc., Co.*, 11 Oh. 96 (1841); *Lessee v. Cincinnati, etc., Turnpike Co.*, 11 Oh. 392 (1842); *James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 261 (1858); *Ry. v. Iron Co.*, 46 Oh. St. 44, 49 (1888); *R. R. v. Hinsdale*, 45 Oh. St. 556, 572 (1888).

Rule of construction.

An act of incorporation, like any other statute, should be construed in such manner as

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will best answer the intention of the legislature, and all its parts should, if possible, be made subservient to and in harmony with the leading purposes and objects intended to be accomplished, and for which the corporation is created. To effect this, the whole must be considered and construed together, with direct reference to those purposes and objects and all its minor and incidental provisions be so used as to promote them. To dissect it into parts and to seize upon isolated portions from which to graft independent powers not in harmony with or necessary to attain the main design is, in almost every case, to defeat the intention of the legislature.—*Straus v. Eagle Ins. Co.*, 5 Oh. St. 59 (1855). See *White's Bank v. Toledo Ins. Co.*, 12 Oh. St. 601, 605 (1861); *James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 261 (1858).

Same subject.

Owing to the change of circumstances and the increased power of the legislature over corporations, the language of acts of incorporation is to be construed by exactly the same rules of interpretation as are applied to like words in any contract or statute.—*National Bank v. Ins. Co.*, 41 Oh. St. 1, 12 (1884).

Same subject.

Powers cannot be implied from the want of express provision in a charter, as, for instance, where the charter of a gas company is silent as to the rates it may charge, power in the corporation to fix its own rates cannot be implied.—*Zanesville v. Gas Light Co.*, 47 Oh. St. 1, 31 (1889).

Same subject.

Laws conferring corporate privileges and immunities upon corporations must be strictly construed, and any ambiguity in the terms of the charter of a corporation must operate against the incorporators and in favor of the public.—*State v. Vanderbilt*, 37 Oh. St. 590, 641 (1882); *State ex rel. v. Eagle Ins. Co.*, 50 Oh. St. 252, 267 (1893); *Debolt v. Ohio, etc., Trust Co.*, 1 Oh. St. 563 (1853); *Matheny v. Golden*, 5 Oh. St. 361, 417 (1856). See *James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 261 (1858).

Modification of old rule.

The line of cases resting upon the authority of *Bank v. Swayne*, 8 Oh. St. 258, and ending with *Kilbrech v. Bates*, 38 Oh. St. 187, rest upon their own peculiar merits: and while no doubt good law applicable to the situation then before the court, are not to be unreservedly applied to our modern corporations.—See *Larwell v. Hanover, etc., Society*, 40 Oh. St. 274, 285 (1883); *National Bank v. Ins. Co.*, 41 Oh. St. 1, 11 (1884).

Application of general rule.

The general rule should be reasonably applied with a view of promoting the legitimate

objects of the corporation rather than with a strictness that would so hedge it about as to obstruct the practical attainment of the corporate purpose or embarrass the corporate business. Those implied powers which a corporation has, in order to carry into effect its legitimate purposes, are not limited to such as are indispensable to their accomplishment, but include all those powers that are necessary in the sense of appropriate, convenient and suitable, including a right of reasonable choice of means to be employed; and whether an act comes within those powers must be determined in each case from all the facts and circumstances. Acts which, if standing alone, or when engaged in as a business, would be beyond the powers of a corporation, are not necessarily ultra vires, when they are merely incidental to or form a part of an entire transaction that, in its general scope, is within the corporate purpose. The validity of transactions is to be determined from their general character, considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others.—*Central, etc., Fuel Co. v. Capital, etc., Dairy Co.*, 60 Oh. St. 96 (1899). See *Central Trust Co. v. Columbus, etc., Ry. Co.*, 87 Fed. 815 (1898); s. c., 10 O. F. D. 328; *Railroad Co. v. Furnace Co.*, 37 Oh. St. 321, 330 (1881).

Same subject.

In determining whether a corporate act is ultra vires or not, regard must be had to its effect and the real object in view.—*Bank v. Flour Co.*, 41 Oh. St. 552, 558 (1885).

Influence of circumstances.

In applying the doctrine of ultra vires, regard must not only be had to the unauthorized agreement or transaction, but also to the relation which the litigating parties sustain to it.—*Ehrman v. Ins. Co.*, 35 Oh. St. 324, 337 (1880); *Central, etc., Fuel Co. v. Capital, etc., Dairy Co.*, 60 Oh. St. 96, 106 (1899).

Acts of stockholders, when deemed corporate acts.

When all or a majority of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company in the same manner as if it had been done by a formal resolution of its board of directors, and the act so done is ultra vires of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as that of the corporation, and may be challenged by the state as such.—See paper by F. B. Fenney, 32 W. L. B. 318; *State ex rel. v. The Standard Oil Co.*, 49 Oh. St. 137 (1892).

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Purpose of corporate act—evidence.

Where a corporation is organized to do an act in furtherance of its business, evidence is admissible to show the real purpose of the act, and that it was for an unauthorized object.—See *White's Bank v. Toledo Ins. Co.*, 12 Oh. St. 601, 607 (1861); *Straus v. Eagle Ins. Co.*, 5 Oh. St. 59 (1855).

Notice of corporate powers.

The powers of a corporation are presumed to be known as matters of law to all persons interested in it or having dealings with it.—*Lee v. Hartwell*, 5 W. L. G. 9 (1860); *James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 273 (1855).

Presumption of validity of corporate acts.

It is presumed that a corporation is acting within its powers, and a contract, bill or note of a corporation will be presumed to be valid until the contrary is shown.—*Straus v. Eagle Ins. Co.*, 5 Oh. St. 59, 62 (1855).

Ultra vires acts do not dissolve per se.

The powers of a corporation do not cease by the mere act of violating its charter, though there be a provision in the charter that such a consequence shall ensue. The act of violation must be established by some proceeding instituted by the state. It is the right of the government (which may waive any violation) that a charter shall not be destroyed or even surrendered without its assent.—*Finnell v. Burt*, 2 Handy, 202 (1856); *Benninger v. Gall*, 1 C. S. C. 331 (1871). See *Webb v. Moler*, 8 Oh. 552 (1838).

When incidental ultra vires act valid.

A corporation exercising a reasonable choice of means of accomplishing an act within its general powers may incidentally do some act not authorized, as, for instance, where a corporation, to avoid delay and expense in obtaining a running business, buys out the business of a partnership; it may take with the property outstanding claims, including a claim for damages caused by negligence, which it may enforce, although it would have no general power to buy claims of that nature.—*Central, etc., Fuel Co. v. Capital, etc., Dairy Co.*, 60 Oh. St. 96 (1899).

Contracts partly ultra vires.

Where a contract with a corporation is partly legal and partly ultra vires, the legal part will be enforced if it can be separated from the part which is ultra vires.—*Morris v. Way*, 16 Oh. 469 (1847).

Who may question corporate powers?

A person against whom a corporation may claim the right to exercise a power may claim the power in question and require the company to show the existence of the power. Even after an adjudication upon the question, the company may claim and exercise the right

as to other persons until ousted by the state.—*Zanesville v. Gas Light Co.*, 47 Oh. St. 1 (1889); *Gas Light Co. v. Zanesville*, 47 Oh. St. 35, 47 (1889).

Rights of stranger to transaction.

A stranger to an agreement or transaction has no right to question its validity. To obtain a standing in a court of justice to make such inquiry a party must show that he is interested in the question, and that the execution of the agreement operates to his injury or prejudice; so the maker of a note, when sued by a corporation, which acquired the note from the payee company, cannot question the powers of the companies to make the transfer.—*Ehrman v. Union, etc., Ins. Co.*, 35 Oh. St. 324 (1880); *White's Bank v. Toledo Ins. Co.*, 12 Oh. St. 601 (1861); *Bank v. McIntyre*, 40 Oh. St. 528 (1884); *Central, etc., Fuel Co. v. Capital, etc., Dairy Co.*, 60 Oh. St. 96 (1899); *Gould v. Union, etc., Ins. Co.*, 8 W. L. B. 281 (1882); s. c., 8 Dec. 525.

Guaranty of ultra vires contracts.

When a contract not illegal, immoral or contrary to public policy is entered into by a corporation through its officers and directors, a written guaranty that such corporation will perform its promise under the contract is valid and enforceable, although the contract of the corporation may be void as ultra vires.—*Zerkle v. Price*, 5 N. P. 480 (1898); s. c., 7 Dec. 465.

Fiction of legal entity of corporation.

The fiction that a corporation is a legal entity distinct from the persons who compose it can never be resorted to when it allows the persons composing the corporation to work an injury to any one.—*Sportsman Shot Co. v. American Shot, etc., Co.*, 30 W. L. B. 87 (1893); *Cronin v. Potter's Co-op. Co.*, 29 W. L. B. 52 (1892); *First Nat. Bank v. Trebein*, 59 Oh. St. 316 (1898); *State ex rel. v. Standard Oil Co.*, 49 Oh. St. 137 (1892).

Partnership reorganized as corporation—liability.

The incorporation of partnership business without notice to creditors will not free partners from individual liability for debts of the company.—*Perkins v. Rouss*, 29 So. Rep. (Miss.) 92.

Liability of corporation taking partnership property.

Where the members of a partnership form a corporation and transfer all the property to it, it becomes liable for the partnership debts.—See *Andres v. Morgan*, 62 Oh. St. 236 (1900).

When partnership obligations deemed paid.

When a partnership, which has given its notes to a party, is converted into a corporation and it sends its notes to take up the partnership obligations, the payee cannot

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keep both, but must choose.—See *Ellis v. Ballou*, 88 N. W. Rep. (Mich.) 898 (1902).

Corporation used to defraud—liabilities.

If persons with the design to defraud any one or the public generally, combine together and succeed in their purpose, they must respond in damages to those injured, and they cannot defend on the ground that they have been duly incorporated and acted as a corporation.—*Bartholomew v. Bentley*, 1 Oh. St. 37, 44 (1852); *Bartholomew v. Bentley*, 15 Oh. 659 (1846); *Brundred v. Rice*, 49 Oh. St. 640 (1892); *Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889).

Same subject.

Where a failing debtor forms a corporation composed of himself and members of his family, he taking substantially all the stock, and at once conveys all his property to the corporation in exchange for the stock by him taken, and for no other consideration, and immediately places all his stock except one share with certain of his creditors who have knowledge of the facts, as collateral security to their claims, and as president and general manager retains control of the property, such a conveyance and transaction is a fraud on creditors, and may be set aside. When it is made to appear that a charter is being used to defraud, and conceal the acts of the real parties, it will be dealt with as though no corporation had been formed.—*First National Bank v. Trebein*, 59 Oh. St. 316 (1898). See *Andres v. Morgan*, 62 Oh. St. 236 (1900).

Personal liability for ultra vires acts.

Where the entire business carried on by persons in the name of the corporation is such that the corporation is prohibited by law from doing, they cannot interpose the corporate privileges between them and the liabilities which the law imposes upon individuals in the transaction of similar business without the use of a corporate name.—*Medill v. Collier*, 16 Oh. St. 613 (1886); *Kearny v. Buttles*, 1 Oh. St. 362 (1853); *Rowland v. Meader Furniture Co.*, 38 Oh. St. 269 (1882); *Lawler v. Walker*, 18 Oh. 151 (1849); *Lawler v. Burt*, 7 Oh. St. 340 (1857); *Ridenour v. Mayo*, 40 Oh. St. 9 (1883). See *Manufacturers, etc., Ass'n v. Lynchburg Drug Mills*, 8 O. C. C. 112 (1893).

Same subject.

Where a corporation has general power to do an act or make a contract, but does the act or makes the contract to an extent, for a purpose or in a mode not authorized, the persons interested in the corporation are not personally liable as the makers of the contract or the doers of the act.—*Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889).

Same subject.

All the stockholders of a corporation are not personally responsible for the debts contracted in the transaction of the business the

corporation is prohibited from doing. The liability is fixed upon those who engage in or sanction the business.—*Medill v. Collier*, 16 Oh. St. 613 (1866); *Kearny v. Buttles*, 1 Oh. St. 362 (1853); *Second Nat. Bank v. Hall*, 35 Oh. St. 158, 166 (1878). See *Rianhard v. Hovey*, 13 Oh. 300 (1844).

Estoppel.

A creditor is not estopped to claim against the interested parties by his having recovered judgment against the corporation or having proved his claim against it in bankruptcy proceedings, and received a dividend.—*Ridenour v. Mayo*, 29 Oh. St. 138 (1876); *Meader Furniture Co. v. Rowland*, 3 W. L. B. 480 (1878).

Corporation not estopped by ratification of stockholders.

A corporation is not estopped from maintaining an action to set aside ultra vires acts by the fact that at the time of the acts the directors owned all its capital stock, and as stockholders unanimously ratified what they as directors had done.—See *Central Trust Co. v. Columbus, etc., Ry. Co.*, 87 Fed. 815 (1898); *Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887). Contra, and better rule, *s. c.*, 20 W. L. B. 287.

Rights of stockholders.

A stockholder has the right to insist upon the confinement of corporate acts and business within the scope of its powers, but in a proper case a stockholder may be denied relief because of his assent to or acquiescence in the acts complained of.—*Hill v. Cincinnati Hotel Co.*, 25 W. L. B. 425 (1891); *Goodin v. Evans*, 18 Oh. St. 150 (1868); *Sanderson v. Aetna, etc., Nail Co.*, 34 Oh. St. 442 (1878); *Baldwin v. Hillsboro Ry. Co.*, 10 W. L. J. 337 (1853); *Chapman v. Mad River, etc., R. R. Co.*, 6 Oh. St. 119 (1856); *Zabriskie v. Cleveland, etc., R. R. Co.*, 64 U. S. 381 (1859).

Same subject.

The court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being violated.—*Zabriskie v. Cleveland, etc., R. R. Co.*, 64 U. S. 381 (1859).

Rights of members of corporations not for profit.

Any member of a religious corporation has the right by injunction to prevent a breach of trust by the corporation or a majority of its members.—*Wiswell v. First, etc., Church*, 14 Oh. St. 31, 40 (1862).

Liability for assault and battery.

A corporation is not liable to be sued in an action of assault and battery.—*Orr v. Bank of U. S.*, 1 Oh. 36 (1821). See *Nelson, etc., College Co. v. Lloyd*, 60 Oh. St. 443 (1889); *Passenger R. R. Co. v. Young*, 21 Oh. St. 518 (1871); *Little Miami R. R. Co. v. Wetmore*, 19 Oh. St. 110 (1869).

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Liability for libel.

A corporation may be sued for libel the same as an individual.—Union, etc., Ins. Co. v. Mutual, etc., Ins. Co., 2 W. L. B. 269 (1877).

Liability for trespass.

An action of trespass *quare clausum fregit* will not lie against a corporation.—Foote v. Cincinnati, 9 Oh. 31 (1839); Ward v. Toledo, etc., R. R. Co., 10 W. L. J. 365 (1853).

Liability for negligence.

Corporations are liable for injuries arising from the negligence of their agents in the course of their employment in the same manner and to the same extent as individuals.—Cleveland, etc., R. R. Co. v. Keary, 3 Oh. St. 201 (1854). See as to charitable institutions Conner v. Sisters of Poor, 7 N. P. 514 (1900); Johnson v. Lawrence Hospital, 12 Dec. 795 (1902).

Power to contract.

Inasmuch as neither the kind of contracts nor their subject-matter, nor the extent to which they may be made, is ascertained or defined in this section, the capacity or power to contract must have reference to and be limited by the nature of the corporate business engaged in.—Hays v. Galion Gas Co., 29 Oh. St. 330, 338 (1876).

Same subject.

Unless expressly restrained by its charter, every corporation has the incidental power to make any contract and evidence it by any instrument that may be necessary and proper to accomplish the objects for which it was created.—Straus v. Eagle Ins. Co., 5 Oh. St. 59, 62 (1855).

Form of contract.

A company authorized to loan its money on bonds and mortgages may take and enforce a loan on a note and mortgage.—National Bank v. Ins. Co., 41 Oh. St. 1 (1884). See Andes Ins. Co. v. McCoy, 6 A. L. R. 486 (1877).

Corporation may sue for slander.

A corporation for profit may maintain an action for damages against a person who has injured the reputation and business of such corporation by a slander of its managing agent.—Cleveland Police Co. v. Brayton, 19 O. C. C. 47 (1899).

Contract for a term of years.

A corporation may, if desirable, make a contract to run a term of years.—R. R. Co. v. Furnace Co., 37 Oh. St. 321 (1881).

Executed contracts.

Where a contract not illegal has been executed and fully performed on the part of either the corporation or the other contracting party, neither will be heard to object

that the contract and such performance were not within the legitimate powers of the corporation.—Larwell v. Hanover, etc., Society, 40 Oh. St. 274, 285 (1883); Hays v. Galion, etc., Gas Co., 29 Oh. St. 330, 340 (1876); Hamilton, etc., Hydraulic Co. v. Cincinnati, etc., R. R. Co., 29 Oh. St. 341 (1876); Armstrong v. Karshner, 47 Oh. St. 276, 296 (1890). See Norwalk Bank v. Norwalk, etc., Stamping Co., 6 Oh. Dec. 70 (1897); Hill v. Cincinnati Hotel Co., 25 W. L. B. 425 (1891). See *contra*, Simpson v. Bldg. Ass'n, 38 Oh. St. 349 (1882).

Power to borrow money.

When not prohibited, a corporation may borrow money to carry on the objects of its creation, and it may evidence and secure the loan by appropriate instruments.—Larwell v. Hanover, etc., Society, 40 Oh. St. 274, 282 (1883); Hays v. Galion Gas, etc., Co., 29 Oh. St. 330 (1876); Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (1889); Burt v. Rattle, 31 Oh. St. 116 (1876); Bosche v. Toledo Display Horse Co., 14 O. C. C. 289 (1897); s. c., 7 C. D. 374.

See § 3256, notes.

Same subject — accommodation.

A corporation has no power to become an accommodation indorser or maker of commercial paper, and a note so indorsed is void as against the company in the hands of one having notice of the intended use of the money.—Benedict v. Market Nat. Bank, 4 N. P. 231 (1897); s. c., 6 Dec. 320.

Same subject — usurious interest.

Where a corporation having power to borrow money makes a loan at usurious rates, it cannot plead its want of power to contract for more than a legal rate, but it must stand on the same footing as a natural person.—Larwell v. Hanover, etc., Society, 40 Oh. St. 274 (1883).

Execution of notes.

Corporate notes are properly executed when they have a clause like the following:

"In testimony whereof, said company have caused their corporate seal to be attached hereto and signed by their president and attested by their secretary, this 1st day, etc.

JOHN JONES,

(Seal of company.)

Prest.

WM. SMITH,

Secy."

—Hays v. Galion Gas, etc., Co., 29 Oh. St. 330, 334 (1876).

Power to purchase negotiable paper.

A corporation having power to invest its funds in commercial paper has no power to buy a note for the sole purpose of assisting a third person in collecting the same by obtaining a lien upon stock of the corporation owned by the maker, the corporation having a loan on its stock to secure debts to it from stock-

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holders. Such a transaction is void at least to the extent of releasing the stock owned by the maker of the note from any lien in favor of the company.—*White's Bank v. Toledo Ins. Co.*, 12 Oh. St. 601 (1861).

Same subject.

An insurance company has no power to buy notes on credit for the purpose of setting the same off against claims against it.—*Straus v. Eagle Ins. Co.*, 5 Oh. St. 59 (1855).

Same subject.

A corporation has no power to purchase negotiable paper except in the course of its legitimate business.—*Cuyahoga Furnace Co. v. Lewis*, C. L. Rec. 16 (1855).

Power to charge interest.

Where the charter of a company is silent as to the rate of interest to be charged by it on loans, a stipulation for a rate higher than the maximum fixed by the usury laws of the state does not invalidate the loan. The principal, and interest thereon at the legal rate, may be collected.—*National Bank v. Ins. Co.*, 41 Oh. St. 1 (1884); *Larwell v. Hanover, etc., Society*, 40 Oh. St. 274 (1883); *Ewing v. Toledo Savings Bank*, 43 Oh. St. 31 (1885); *State ex rel. v. Urbana, etc., Ins. Co.*, 14 Oh. 6 (1846).

Same subject.

Where a bank charter declares that it shall not take more than six per cent. interest upon loans, a contract for a greater rate of interest is totally void.—*Bank v. Swayne*, 8 Oh. 237 (1838); *Miami Exporting Co. v. Clark*, 13 Oh. 1 (1844); *Preble County v. Russell*, 1 Oh. St. 313; *Bank of Wooster v. Stevens*, 1 Oh. St. 233 (1853); *Russell v. Failor*, 1 Oh. St. 329 (1853); *Union Bank v. Bell*, 14 Oh. St. 209 (1863); *Kilbreth v. Bates*, 38 Oh. St. 187 (1882); *Lee v. Hartwell*, 5 W. L. G. 9 (1860). See *Southern Bank v. Gassoway*, 1 Dis. 207 (1856); *Kilbreth v. Wright*, 1 W. L. B. 6 (1876); *Creed v. Commercial, etc., Bank*, 11 Oh. 489 (1842); *Spaulding v. Bank*, 12 Oh. 544 (1841); *Dunkle v. Renick*, 6 Oh. St. 527 (1856); *McLean v. Lafayette*, 3 McLean (U. S.) 587 (1845); s. c., 2 O. F. D. 412.

Power of national banks to charge interest.

La Dow v. Bank, 51 Oh. St. 234 (1894); *Shunk v. First Nat. Bank*, 22 Oh. St. 508 (1872); *Bank v. Slemmons*, 34 Oh. St. 142 (1877); *Hade v. McVay*, 31 Oh. St. 231 (1877); *Allen v. First Nat. Bank*, 23 Oh. St. 97 (1872); *First Nat. Bank v. Garlinghouse*, 22 Oh. St. 492 (1872).

Power to hold stock in other corporations.

A corporation has no power to subscribe for or become the owner of any portion of the capital stock of another corporation unless authority is clearly conferred by statute.—

Franklin Bank v. Commercial Bank, 36 Oh. St. 350 (1881); *Ry. Co. v. Iron Co.*, 46 Oh. St. 44 (1888); *Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887); *Hafer v. N. Y., etc., R. R. Co.*, 14 W. L. B. 68, 70 (1885); *Easun v. Buckeye Brewing Co.*, 51 Fed. 156 (1892); s. c., 7 O. F. D. 188. *Contra*, *Smith v. New-ark, etc., R. R. Co.*, 8 O. C. C. 583 (1894); s. c., 4 C. D. 356.

Same subject—recovery of money paid.

Where a corporation delivers goods or pays money in payment of a subscription to the stock of another company, it cannot recover the same.—*Ry. Co. v. Iron Co.*, 46 Oh. St. 44 (1888).

Same subject—prevention of loss.

A corporation has the power to hold stock of another corporation if necessary to secure itself from loss.—See *Armstrong v. Heran-court Brewing Co.*, 26 W. L. B. 39, 40 (1891).

Same subject—building and loan associations.

A corporation has power to subscribe for shares in a building and loan association for the purpose of making a loan.—*Norwalk Bank Co. v. Norwalk, etc., Stamping Co.*, 14 O. C. C. 1 (1897); 7 C. D. 275.

Power to deal in and hold its own stock.

A corporation has no power, unless specially authorized, to purchase, deal in, or hold its own stock.—*Holcomb v. Gibson*, 39 W. L. B. 380 (1898); *Hubbard v. Riley*, 3 W. L. B. 434 (1878); *Shaw v. Ohio, etc., Installation Co.*, 19 W. L. B. 292 (1888); *Coppin v. Greenlees, etc., Co.*, 38 Oh. St. 275 (1882); *Benedict v. Market Nat. Bank*, 4 N. P. 231 (1897); s. c., 6 Dec. 320; *Wills v. Reed*, 5 W. L. B. 79 (1880); *Merchants' Nat. Bank v. Overman Carriage Co.*, 17 O. C. C. 253 (1898); s. c., 9 C. D. 738; *State ex rel. v. Oberlin, etc., Loan Ass'n*, 35 Oh. St. 258 (1879); *Cleveland, etc., R. R. Co. v. Kelley*, 5 Oh. St. 180, 193 (1855). See *State v. Franklin Bank*, 10 Oh. 91, 98 (1840).

Same subject, exception.

One exception to the general rule is that a corporation may have a lien on its own stock in equity if necessary to protect itself against loss, as where directors have used corporate funds to pay personal debts secured by the pledge of their stock; in such case the company may follow the funds, and if necessary have and assert a lien on the stock pledged.—*Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887).

Same subject, exception.

A corporation may take and hold its own stock if necessary to settle a dispute; as, for instance, where a corporation has exchanged stock for property, it may re-exchange if necessary to settle a dispute as to the value or merits of the property.—See *Sanderson v.*

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Ætna Iron Co., 34 Oh. St. 442 (1878); *Morgan v. Lewis*, 46 Oh. St. 1 (1888); *Beggio v. Sandheger*, 8 N. P. 13, 15 (1900).

Same subject, exception.

A corporation may buy or take its own stock if necessary to secure itself from loss on a pre-existing debt.—*Taylor v. Miami Exporting Co.*, 6 Oh. 176 (1833). See *State v. Franklin Bank*, 10 Oh. 91, 97 (1840).

Same subject, exception.

A company may expend money to take up or regain stock which has been fraudulently issued, where there is reason to apprehend that otherwise great loss will result to it.—*Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618.

Same subject, exception.

It seems that a corporation, as a part of a contract of sale of shares of its capital stock, may agree to buy the same back at a stated time, and the contract will be enforced, there being no intervening rights of creditors.—*See Zerkle v. Price*, 5 N. P. 480 (1898); s. c., 7 Dec. 465; *Shoemaker v. Goshen Township*, 14 Oh. St. 569, 583 (1863); *Weeden v. Lake Erie, etc., R. R. Co.*, 14 Oh. 563 (1846). See *Stunt v. Newark Weldless Tube, etc., Co.*, 22 O. C. C. 120 (1901).

Same subject, exception.

A purchase of stock by a corporation, in consideration of the retirement of the owners from the business, does not come within any of the exceptions to the general rule.—*Merchants' Nat. Bank v. Overman Carriage Co.*, 17 O. C. C. 253 (1898); s. c., 9 C. D. 738.

Same subject, exception.

A surrender of stock to a corporation by the owner, in consideration of the payment to the owner of a proportion of the earnings of the corporation, does not come within the exceptions to the general rule, and is ultra vires.—*Shaw v. Ohio, etc., Installation Co.*, 19 W. L. B. 292 (1888).

Same subject, exception.

Where an agent of a company sold its stock with the agreement that the purchaser might buy land of the company at a future day and pay for the same with the stock, the company cannot enforce part of the agreement and avoid the rest because of want of authority in the agent. It must execute the whole contract or refund the money.—*Weeden v. Lake Erie, etc., R. R. Co.*, 14 Oh. 563 (1846).

What is a purchase of its own stock?

Where a corporation, by resolution, authorized the purchase of a part of its own stock by a person as trustee, to be paid for by its notes, it is a purchase of the stock by and for the company.—*Merchants' Nat. Bank v. Overman Carriage Co.*, 17 O. C. C. 253 (1898); s. c., 9 C. D. 738.

Power to form partnership.

A corporation has no power to enter into a partnership with an individual or another corporation.—*Merchants' Nat. Bank v. Standard Wagon Co.*, 6 N. P. 264 (1899); s. c., 9 Dec. 380. See *Pomeroy Salt Co. v. Davis*, 21 Oh. St. 555, 573 (1871); *Andrews, etc., Co. v. Smead, etc., Co.*, 7 N. P. 439 (1895); *Geurineck v. Alcott*, 66 Oh. St. 94 (1902).

What joint arrangements or combinations can be formed.

See *Geurineck v. Alcott*, 66 Oh. St. 94 (1902).

Property rights of corporations.

The property of a corporation is "private property" within the meaning of § 19 of article 1 of the constitution.—*Ohio ex rel. v. Neff*, 52 Oh. St. 375 (1895).

Power to buy land.

At common law corporations had power to buy and sell land unless specially restrained. The modern rule is to allow them to buy and hold such lands as may be necessary in the transaction of their business. If necessary to obtain materials, a company may buy land.—*Lessee of Overmeyer v. Williams*, 15 Oh. 26 (1846).

Purchase of unnecessary land.

A turnpike company cannot acquire the fee of land occupied by it, and on which it has an easement sufficient for its purposes, for the purpose of preventing a railroad company from building a bridge across its road.—*Wooster Turnpike Co. v. C. P. & V. R. R. Co.*, 15 O. C. C. 268 (1897); s. c., 8 C. D. 269.

Same subject.

Where a company purchases real estate for an unauthorized purpose, on sale by it, its vendee acquires good title, for the reason that the company's vendor and the company are estopped to plead a want of power in the company.—*Walsh v. Barton*, 24 Oh. St. 28, 42 (1873).

What real estate necessary to business.

Where a company organized to do a safe-deposit business erects a large building and uses only a trifling space for safe-deposit business, a tenant cannot plead ultra vires as a defense to an action for rent.—*Rector v. Hartford Deposit Co.*, 60 N. E. 528 (Ill.) (1901).

Right of third party to question title.

Where property which a corporation under certain circumstances is authorized to acquire is purchased in a mode or for a purpose not authorized, the title of the corporation to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer.—*Ehrman v. Union, etc., Ins. Co.*, 35 Oh. St. 324 (1880); *Walsh v. Barton*, 24 Oh. St. 28, 42 (1873). See *Bank v. McIn-*

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tyre, 40 Oh. St. 538 (1884); *Webb v. Moler*, 8 Oh. 548 (1838).

Estoppel of licensees.

Where a license to use land is obtained from a corporation, the licensee is estopped to deny the power of the corporation to own the land.—See *Hamilton, etc., Hydraulic Co. v. Cincinnati, etc., R. R. Co.*, 29 Oh. St. 341 (1876).

Purchase for unauthorized purpose.

Where a corporation purchases land and gives its notes in payment, no recovery can be had on the notes by one having knowledge of the circumstances, if the land was bought for an unauthorized purpose.—*Vos v. Cedar Grove, etc., Ass'n*, 9 W. L. B. 194 (1883).

Estoppel of company.

A corporation having bought land ordered sold in the case in which it was not a party, cannot, after acquiescing in the confirmation of the sale, set up on proceedings in error its want of power to purchase.—*Bank of U. S. v. White, Wright*, 574 (1834).

Power of hotel, storeroom, and other companies to hold land.

See § 3884a.

Sale of entire property — rescission.

Where a number of companies desired to combine, and did so by transferring their property to a new corporation, which gave in payment such number of its shares as the value of the property entitled each to have, one of the companies, on becoming dissatisfied with the arrangement, cannot maintain an action for rescission of the sale on ground that the sale was in restraint of trade, unless it can tender back all the shares by it received. *Sportsman Shot Co. v. American Shot, etc., Co.*, 30 W. L. B. 87 (1893).

Privilege of banking — when conferred.

A grant of power to a corporation to hold and dispose of real and personal estate, to contract, etc., does not authorize it to do banking business.—*State v. Granville, etc., Society*, 11 Oh. 1 (1841).

Word "successor" not necessary to perpetual grant.

Where a grant is made to a corporation aggregate, which may be perpetual, the word "successors" is not necessary to create a perpetuity of right, or a fee simple.—*Railway v. Bosworth*, 46 Oh. St. 81 (1888).

Conveyance of corporation — presumption.

A deed of a corporation in due form carries with it the presumption that the executing officer had authority.—*Bank v. Flour Co.*, 41 Oh. St. 552, 557 (1885); *Cincinnati, etc., R. R. Co. v. Harter*, 26 Oh. St. 426 (1875).

Same subject — execution.

Where an assignment of a lease in the granting clause purports to be made in the

name of a person who is therein described as the treasurer of an incorporated company, and such named person, as treasurer of and in behalf of such company, sets his hand and the seal of the company to the instrument, the assignment will not be held to be the act of the company.—*Norris v. Dains*, 52 Oh. St. 215 (1894).

Same subject.

A deed signed and sealed by the president personally, and not by the corporation, is ineffectual as a conveyance.—*Lessee of Hatch v. Barr*, 1 Oh. 390 (1824).

Same subject.

In the absence of any statutory requirement to the contrary, a deed of conveyance by a banking corporation is properly executed when its cashier, on behalf of the bank and by its authority, affixes thereto the corporate seal and subscribes his name as such cashier, and in such case the cashier is the proper person to acknowledge the deed.—*Sheehan v. Davis*, 17 Oh. St. 571 (1867).

Same subject — proof of execution.

The signature of the president of a corporation to a deed does not prove itself, nor is it proven by the seal of the corporation. The execution of the deed should be proved if objected to.—*Walsh v. Barton*, 24 Oh. St. 28, 41 (1873).

Same subject.

See paper by S. H. Wilder, 9 W. L. B. 253 (1883).

Stockholder may witness deed.

A stockholder of a corporation may be a witness to a deed to it.—*Johnson v. Turner*, 7 Oh. pt. 2, 216 (1836); *Read v. Peoples, etc., Co.*, Lucas Probate Court (1900). Affirmed by Common Pleas Court; s. c., 23 O. C. C. 25 (1901).

Stockholder may act as notary.

A stockholder of a company may officiate as notary in taking the acknowledgment to a deed to his corporation.—*Norton v. Columbian, etc., Ass'n*, 6 W. L. B. 141 (1881); *Reed v. Peoples, etc., Co.*, Lucas Probate Court (1900).

Proof of debt in chattel mortgage.

The certificate of the notary may obviate defects in the proof of debt in a chattel mortgage to a corporation.—See *Gambrinus Stock Co. v. Weber*, 41 Oh. St. 689 (1885).

Corporate seal.

When a corporation has no seal, an arbitration bond duly authorized by the directors and signed in the name of the corporation by the president with his private seal in scroll is valid against the corporation.—*Western Female Seminary v. Blair*, 1 Dis. 372 (1857).

Same subject.

The seal of a corporation is not necessary to the valid execution of a deed of the corpora-

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tion in this state.—See *East End, etc., Loan Co. v. Hughey*, 16 O. C. C. 19 (1898); s. c., 8 C. D. 724. See *Payser v. Standard Paving Brick Co.* (Sup. Ct.), 46 W. L. B. 84 (1901).

Same subject.

See paper on corporate seals by Clement Bates, 38 W. L. B. 204 (1897), and by F. M. Coppock, 9 W. L. B. 19 (1893).

Same subject—presumption.

The seal of a corporation affixed to a deed is prima facie evidence that it was so affixed by the authority of the corporation.—*Sheehan v. Davis*, 17 Oh. St. 571 (1867).

Power of alienation—exception.

A corporation owing duties to the public has no power to alienate its property or franchises in such a way as to disable itself from performing its functions.—*Coe v. Columbus, etc., Ry. Co.*, 10 Oh. St. 372 (1859); *R. R. Co. v. Furnace Co.*, 37 Oh. St. 321, 331 (1881); *Atkinson v. Marietta, etc., R. R. Co.*, 15 Oh. St. 21 (1864); *Bank of Toledo v. Bond*, 1 Oh. St. 622 (1853).

Power to become surety.

A corporation has no power to become surety on a bond in order to secure business for itself. As, for instance, a company desiring to sell materials to a contractor has no power to become surety for the faithful performance of the duties of such contractor.—*Humboldt Mining Co. v. American, etc., Co.*, 62 Fed. 356 (1894); s. c., 9 O. F. D. 153. *Contra, Glenville v. Prout*, 6 N. P. 152 (1899); s. c., 8 Dec. 99.

Same subject.

A corporation has no power to pay or secure the debt of a third person, but where he is its creditor it may rightly pay or secure his debt when the real object and effect is to pay or secure the indebtedness of the company to him in the same amount.—*Bank v. Flour Co.*, 41 Oh. St. 552 (1885).

Power to become guarantor.

A corporation, in selling bonds not its property, has no power in law to guarantee their payment. But the corporation may, in making the sale, enter into a contract to repurchase them at the same price on demand, and such contract will be enforced.—*First Nat. Bank v. Schaeffer*, 16 O. C. C. 457 (1898).

Power to enter into trust agreement.

A corporation has no power to enter into a "trust" agreement whereby its affairs are not managed in its interests, but primarily in the interest of holders of trust certificates. Such an agreement tending to create a monopoly is contrary to public policy.—*State ex rel. v. The Standard Oil Co.*, 49 Oh. St. 137 (1892).

Power to pledge personal liability of stockholders.

A corporation has no power by any act whatever to pledge the individual liability of its stockholders.—*State ex rel. v. Sherman*, 22 Oh. St. 411, 431 (1872).

Pleading corporate capacity.

At common law a corporation, when it sued, need not set forth its title in the declaration, but if issue be taken it must show by evidence upon trial that it was a body corporate, having the right to sue in the character and capacity in which it appears in court. The code does not require more.—*Lewis v. Bank of Ky.*, 12 Oh. 146 (1843); *Cincinnati Gas, etc., Co. v. Dodds*, 29 W. L. B. 61 (1893); *Brady v. Palmer*, 19 O. C. C. 687 (1889); s. c., 10 C. D. 27 (1889); *Smith v. Weed Sewing Machine Co.*, 26 Oh. St. 562 (1875). See *Spence v. Ins. Co.*, 40 Oh. St. 517 (1884); *Elektron Mfg. Co. v. Jones Bros. Co.*, 8 O. C. C. 311 (1894); s. c., 4 C. D. 555; *Brady v. National Supply Co.*, 64 Oh. St. 267 (1902).

Pleading corporate existence or capacity necessary, when.

Where a corporation is made defendant and its existence or powers are material in the action, the same must be pleaded.—*Brady v. National Supply Co.*, 64 Oh. St. 267 (1901); *Streit v. Hoster Brewing Co.*, 12 Dec. 619 (1902).

Pleading want of corporate capacity.

The question as to the want of corporate existence or capacity cannot be raised on a general denial.—See *Elektron Mfg. Co. v. Jones Bros. Co.*, 8 O. C. C. 311 (1894); *Brady v. National Supply Co.*, 45 W. L. B. 176 (1901).

Allegation and proof of existence in criminal cases.

See *Murphy v. State*, 36 Oh. St. 628 (1881); *Burke v. State*, 34 Oh. St. 79 (1878); *Hamilton v. State*, 34 Oh. St. 82 (1878); *Calkins v. State*, 18 Oh. St. 366 (1868); *Reed v. State*, 15 Oh. 217 (1846).

Misnomer of corporations.

Where a corporation, whose name is composed of several words, is sued by a name in which a word in the corporate name is omitted, such omission or misnomer, unless pleaded in abatement, will be disregarded by the court.—*State ex rel. v. Telephone Co.*, 36 Oh. St. 296 (1880); *Cleveland, etc., R. R. Co. v. Fredenbur*, 3 O. C. C. 23 (1887); s. c., 2 C. D. 15. See *Noblet v. Ohio, etc., R. R. Co.*, 1 W. L. B. 346 (1876).

Security for costs, insolvent corporation must give.

See § 5340 (1).

Stockholders as witnesses under old law.

See *Lawson v. Farmers' Bank*, 1 Oh. St. 206 (1853).

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Corporation is a person.

The words "person" and "persons," as used in § 2485, Revised Statutes, include private corporations.—*Cincinnati, etc., Gas Co. v. Avondale*, 43 Oh. St. 257 (1885). See *State v. Cincinnati Fertilizer Co.*, 24 Oh. St. 611 (1874).

Powers of company formed to repair boats.

See *State ex rel. v. Southwestern, etc., Co.*, 23 Oh. St. 166 (1872).

Religious, literary, or scientific society may lease theatre.

See *Catholic Institute v. Gibbons*, 3 W. L. B. 581 (1878).

§ 3240. FIRST ELECTION OF TRUSTEES IN CORPORATION NOT FOR PROFIT; TERM AND NUMBER.—A majority of the subscribers of the articles of incorporation formed for a purpose other than profit, may elect not less than five trustees of the corporation who shall hold their office till the next annual meeting, or until their successors are elected and qualified; but in the case of religious corporations and institutions incorporated for the purpose of promoting education, science or art the regulations of such corporations may provide for the length of time said trustees shall hold their offices, the term thereof not to exceed in number of years the number of such trustees; provided, that lodges, societies, or bodies of any secret or benevolent order incorporated under the laws of this state, may elect such number of trustees, not less than three, as may be provided in the laws or regulations governing such lodge, society, or body, and the election of such trustees may be held at the time specified in such laws or regulations. Provided further, that the members of any corporation heretofore organized, or that may hereafter be organized, for the purpose of owning and conducting a hospital for sick and disabled, persons, may provide for the election of not less than five nor more than fifteen trustees who shall serve during life, and also that in case of vacancy in the board of trustees of such association by death, resignation or otherwise, the remaining members of such board may fill such vacancy. In case of a corporation heretofore organized for such purpose such regulations providing that the trustees shall hold office during life, may be adopted at any annual meeting, or at any special meeting of the association duly and regularly called; but notice of such proposed change in the regulations shall be published for three successive weeks in some newspaper published and of general circulation at the place where such hospital is located. (May 10, 1902, 95 v. 547; April 6, 1888, 85 v. 166; March 26, 1883, 80 v. 79; April 20, 1881, 78 v. 200; R. S. 1880.)

Repeals.

The act of April 20, 1881, 78 v. 200, is not repealed in express terms by the act of March 26, 1883, 80 v. 79, nor is the latter act repealed by the act of April 6, 1888, 85 v. 166.

Tenure of office.

Neither the incorporators nor the trustees first elected are authorized to adopt a by-law or regulation providing that they shall hold office during life, and in case of vacancy fill the same by appointment.—*State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882).

§ 3241. MEMBERSHIP IN CORPORATION NOT FOR PROFIT, RELIGIOUS, SECRET AND BENEVOLENT SOCIETIES.—The subscribers of such articles of incorporation shall cause the same to be copied into a book which they shall provide, and which shall be the property of the corporation; and a person having the qualifications prescribed by the corporation, may become a member by subscribing his name to such copy; provided, that when the incorporators of a corporation, now or hereafter formed, are, or shall be members of a church, religious, secret or benevolent society, and have signed or shall sign articles for the purpose of enabling such church, religious, secret or benevolent society to become incorporated, any person who is or shall become a member of such church, religious, secret, or benevolent society, in good standing, shall by virtue of such membership be a member of such corporation, and entitled to vote at all meetings of such corporation, for the election of officers or other

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purpose, anything in the preceding section to the contrary notwithstanding. (March 16, 1887. 84 v. 85; May 15, 1886, 83 v. 168; R. S. 1880.)

Membership in mutual protective societies.

After a mutual protection association has been formed under § 3630, the members thereof are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation, are entitled to protection.—State v. Standard, etc., Ass'n. 38 Oh. St. 281 (1882).

Right to vote.

Where the right to vote upon all matters touching the interests of the corporation is secured by the charter to each member, a further provision giving to pew owners the privileges of membership does not restrict the right of voting to them, but it belongs to every one admitted to the society by a majority of the members of the congregation.—Wiswell v. First, etc., Church, 14 Oh. St. 31 (1862).

Rights of majority.

Where a religious society purchases land, and the title vests in it in fee as a corporation, the majority of the society have a right to control its use and occupation, of which they cannot be deprived by any supposed error of doctrine.—Keyser v. Stansifer, 6 Oh. 363 (1834).

Secession, rights of parties.

Members who secede from an organization thereby forfeit all right to any part of the church property; the question as to whether or not there has been a secession is a mixed question of law and fact, to be decided from all the circumstances. There may be an agreed separation without forfeiture.—Wiswell v. First, etc., Church, 14 Oh. St. 31 (1862); Ex parte Shoup, 16 W. L. B. 71 (1886); Methodist, etc., Church v. Wood, 5 Oh. 283 (1831).

Property rights.

By becoming a member of a corporation not for profit, one does not acquire a severable right to any of its property, but merely the right of a member so long as he remains a member.—Hershiser v. Williams, 24 W. L. B. 314 (1890).

Inherent power of corporation to expel.

A corporation has inherent power to remove or expel a member for causes which are not set forth in the constitution or by-laws. One of those causes may be where the party has committed some act which tends to the injury or destruction of the corporation.—Cheney v. Ketcham, 5 N. P. 139 (1897); s. e., 7 Dec. 183; State ex rel. v. Society, 8 A. L. R. 628 (1880); s. e., 5 W. L. B. 124; State ex rel. v. German, etc., Society, 2 W. L. B. 125 (1877); Hershiser v. Williams, 24 W. L. B. 314 (1890).

Proceedings to expel.

No member of a corporation shall be disfranchised without the agency of a tribunal competent to investigate the cause, and pronounce the sentence of loss of right. Where the charter prescribes the terms under which the power of amotion is to be exercised, they must be pursued; where the organic law is silent, the corporation itself possesses the inherent power to ascertain and declare the forfeiture either of franchise or office, but the proceeding is essentially adversary in its character, and cannot be conducted ex parte. It is essential to its validity that the parties should be duly summoned and given reasonable notice and an opportunity to be heard, and the facts investigated and a determination reached by the tribunal.—State ex rel. v. Bryce, 7 Oh. pt. 2, 82 (1836); Cheney v. Ketcham, 5 N. P. 139 (1897); s. e., 7 Dec. 183.

Expulsion from corporation not for profit having capital stock.

A great many clubs and societies are organized as corporations not for profit with a capital stock; in such cases the property interest represented by the stock is incidental to the personal interest or membership, and there may be an expulsion from membership.—Cheney v. Ketcham, 5 N. P. 139, 140 (1897); s. e., 7 Dec. 183.

Power of subordinate committee.

The power of expulsion from membership cannot be delegated to and exercised by a committee or subordinate branch of the corporation except upon clear and express authority fairly and reasonably exercised.—Cheney v. Ketcham, 5 N. P. 139 (1897); State ex rel. v. Fraternal, etc., Circle, 9 O. C. C. 364 (1895); s. e., 6 C. D. 385; Blumenthal v. Cincinnati, etc., Exchange, 7 W. L. B. 327 (1882).

Remedies for expulsion.

The appropriate remedies for an illegal expulsion are either injunction or an action for damages. Mandamus is not an appropriate remedy.—Cheney v. Ketcham, 5 N. P. 139 (1897); s. e., 7 Dec. 183; State ex rel. v. Zesch, 5 N. P. 274 (1898); s. e., 7 Dec. 298; Fraternal, etc., Circle v. State, 5 Dec. 754 (1897); Blumenthal v. Cincinnati, etc., Exchange, 7 W. L. B. 327 (1882); State ex rel. v. Fraternal, etc., Circle, 9 O. C. C. 364 (1895); s. e., 6 C. D. 385; s. e. (Sup. Ct.), 5 Dec. 754.

When injunction granted.

An injunction to restrain wrongful expulsion may be obtained where the benefits to be derived from the corporation are not determinable by any rules that could be given to the jury in fixing their money value.—State ex rel. v. Zesch, 5 N. P. 274 (1898); s. e., 7 Dec. 298.

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Injunction against threatened expulsion.

An injunction will not be granted to restrain threatened expulsion from an organization for the reason that the court must presume that if any proceedings are taken they will be regular, and that the complainant can obtain relief within the organization.—*Hershiser v. Williams*, 6 O. C. C. 147; s. c., 3 C. D. 389; s. c., 53 Oh. St. 633 (1895).

When peremptory writ not granted.

Peremptory writ will not be granted to restore a member of a corporation informally expelled to his rights as a member when he would at once be formally expelled.—*State ex rel. v. Society*, 8 A. L. R. 628 (1880); s. c., 5 W. L. B. 124; *State ex rel. v. Allgemeiner, etc., Verein*, 5 W. L. B. 295 (1878).

Fraud and collusion.

A court of equity will set aside a judgment of a tribunal ordering the expulsion of a member if such order was brought about through fraud and collusion.—*Kent v. Odd Fellows, etc., Ass'n*, 14 W. L. B. 237 (1885). See *Blumenthal v. Cincinnati, etc., Exchange*, 7 W. L. B. 327 (1882).

Irregularities in proceedings.

A court will not interfere with proceedings to expel a member because of irregularities if there has been substantial compliance with the law.—*State ex rel. v. Cincinnati, etc., Exchange*, 4 N. P. 244 (1897); s. c., 6 Dec. 363; *Hershiser v. Williams*, 24 W. L. B. 314 (1890); *State ex rel. v. Allgemeiner, etc., Verein*, 3 W. L. B. 295 (1878).

Waiver of right to order of restoration.

The bringing of an action for damages for illegal expulsion from a corporation is a waiver of the right to a writ of mandamus.—

State ex rel. v. Slavonska Lipa, 28 Oh. St. 665 (1876).

Waiver of rights of member.

A member on trial may waive any of the provisions of the rules and regulations of the corporation.—*State ex rel. v. Cincinnati, etc., Exchange*, 4 N. P. 244 (1897); s. c., 6 Dec. 363.

What is prejudicial conduct of member?

It will be left to the organization to say what conduct is prejudicial to its interests.—*Hershiser v. Williams*, 24 W. L. B. 314 (1890). See *State ex rel. v. German, etc., Society*, 2 W. L. B. 125 (1877).

Must exhaust remedies within the corporation.

Until a member who complains of his expulsion has exhausted all the judicatories of the order, society or corporation, the civil courts will not take cognizance of his case, and this is so even if the person before whom the appeal should be heard is adverse and has previously voted against the member.—*State ex rel. v. Castle*, 10 W. L. B. 2 (1883); *Kent v. Odd Fellows, etc., Ass'n*, 14 W. L. B. 237 (1885); *Hershiser v. Williams*, 6 O. C. C. 147; s. c., 3 C. D. 389; s. c., 53 Oh. St. 633 (1895). See *Baltimore, etc., R. R. Co. v. Stankard*, 56 Oh. St. 224 (1897).

Same subject, exception.

Where the body acting as a tribunal is without authority, or where no appeal is provided for, or where the action taken is void, as, for instance, where an expulsion is ordered without trial, the courts may be resorted to without appealing within the organization.—*Cheney v. Ketcham*, 5 N. P. 139 (1897); s. c., 7 Dec. 183.

§ 3242. CORPORATIONS FOR PROFIT; TO GIVE NOTICE OF OPENING BOOKS FOR SUBSCRIPTION; NOTICE MAY BE WAIVED.

—The persons named in the articles of incorporation of a corporation for profit, or a majority of them, shall order books to be opened for subscription to the capital stock of the corporation at such time or times and at such place or places as they may deem expedient, and of the time and place of opening of which books at least thirty days' notice shall be given by publication in a newspaper published or generally circulated in the county or counties where books of subscription are to be opened; provided, that such notice may be waived in writing by all the incorporators, and such waiver shall be entered or copied in the records of such corporation. (April 6, 1891, 88 v. 280; March 5, 1883, 80 v. 42; R. S. 1880; May 1, 1852, 50 v. 274, § 9.)

Publication of notice.

Only one publication is required thirty days before the date set, and it need not be for thirty days successively before that date. The paper should be printed in the English language.—*Muskingum Turnpike Co. v. Ward*, 13 Oh. 120 (1844); *Craig v. Fox*, 16 Oh. 563, 566 (1847); *Cincinnati v. Purcell*, 26 Oh. St. 49 (1875).

Waiver of publication — proof.

When the authenticity and genuineness of the records of a corporation have been proved, it is competent to prove by such records that the incorporators have waived notice by publication of the opening of stock books.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362, 392 (1892); s. c., 3 C. D. 493.

Corporations for profit—Subscription to Stock, § 3242.

Verbal subscriptions not binding.

A subscription to stock in a corporation must be in writing and mutually binding on both parties. A recovery cannot be had on a verbal agreement to take shares, in the absence of estoppel.—*Fanning v. Ias. Co.*, 37 Oh. St. 339 (1881).*

Delivery of subscription—proof.

Where a subscription was delivered reading as follows:

"We, the undersigned, heirs of Alex. Brown's estate, agree to take one thousand dollars in stock in the Mansfield, etc., R. R. Co. if it comes near enough to the town of Weston to suit the convenience of said town," it was held that parol evidence was admissible to prove the delivery of the subscription and thus establish the mutuality of the agreement, and the implied agreement on the one hand to pay, and on the other to issue stock.—*Mansfield, etc., R. R. Co. v. Brown*, 26 Oh. St. 223 (1875).

Subscription books.

This section, so far as it concerns the opening of books, must be deemed directory, and a subscription, unexceptional in other respects, will be valid if made on a separate sheet of paper.—*Ashtabula, etc., R. R. Co. v. Smith*, 15 Oh. St. 328 (1864).

Construction of subscriptions.

The ordinary rules of construction applicable to contracts apply to subscriptions; for instance, all parts must be taken into consideration so as to make the whole consistent.—*Lesh v. Karshner*, 47 Oh. St. 302, 305 (1890).

Statutes form a part of subscriptions.

The statutes in force at the time subscriptions are made enter into and form a part of such subscriptions, and the subsequent exercise of the powers given the company will not affect the subscriptions.—*Mansfield, etc., R. R. Co. v. Stout*, 26 Oh. St. 241, 254 (1875); *Jewett v. Valley Ry. Co.*, 34 Oh. St. 601 (1878); *Armstrong v. Karshner*, 47 Oh. St. 276 (1890); *Compton v. Ry. Co.*, 45 Oh. St. 592, 620 (1888).

Interest on subscriptions.

Where interest is stipulated to be paid on the amount paid on subscriptions of stock until the road is completed, the interest is not payable except out of profits.—*Ryan v. Miami Valley Ry. Co.*, 10 A. L. R. 263 (1881); *Wood v. Pearce*, 2 Dis. 411 (1858); *Painesville, etc., R. R. Co. v. King*, 17 Oh. St. 534 (1867).

Offer to subscribe.

Until some action is taken on a subscription to stock it is revocable, there being no mutuality, and it being merely an offer to subscribe.—*Wallace v. Townsend*, 43 Oh. St. 537

(1885). See *Armstrong v. Karshner*, 47 Oh. St. 276, 296 (1890).

Same subject—revocation.

An offer in writing to subscribe to the capital stock of a railroad company is revocable at the option of the party making such offer at any time before its delivery to and acceptance by such company, and his death before such delivery and acceptance works such revocation.—*Wallace v. Townsend*, 43 Oh. St. 537 (1885).

Power to receive subscriptions payable in land or property.

See *Noble v. Callender*, 20 Oh. St. 199 (1870); *Goodin v. Evans*, 18 Oh. St. 150 (1868); *Gates v. Tippecanoe Stone Co.*, 57 Oh. St. 60, 75 (1897).

Sales of stock by corporation.

In the absence of express provision, the duly organized corporation has the same power of disposition over its unissued and unsubscribed capital stock as an ordinary owner has over his property. Such stock can be used in payment of debts or exchange for labor or property.—See *Dayton, etc., R. R. Co. v. Hatch*, 1 Dis. 84 (1855); *Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 197 (1897); *Sims v. Street R. R. Co.*, 37 Oh. St. 556, 565 (1882).

What conditional subscriptions are contrary to public policy.

Whenever a subscriber to stock of a company attempts to secure in his contract of subscription by conditions, advantages or privileges not common to all other stockholders or subscribers, and without their knowledge or consent, such conditions are contrary to public policy and can have no effect to limit in any way the contract of subscription and in so far as it attempts to do so it will be treated as a fraud on other subscribers. See *Stunt v. Newark Weldless Tube, etc., Co.*, 22 O. C. C. 120 (1901); *Noble v. Callender*, 20 Oh. St. 199 (1870); *Henry v. Vermillion, etc., R. R. Co.*, 17 Oh. 187 (1848).

Conditional subscription—when absolute.

Corporations in this state have power to receive and accept conditional subscriptions, but until the conditions in such subscriptions are performed they cannot become absolute and take full effect as stock subscriptions.—*Ashtabula, etc., R. R. Co. v. Smith*, 15 Oh. St. 328 (1864); *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864); *R. R. Co. v. Hinsdale*, 45 Oh. St. 556 (1888); *Armstrong v. Karshner*, 47 Oh. St. 276, 296 (1890). See *Lesh v. Karshner*, 47 Oh. St. 302 (1890).

Verbal conditions.

In the absence of fraud or mistake, conditions to subscriptions must be in writing to

Corporations for Profit — Subscription to Stock, § 3243.

be part of the contract.—*Freeman v. Muth*, 3 W. L. B. 914 (1878).

Waiver of conditions.

The giving of a note in payment by a subscriber is *prima facie* waiver of conditions precedent.—*Dayton, etc., R. R. Co. v. Hatch*, 1 Dis. 84 (1855); *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864); *Four Mile R. R. Co. v. Bailey*, 18 Oh. St. 208 (1868).

Same subject.

The payment of the first installment on a subscription and voting the stock at an election of directors, and acting as an officer of the company is a waiver of conditions contained in a stock subscription.—*Dayton, etc., R. R. Co. v. Hatch*, 1 Dis. 84 (1855).

Conditions subsequent.

It seems that conditions subsequent in a stock subscription should be viewed as a stipulation merely; and in case of non-performance the parties should be left for redress to the ordinary remedies for breach of contract.—*Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225, 247 (1864). See *Zerkle v. Price*, 5 N. P. 480 (1898); *Shoemaker v. Goshen Township*, 14 Oh. St. 569, 583 (1863); *Stunt v. Newark Weldless Tube, etc., Co.*, 22 O. C. C. 120 (1901).

Conditional subscriptions — as to amount to be subscribed.

A subscription to stock not to be binding until a certain amount is subscribed is a valid absolute subscription when the amount specified is obtained.—*Emmitt v. Springfield R. R. Co.*, 31 Oh. St. 23 (1876).

Same subject — first-class road.

Railroad companies in this state are not required to construct first-class roads before they can collect subscriptions unless the subscriptions contain stipulations to that effect.

—*Armstrong v. Karshner*, 47 Oh. St. 276 (1890).

Same subject — depot to be built.

Where a subscription contained a condition as to the location of the road, and provided that a depot be located at a certain point, it was held that the clause referring to the depot was a mere stipulation, and not a condition precedent.—*Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864).

Same subject — road to pass through — road to be built.

Where the condition in a subscription was that the road was to pass through a certain place or to be built at a certain place, permanent location of the road without its construction on the route designated is a compliance with the condition.—*Ashtabula, etc., R. R. Co. v. Smith*, 15 Oh. St. 328 (1864); *Mansfield, etc., R. R. Co. v. Stout*, 26 Oh. St. 241, 254 (1875); *Warner v. Callender*, 20 Oh. St. 190 (1870); *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864). See *Elder v. Bellaire, etc., Ry. Co.*, 1 O. C. C. 256 (1865); s. c., 1 C. D. 140.

Same subject — road to be operated and maintained.

See *Port Clinton R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 Oh. St. 544, 560 (1862).

Same subject — rule of construction.

In construing conditional subscriptions in the absence of words expressing a different design, it will be presumed that it was the object of the parties to make the subscriptions available to the company as soon as possible, so as to furnish it funds to prosecute its work.—See *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864).

Defenses of subscribers — rights of creditors and enforcement of subscriptions.

See notes to § 3253.

§ 3243. WHEN SUBSCRIPTIONS OF STOCK ARE PAYABLE.—An installment of ten per cent. on each share of stock shall be payable at the time of making the subscription, and the residue thereof shall be paid in such installments, and at such times and places, and to such persons, as may be required by the directors of the corporation. (May 1, 1852, 50 v. 274, § 6; R. S. 1880.)

Purpose of section, payment of first installment.

This section is designed to fix the time of payment of the first installment, and to provide the mode for determining the time at which the residue shall become payable. It does not prescribe the form in which subscriptions are required to be made, nor does the want of a stipulation for the payment of the first installment invalidate the subscription.—*Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864); *Ashtabula, etc., R. R. Co. v. Smith*, 15 Oh. St. 328 (1864).

Omission to pay first installment — liability.

The failure to pay the first installment does not release subscribers.—*Henry v. Vermillion, etc., R. R. Co.*, 17 Oh. 187, 191 (1848).

Time of making the subscription.

The time of making the subscription refers to the time at which it becomes complete. In the case of conditional subscriptions the first installment becomes payable when the subscription becomes absolute.—*Ashtabula, etc., R. R. Co. v. Smith*, 15 Oh. St. 328 (1864).

Corporations for Profit — Subscriptions, Organization, etc., § 3244.

Calls — before stock fully subscribed.

The whole of the authorized capital stock need not be subscribed before calls are made. The common law is modified by § 3244 and this section.—*Jewett v. Valley Ry. Co.*, 34 Oh. St. 601 (1878). See *Clarke v. Thomas*, 34 Oh. St. 46 (1877).

Calls — as to conditional subscriptions.

General calls become applicable to conditional subscriptions as soon as they become absolute by performance of conditions.—*Mansfield, etc., R. R. Co. v. Stout*, 26 Oh. St. 241 (1875).

Calls — where and to whom payable.

Notice to pay a stock subscription to the treasurer of the company implies that the payment is to be made at his office, and is sufficiently definite as to place and person.—*Muskingum, etc., Turnpike Co. v. Ward*, 13 Oh. 120 (1844).

Calls — when company insolvent.

When a company becomes insolvent the method of making calls cannot be pursued; and as to creditors the debt thereafter must be treated as due without further demand.—*Henry v. Vermillion, etc.*, R. R. Co., 17 Oh. 187 (1848).

Calls — where demand notes have been given.

Where subscribers have given demand notes in payment of subscriptions, calls should be made by the directors to fix their liability for the reason that a cause of action would not

accrue on such notes until a call had been made.—*Kilbreath v. Gaylord*, 34 Oh. St. 305 (1877).

Calls — pending consolidation.

A general call made by a company during the pendency of consolidation proceedings will continue in force for the benefit of the consolidated company, provided an officer authorized to receive such payments be continued at the place named in the call.—*Mansfield, etc., R. R. Co. v. Stout*, 26 Oh. St. 241 (1875).

Waiver of right of board to make call.

The subscriber and the company may agree in the subscription as to the times and amounts of payments thereon, and thereby waive the right of directors to require the payment of subscriptions at such times and places as they see fit.—*Mansfield, etc., R. R. Co. v. Pettis*, 26 Oh. St. 259 (1875).

Same subject — illustration.

Where a subscription contained a condition that not more than ten per cent. shall be required to be paid at any one call, nor shall calls be made more frequently than once in sixty days, it is not included in a call by the directors for the payment of ten per cent. monthly until the whole is paid.—*Mansfield, etc., R. R. Co. v. Pettis*, 26 Oh. St. 259 (1875).

Liability of incorporators.

Incorporators are liable until at least ten per cent. of the authorized capital is paid in.—See *Hessler v. Cleveland Punch, etc., Co.*, 61 Oh. St. 621 (1899).

§ 3244. **CERTIFICATE OF SUBSCRIPTION TO STOCK; NOTICE; ELECTION OF DIRECTORS.**—As soon as ten per cent. of the capital stock is subscribed, the subscribers of the articles of incorporation, or a majority of them, shall so certify, in writing, to the secretary of state, and thereupon shall give notice to the stockholders, as provided in section three thousand two hundred and forty-two, to meet at such time and place as they may designate, for the purpose of choosing not less than five nor more than fifteen directors, who shall continue in office until the time fixed for the annual election, and until their successors are chosen and qualified; provided, that in case all subscribers are present in person, or by proxy, such notice may be waived in writing, and the incorporators of the company shall be liable to any person affected thereby, to the amount of any deficiency in the actual payment of said ten per cent., at the time of so certifying. (May 1, 1852, 50 v. 274, § 9; R. S. 1880; April 15, 1880, 77 v. 266; May 18, 1894, 91 v. 304.)

Conditional subscriptions.

In computing this ten per cent., no regard can be given to conditional subscriptions which have not become absolute. For this provision is for the benefit of creditors of the company, and therefore only subscriptions having a present value should be counted.—*Portland, etc., R. R. Co. v. Spillman*, 32 Pac. (Ore.) 688 (1893).

Calls — ten per cent. must be subscribed.

The subscription of ten per cent. is a condition precedent to the calling and enforcement of the subscriptions made before organ-

ization, just as at common law the subscription of the whole stock was a condition precedent.—*Portland, etc., R. R. Co. v. Spillman*, 32 Pac. (Ore.) 688 (1893). See *Jewett v. Valley R. R. Co.*, 34 Oh. St. 601 (1878); *Emmitt v. Springfield, etc., R. R. Co.*, 31 Oh. St. 23 (1876).

Subscribers may waive subscription of ten per cent.

So far as a stockholder's liability to pay calls is concerned, he may waive the right to have ten per cent. subscribed before calls are made.—*Portland, etc., R. R. Co. v. Spillman*,

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32 Pac. (Ore.) 688 (1893). See Emmitt v. Springfield, etc., R. R. Co., 31 Oh. St. 23 (1876).

Presumption of regularity of organization.

Where it is alleged that pursuant to a regular notice the stockholders elected a board of directors, it will be presumed that the steps necessary to a valid organization had been taken.—Ashtabula, etc., R. R. Co. v. Smith, 15 Oh. St. 328 (1864).

Notice of meeting to elect.

This section, so far as it concerns the notice of the meeting to elect directors, is directory. If the necessary amount of stock has been obtained, and at a meeting of the stockholders called for the purpose they elect directors, the validity of their acts cannot be questioned collaterally, on account of irregularity in the election.—Chamberlain v. Painesville, etc., R. R. Co., 15 Oh. St. 225 (1864).

Failure to give notice.

An organization meeting is not a nullity because of the failure to give notice, if the parties for whom the notice was provided acquiesce and do business under such organization.—McClineh v. Sturgis, 72 Me. 288 (1881); Braintree Co. v. Inhabitants of Braintree, 146 Mass. 482 (1888).

Proof of organization.

In a proceeding to condemn land, a company is obliged to prove not only its incorporation, but the validity of its organization; and it must therefore prove the subscription of ten per cent. of the stock.—Powers v. Hazelton, etc., Ry. Co., 33 Oh. St. 429 (1878).

Same subject — records.

The organization of a company may be shown by its records after proving their authenticity and genuineness.—Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 O. C. C. 362, 392 (1892); s. c., 3 C. D. 493.

Who must be directors.

Where there are but five stockholders, each must be a director.—Gates v. Tippecanoe Stone Co., 9 O. C. C. 99, 103 (1894); s. c., 6 C. D. 23.

Term of office of directors.

Directors continue in office until their successors are elected and qualified.—Bartholomew v. Bentley, 1 Oh. St. 37, 42 (1852); State ex rel. v. Bonnell, 35 Oh. St. 10, 17 (1878).

Abandonment of office.

Where no directors are elected within a reasonable time after the expiration of the terms of those duly elected, and the company ceases to do business, it will be presumed that the offices have been resigned or abandoned.—Bartholomew v. Bentley, 1 Oh. St. 37, 42 (1852).

Resignations.

This section does not prevent resignations of directors, but, on the contrary, they are allowable as at common law.—Briggs v. Spaulding, 141 U. S. 132 (1890).

Liability of directors — acting before ten per cent. is subscribed.

The subscription of the necessary amount of stock (ten per cent.) to authorize the election of directors is not only a matter of substance, but is essential to the organization of the corporation, and necessary to the transaction of business by it; and persons acting as directors before the necessary ten per cent. has been subscribed are without authority to create a corporate obligation, and become personally liable, although they have acted in good faith. In such a case the directors should be charged with an amount equal to the necessary stock subscriptions and the statutory liability of the stockholders.—Trust Co. v. Floyd, 47 Oh. St. 525 (1890).

Organization meeting should be held in this state.

It is a well-settled rule of law that the acceptance of a charter and the organization of a corporation must occur in the state creating it.—See Myers v. Manhattan Bank, 20 Oh. 283 (1851); Smith v. Silver, etc., Co., 64 Md. 85 (1885); Freeman v. Machias, etc., Co., 38 Me. 343 (1854); Heath v. Silverthorn, etc., Co., 39 Wis. 149 (1875).

Service of process when corporation fails to elect officers.

See § 5045.

Liability of incorporators — amount.

The liability of incorporators under this section is for the amount of any deficiency in the actual payment of ten per cent. of the authorized capital stock of the corporation at the time of their certifying, as therein provided, to the secretary of state, and not merely for one-tenth of that amount.—Hessler v. Cleveland Punch, etc., Co., 61 Oh. St. 621 (1899).

Same subject — rights of creditors.

This liability is a security for the creditors of the corporation, in addition to the liability of the stockholders; and it is not necessary, to entitle a creditor to its benefit, that he should have knowledge of the making of the certificate, or of its contents.—Hessler v. Cleveland Punch, etc., Co., 61 Oh. St. 621 (1899).

Practice.

A suit to enforce the liability of incorporators should be prosecuted for the benefit of all creditors, as in cases against the stockholders, and the liabilities of both classes may be enforced in one action, and the attorney fees of the creditor plaintiff may be allowed out of the fund.—Hessler v. Cleveland Punch, etc., Co., 61 Oh. St. 621 (1899).

Election of Directors, § 3245.

§ 3245. CONDUCT OF ELECTION; CUMULATIVE VOTING; INSPECTORS.

— At the time and place appointed, directors shall be chosen, by ballot, by the stockholders who attend for that purpose, either in person or by lawful proxies; at such election and at all other elections of directors, every stockholder shall have the right to vote in person or by proxy the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors shall not be elected in any other manner. A majority of the number of shares shall be necessary for a choice, but no person shall vote on any share on which any installment is due and unpaid.

At such first election the subscribers of the articles of incorporation, or any of them as may be present, shall be inspectors of such election, and shall certify what persons are elected directors, and shall appoint the time and place for holding their first meeting. (May 1, 1852, 50 v. 274, § 9; April 23, 1898, 93 v. 230.)

Cumulative voting under old law.

This section, before the amendment of 1898, did not confer upon stockholders the right of cumulative voting.—State ex rel. v. Stockley, 45 Oh. St. 304 (1887); State ex rel. v. Holloway, 1 O. C. C. 157 (1885); s. c., 1 C. D. 90; State ex rel. v. Fosdick, 1 O. C. C. 265 (1885); s. c., 1 C. D. 145.

Cumulative voting not obligatory.

Even though stockholders are entitled to vote on the cumulative plan, they are not obliged to.—Schmidt v. Mitchell, 41 S. W. (Ky.) 929 (1897).

Applicability of act to existing corporations.

See Smith v. Atchison, etc., R. R. Co., 64 Fed. 272 (1894); Commonwealth v. Butterworth, 160 Pa. St. 55 (1894); Attorney-General v. Looker, 69 N. W. (Mich.) 929 (1897); Cross v. W. Va., etc., Ry. Co., 35 W. Va. 174 (1891); State v. Greer, 78 Mo. 188 (1883); Hays v. Commonwealth, 82 Pa. St. 518 (1876).

Suggestions as to cumulative voting.

Under the cumulative system of voting, the majority, in order to be safe, should abandon any idea of electing the whole board, but should cumulate their votes on such a proportion of the board as their stock bears to the whole stock, and should scatter no votes by way of compliment or otherwise. Where, for instance, there are five directors to be elected, a minority holding more than one-fifth of the stock can elect one director by cumulating their votes on such director.

Majority necessary to choice.

Attention is called to the fact that the old law provided that a plurality and not a majority, as in the new act, was necessary to a choice.

Majority of votes elects.

In the election of directors of a corporation, cumulative voting being authorized by this section, one receiving a majority of the votes so cast is elected a director, though he does not receive the votes of the holders of a ma-

jority of the shares.—Schwartz v. State 61 Oh. St. 497 (1899).

Payment of installments before election.

It is clear from a reading of § 3243 and § 3244 that ten per cent. of the ten per cent. subscribed should be paid by those voting at an election under this section; but if an election is held, and persons are elected by votes on stock on which installments are due, they become de facto directors, and their acts are not subject to collateral attack.—Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (1889). See Henderson v. Hogan, 1 W. L. B. 227 (1876).

Votes necessary to elect.

A majority of the stockholders who attend for such purpose, either in person or by proxy, is sufficient, neither a majority of all the shares provided for in the charter of the corporation, nor a majority of the shares issued is required. This does not apply when the cumulative method of voting is adopted. Lutterby v. Herancourt Brewing Co., 12 Dec. 67 (1901).

Who may vote.

The person in whose name stock is registered, if only a trustee, is entitled to vote upon the stock, and the officers in charge of the election cannot look into the rights of any other person in the stock.—Hafer v. N. Y., etc., R. R. Co., 14 W. L. B. 68. 72 (1885).

Stock held by the corporation.

The voting power incident to stock in a corporation is not lost when it becomes the property of the corporation, but the withdrawal of such stock from the number of voting shares is in effect an equal distribution of their voting power among the individual shareholders.—Allen v. De Lagerberger, 20 W. L. B. 368 (1888).

Stock pledged by the corporation.

When the directors of a corporation pledge its own stock to secure a loan, they may, if it

Stockholders — Vote of, §§ 3245a, 3245b.

will secure additional consideration for the benefit of the corporation in the contract of loan, confer upon the pledgee the right to vote the stock.—*Allen v. De Lagerberger*, 20 W. L. B. 368 (1888).

Duty of inspectors.

It is the duty of the corporators, when acting as inspectors, when so requested, to determine what persons are entitled to vote. Generally this must be done by reference to the stock books, but it seems that the legislature intended to give them more power in Ohio, for § 3245c provides that the ownership of stock may be determined by the corporate books, stock certificates or other satisfactory proof. The inspectors may exercise a reasonable discretion as to the time for closing the election, so as to expedite matters or to allow each stockholder a vote.—*In re M. & H. R. R. Co.*, 19 Wend. (N. Y.) 135 (1838); *In re Chenango Ins. Co.*, 19 Wend. (N. Y.) 635 (1839); *People v. A. & S. R. R. Co.*, 55 Barb. (N. Y.) 344 (1869).

Same subject.

When the inspectors once receive a vote, either without objection or over the objection of a stockholder, they cannot afterward reject it.—*Hartt v. Harvey*, 32 Barb. (N. Y.) 55 (1860); *People v. White*, 11 Abb. Prac. Rep. 168, 179 (1860).

§ 3245a. **CORPORATIONS MAY LIMIT VOTES OF STOCKHOLDERS.**—A corporation may provide in its articles of incorporation that each stockholder, irrespective of the amount of stock he may own, shall be entitled to one vote, and no more, at any election of directors, or upon any subject submitted at a stockholders' meeting, and when such provision is made it shall be governed thereby. (March 19, 1884, 81 v. 54, 55.)

Sections numbered the same.

There are two sections bearing the number 3245a, reading differently, and both in force.

§ 3245b. **PROVISIONS TO WHICH SUCH CORPORATIONS ARE SUBJECT.**—Every corporation where articles of incorporation contain the limitation mentioned in section thirty two hundred and forty-five (a), shall be subjected to the following provisions:

1. No person shall hold or own stock in excess of one thousand dollars face value.
2. The directors shall annually within thirty days after the thirty-first day of December, make and file with the recorder of the county in which the corporation is doing business, a statement of its financial condition upon the said thirty-first day of December, plainly setting forth its assets and liabilities in detail, the amount of its paid up capital stock, the names of its stockholders, and the number of shares owned by each, and said statement shall be signed and sworn to by a majority of the directors, including the treasurer, before any officer authorized to administer oaths in this state. If the board of directors fail to make the annual statements required by this section, or if they make a false statement, they shall be personally liable for all claims and demands against such corporation.
3. By-laws for the government of the corporation, and for distribution of its net earnings among its workmen, patrons and shareholders, not inconsistent with the

Evidence to set aside the action of inspectors.

In a legal proceeding brought to set aside the action of inspectors, only the evidence introduced before the inspectors can be used.—*In re M. & H. R. R. Co.*, 19 Wend. (N. Y.) 135 (1838).

Inspector may be candidate.

An inspector may be a candidate for election.—*Commonwealth v. Woolper*, 3 S. & R. (Pa.) 29 (1817).

Certificate of election.

The certificate of election is prima facie evidence of the facts stated therein; but when the inspectors state not only the result, but also the facts which induced their decision, such facts may show their decision to be erroneous, and so nullify their certificate.—*Hartt v. Harvey*, 32 Barb. (N. Y.) 55 (1860).

Same subject.

A certificate may be used although made long after the election.—*People v. Peek*, 11 Wend. (N. Y.) 604 (1834).

Same subject.

An election is good although the inspectors fail to certify the result, or though they certify falsely.—*People v. Peek*, 11 Wend. (N. Y.) 604 (1834); *Hartt v. Harvey*, 32 Barb. (N. Y.) 55 (1860); *State ex rel. v. Smith*, 15 Ore. 98 (1887).

Directors, Election of, §§ 3245a-3245c.

constitution and laws of the state may be made by the stockholders. (March 19, 1884, 81 v. 54, 55.)

Sections numbered the same.

There are two sections bearing the number 3245b, reading differently, and both in force.

Common-law rule.

This section goes back to the old common-law rule that a shareholder was entitled to no more than one vote, irrespective of the number of shares held by him.—See *State ex rel. v. Stockley*, 45 Oh. St. 304, 306 (1887).

Purpose of law — evasions.

The restrictions placed by this section upon the voting power of stockholders are intended to protect the minority and to place the workmen in a co-operative organization of employer and employee on a plane with persons owning a great number of shares. In England, under a similar provision, it was held possible

for a person to exceed the limit placed by the law, and to increase his voting power by placing his stock in the hands of third persons to hold and vote according to his directions.—*In re Stranton I. & S. Co.*, L. R. 16 Eq. Cas. 559 (1873); *Pender v. Lushington*, L. R. 6 Ch. Div. 70 (1877); *Moffat v. Farquhar*, L. R. 7 Ch. Div. 591 (1877). See § 3836-3 stock notes.

In other jurisdictions such evasions have not been sanctioned.—*Maek v. De Bardelben Co.*, 90 Ala. 397 (1889); *Campbell v. Poultney*, 6 G. & J. (Md.) 94 (1834); *Webb v. Ridgley*, 38 Md. 364 (1873). See *Creed v. Lancaster Bank*, 1 Oh. St. 1 (1852).

Other corporations may limit stock holdings.

See § 3869 and § 3836-3.

§ 3245a. **APPLICATION FOR APPOINTMENT OF INSPECTORS OF ELECTION; NOTICE.**—Within fifteen days next before any meeting held for the election of directors or trustees, or for the determination of any question by the stockholders of any corporation, or by the subscribers to its stock, or by its creditors and stockholders for its reorganization, any person or persons entitled to vote at said meeting and owning at least a one-tenth interest in its stock may apply to the court of common pleas of the county wherein said meeting is to be held, or if the court be not in session, to a judge thereof, or in case of the absence or disability of such judge then to the probate court, for the appointment of inspectors for such meeting; but no such application shall be acted upon until notice thereof has been served upon the corporation at its general office, and the court or judge may require such additional notice by newspaper publication, or otherwise, as may be deemed proper. (March 18, 1887, 84 v. 115. See note to preceding § 3245a.)

Appointment by directors.

Directors of a company have no authority to appoint inspectors of an election.—*State ex rel. v. Merchant*, 37 Oh. St. 251 (1881).

§ 3245b. **APPOINTMENT OF INSPECTORS; VACANCIES.**—Upon the hearing of such application the court or judge shall appoint three competent disinterested persons inspectors for such meeting, if such appointment be considered proper and right, and for good cause may thereafter vacate such appointment as to one or more of said persons and appoint another or others instead. In case of the failure of any inspector to attend said meeting, or to act thereat, the stockholders may fill the vacancy so caused. (March 18, 1887, 84 v. 115. See note to preceding § 3245b.)

§ 3245c. **LIST OF STOCKHOLDERS TO BE DELIVERED TO INSPECTORS; STOCK OWNERSHIP, HOW ASCERTAINED.**—Before every such meeting it shall be the duty of the officer or the agent of the corporation having charge of the transfer of its stock, to make out, under oath, a list of its stockholders, showing the number and classes of shares held by each, as shown by its books, on the date fixed for closing the stock transfers before its meetings; and if no time be fixed therefor, then on the tenth day prior to the date of such meeting. Such list shall be delivered to the inspectors of the meeting, and shall be prima facie evidence of the ownership of its stock; but in case of its absence the inspectors shall ascertain the ownership of stock by the corporation books, stock certificates or other satisfactory proof. (March 18, 1887, 84 v. 115, 116.)

Directors or Trustees — Election of, §§ 3245d-3246.

§ 3245d. **CONDUCT OF ELECTIONS BY INSPECTORS; CERTIFICATE OF RESULT.**—The inspectors so appointed, or if none be appointed, then those selected by the meeting, shall receive and count the votes cast at such meeting, or at any adjournment thereof, either upon an election, or for the decision of any question to be decided by vote, and determine the result, and their certificate of the result shall be prima facie evidence thereof. (March 18, 1887, 84 v. 115, 116.)

§ 3245e. **COMPENSATION OF INSPECTORS.**—The court or judge making the appointment of inspectors may fix their compensation, and may require the applicants for their appointment to secure its payment; but the corporation shall be liable therefor if the meeting by vote so determine. (March 18, 1887, 84 v. 115, 116.)

§ 3246. **ANNUAL AND OTHER ELECTIONS FOR TRUSTEES AND DIRECTORS.**—Unless the regulations of the corporation otherwise provide, an annual election for trustees or directors shall be held on the first Monday in January of each year; if trustees or directors are, for any cause, not elected at the annual meeting, or other meeting called for that purpose, they may be chosen at a members' or stockholders' meeting, at which all the members or stockholders are present in person or by proxies, or at a meeting called by the trustees or directors, or any two members or stockholders, notice of which has been given, in writing, to each stockholder, or by publication in some newspaper printed in the county where the corporation is situate, or has its principal office, for ten days; and trustees and directors shall continue in office until their successors are elected and qualified. Except that any corporation, the principal object of which is the owning and operating of a clubhouse for the use of its stockholders, the clubhouse of which is not kept open and operated for the use of its stockholders during the winter season, shall hold its annual election of directors on the third Monday in July of each year, and such election shall be held at the clubhouse owned and operated by such corporation. (May 1, 1852, 50 v. 274, § 64, R. S. 1880; April 16, 1900, 94 v. 375.)

Notice of general meeting.

Where a meeting is stated and general, notice of the time and place of holding it, or of the business to be transacted, is, in the absence of provision or regulation to the contrary, in no case required.—*State ex rel. v. Bonnell*, 35 Oh. St. 10 (1878); *Wiswell v. First, etc., Church*, 14 Oh. St. 31 (1862).

Adjourned meetings.

Any business proper to be transacted and properly commenced at a regular meeting but not completed, may be done at an adjourned meeting without further notice to stockholders of the adjourned meeting.—*State ex rel. v. Bonnell*, 35 Oh. St. 10 (1878); *Wiswell v. First, etc., Church*, 14 Oh. St. 31 (1862).

Notice of election.

Where no notice of an election is given, persons elected directors may become de facto directors.—*First, etc., Society v. First, etc., Society*, 25 Oh. St. 128, 133 (1874).

Time of election.

This section, so far as it concerns the time of holding elections, is merely directory and not imperative.—*State ex rel. v. Lakamp*, 4 O. C. C. 257 (1889); s. c., 2 C. D. 583. See *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864).

Informalities in following regulations do not invalidate election.

When the election is not held on the day fixed for the annual meeting, informalities in calling and giving notice of a special election will not invalidate the same. *Lutterby v. Herancourt Brewing Co.*, 12 Dec. 67 (1901).

Right to fair election.

A stockholder has a right to a fair and lawful election of directors without regard to pecuniary injury.—*Hafer v. N. Y., etc., R. R. Co.*, 14 W. L. B. 68, 71 (1885).

What is unfair election?

Where a corporation is restrained from holding an election of officers, and in consequence of the injunction no meeting is held for several hours after the regular time, when a small number of stockholders, without the knowledge of the others, meet, organize, and adjourn until the next day, at which time an election is held by a minority of the stockholders without notice to the others, who are in the vicinity for the purpose of the meeting and might have been readily notified; held, that such election is unfair and must be held invalid, whether the restraining order did or did not bind the stockholders.—*State ex rel. v. Bonnell*, 35 Oh. St. 10 (1878).

Directors or Trustees — Election of, § 3246.

Same subject.

Where at the meeting of the stockholders of a corporation for the election of officers, by a misunderstanding as to the time of an agreed adjourned meeting the minority meet and elect officers, and thereafter the majority meet and elect officers, neither election will be held good, but the old directors will hold over.—*State ex rel. v. Smalley*, 7 O. C. C. 400 (1893); s. c., 4 C. D. 653.

Who are electors?

The members or stockholders of a corporation are the elective and controlling body, and neither the incorporators nor the trustees first elected, are authorized to adopt a by-law or regulation providing that they shall hold office during life, and in case of vacancy, to fill the same by appointment.—*State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882); *Wiswell v. First, etc., Church*, 14 Oh. St. 31 (1862).

Inspectors of elections.

The right to choose inspectors of an election under this section is vested in the stockholders, not the directors.—*State ex rel. v. Merchant*, 37 Oh. St. 251 (1881).

Election notwithstanding receivership.

The right of the stockholders of a company to elect directors is not affected by the sale of the property of the corporation by a receiver under an order of court.—*State ex rel. v. Merchant*, 37 Oh. St. 251 (1881).

Sale of voting power.

A sale by a stockholder of the power to vote upon his shares is illegal.—*Hafer v. N. Y., etc., R. R. Co.*, 14 W. L. B. 68, 71 (1885).

Voting agreement.

An agreement by which the stockholders of a railway company confer upon a committee the power to vote upon their shares for a lawful purpose, is not illegal or against public policy, but such agreement may be revoked at any time by any one of the subscribing shareholders, notwithstanding it is in terms irrevocable.—*Griffith v. Jewett*, 15 W. L. B. 419 (1886). See *State ex rel. v. Standard Oil Co.*, 49 Oh. St. 137 (1892).

Same subject.

Stockholders may place their stock in the hands of a depository with direction to vote it as directed by a committee appointed by themselves and subject to their control.—*Ry. Co. v. State*, 49 Oh. St. 668 (1892); s. c., 6 O. C. C. 415; s. c., 3 C. D. 518.

Same subject.

An agreement by the owners of a majority of the capital stock of a company to elect a particular person secretary or treasurer is not illegal if not entered into for private benefit.—*Mullen v. Gaffney*, 8 Am. L. Rec. 102 (1879).

Same subject.

Where the purchaser of stock in a medical institute guarantees to the seller a professorship in the institution, and it appears that the board of trustees has exclusive power to appoint the professors, the contract is illegal as one controlling the election and conduct of the trustees for private ends.—*Jones v. Scudder*, 2 C. S. C. 178 (1872).

Injunction against election — when granted.

Where there is a dispute as to whether a person is a lawful director of a company and some of the stockholders propose to elect his successor, the election will not be enjoined provided the parties agree to try the right to office by quo warranto; but the parties will be enjoined from obtaining possession of the office by force or other illegal means.—*Hoe v. Hall*, 9 O. C. C. 654 (1893); s. c., 4 C. D. 547.

Equity cannot determine validity of election.

The legality of the election of persons as trustees of a company and their right to exercise the powers and conduct the affairs of a company are questions which cannot be judicially tested by a bill in chancery, but fall appropriately within the jurisdiction of proceedings at law by quo warranto.—*Hullman v. Honecamp*, 5 Oh. St. 237 (1853); *First, etc., Society v. Smithers*, 12 Oh. St. 248 (1861); *Bartholomew v. Lutheran Congregation*, 35 Oh. St. 567 (1880); *Messenger v. Wardens of Trinity Church*, 6 W. L. B. 397 (1881). See *Moses v. Tompkins*, 84 Ala. 613 (1887), and *Lutterby v. Herancourt Brewing Co.*, 12 Dec. 67 (1901), for exceptions.

Election called by directors.

The designation of a time for an election by the directors must be done by them as a board when lawfully convened; and a resolution by the board that an election must be held without fixing a time, does not authorize one of them to fix the time and give notice. A notice of an election required to be given by the directors is not a sufficient notice if signed by the individual names of a majority without stating that it was given by order of the board, or stating that the persons whose names were signed were directors.—*Johnston v. Jones*, 23 N. J. Eq. 216 (1872).

Repeating.

To vote more than once at an election under this section is not a penal offense.—*Lane v. State*, 39 Oh. St. 312 (1883).

Term of office.

Directors must be elected for one year.—*Lutterby v. Herancourt Brewing Co.*, 12 Dec. 67 (1901).

Directors or Trustees — Oath, Duties, etc., § 3247.

Holding over term.

Where directors have been regularly elected and enter upon the duties of the office, they will continue to be directors until their successors are elected and qualified, though they may for a time be interrupted in the discharge of their duties; and such successors must be chosen as provided in the statute.—*State ex rel. v. Bonnell*, 35 Oh. St. 10 (1878).

Abandonment of office.

Where a company is insolvent and exercises none of its powers for a long time, say sixteen years, directors elected before the suspension of business will not be held to have continued in office although the charter provided directors should continue in office until their successors were elected. So long a suspension from the performance of any official duty will be regarded as an abandonment or

resignation of the office.—*Bartholomew v. Bentley*, 1 Oh. St. 37 (1852).

Loss of special charter.

Where a corporation operating under a special charter acts under this section by changing the time of its election, it will be held to have become a corporation under the present constitution.—*State ex rel. v. La kamp*, 4 O. C. C. 257 (1889); s. c., 2 C. D. 533.

Purchase of stock to increase voting power.

See *Taylor v. Miami Exporting Co.*, 6 Oh. 176 (1833).

See further as to elections, notes to § 3244.

Rights of state as a stockholder.

See *Harper v. Ampt*, 32 Oh. St. 291 (1877).

§ 3247. OATH AND DUTIES OF TRUSTEES AND DIRECTORS.—Each trustee and director shall, before entering upon his duties, take an oath faithfully to discharge the same; the trustees or directors chosen at any election shall, as soon thereafter as may be convenient, choose one of their number to be president, and, unless the regulations otherwise provide for the election of such officers, shall appoint a secretary and treasurer of the corporation; and a majority of the trustees or directors shall form a board. (R. S. 1880.)

Oath of officers.

Where an officer of a corporation has not been sworn, he is nevertheless a de facto officer, and his acts as such are binding as to third parties.—*Simpson v. Garland*, 76 Me. 203 (1884).

Contract to secure a corporate office for another, when void.

See *Magill v. Rendigs*, 12 Dec. 558 (1902).

Majority constitutes quorum.

A majority of the board constitutes a quorum for the transaction of business.—*Wickersham v. Crittenden*, 93 Cal. 17 (1892); *Ex parte Willcocks*, 7 Cow. (N. Y.) 402 (1827); *St. Louis, etc., Ass'n v. Hennessy*, 11 Mo. App. 555 (1882).

Majority of quorum may act.

Where the necessary quorum is lawfully assembled, a majority of its members may act.—*Buell v. Buckingham*, 16 Ia. 284 (1860); *Hax v. Davis Mill Co.*, 39 Mo. App. 453 (1889).

Acts by less than quorum.

The acts of directors done at a meeting at which a quorum is not present, are voidable at the election of the corporation, but it may waive its rights by delay and acquiescence.—*See U. S., etc., Co. v. Atlantic, etc., R. R. Co.*, 34 Oh. St. 450 (1878).

Directors must act as a board.

The directors must act together as a board to bind the company, the individual members have no authority.—*See McCortle v. Bates*,

29 Oh. St. 419 (1876); *Young v. Taylor Street Church*, 5 N. P. 378 (1898); s. c., 7 Dec. 449; *Ohio ex rel. v. Treasurer*, 22 Oh. St. 144 (1871).

Directors cannot vote by proxy.

A director cannot vote at a meeting of a board of directors by proxy, hence in counting a quorum, he cannot be regarded as present by proxy.—*Ohio, etc., Bank v. Walton, etc., Iron Co.*, 30 W. L. B. 382 (1893).

Proof as to officers.

The records of a corporation are the best evidence as to its officers, but it is competent to prove that such officers exist by the admissions of the corporation. Newspaper statements and the understanding of a witness from such sources is no evidence as to who are directors of a bank.—*State ex rel. v. Buchanan. Wright*, 233 (1833).

Records of corporation as evidence.

Where a party introduces in evidence a portion of an entry in the records of a corporation, the company may introduce the remaining portion and insist upon proper instructions upon the whole entry by the court.—*Stillwater Turnpike Co. v. Coover*, 25 Oh. St. 558 (1874).

Same subject — sealed pages.

Where certain pages of a record book are placed in evidence, and the other pages of the book are sealed up or fastened together, it is not sufficient to entitle counsel to cross-examine as to the pages so sealed, to offer to prove that they contain matter pertinent to

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the questions to be determined, when opposing counsel state that they have no relevancy to the case. To entitle to an examination of the portion so sealed, the proper action should be taken under §§ 5290, 5291.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 12 O. C. C. 367 (1893); s. c., 5 C. D. 643.

Approval of minutes.

The approval of the minutes of previous meetings of a board of directors is an approval of the form of statement or correctness of previous proceedings.—*Ohio, etc., Bank v. Walton Iron Co.*, 30 W. L. B. 382 (1893).

Ambiguity in proceedings of directors — construction.

Where the proceedings of the directors are ambiguous, they will be so construed, if possible, as to make them consistent and harmonious.—*East Cleveland, etc., Ry. Co. v. Everett*, 19 O. C. C. 205 (1900).

Interpretation of records.

When called upon to interpret the records of directors of a corporation, the court will look to the whole record to ascertain their intention.—*Lockwood v. Wildman*, 13 Ohio, 430 (1844).

Compensation of officers.

Where directors of a corporation appoint one of their number secretary, he is entitled to reasonable compensation for his services where it was the intention of all the parties that he should be paid, although no express contract was made and no provision was contained in the by-law authorizing his compensation.—*Dalton v. Brush Elec. Co.*, 13 O. C. C. 505 (1897); s. c., 7 C. D. 141; *Taussig v. St. L., etc., Ry. Co.*, 65 S. W. Rep. (Mo.) 969 (1901).

Same subject.

Directors are entitled to reasonable compensation for their time and expense incurred in going to, attending, and returning from meetings of the board.—*State ex rel. v. Peoples, etc., Ass'n*, 42 Oh. St. 579 (1885).

Same subject — back pay.

Directors or trustees having accepted compensation for services for a particular year have no power to vote themselves back pay for services during such former year.—*State ex rel. v. Peoples, etc., Ass'n*, 42 Oh. St. 579 (1885).

Same subject — services as agents.

Where directors or trustees act for the corporation as secretary, treasurer, general or special agent, they are not entitled to compensation in the absence of a special agreement.—*State ex rel. v. Peoples, etc., Ass'n*, 42 Oh. St. 579 (1885); *McMullen v. Ritchie*, 64 Fed. 253 (1894); s. c., 8 O. F. D. 314.

Election of president by stockholders.

Under the Colorado statutes, which provide that the directors or trustees shall elect

one of their number to be president, it was held that an election of president by the stockholders was a nullity, and therefore such person would have no authority to bind the corporation by signing a promissory note.—*Walsenberg Water Co. v. Moore*, 5 Colo. App. 144 (1894).

Power of president by virtue of office.

The president pro tempore of an insolvent corporation has no authority by virtue of his office, to execute a mortgage on the property of the company or an assignment for the benefit of creditors.—*Commercial Nat. Bank v. Cincinnati Nat. Bank*, 3 O. C. C. 513, 516 (1889); s. c., 2 C. D. 295.

Authority of president — presumption.

A deed executed by the president of a company in due form under the seal of the corporation and delivered, will be presumed to have been authorized by the directors, and the mere fact that such authority is not found on their minutes will not rebut the presumption.—*Cincinnati, etc., R. R. Co. v. Harter*, 26 Oh. St. 426 (1875).

Power of president to bring suits.

Without specific authority from the board of directors, the president of an insolvent corporation has authority to bring and defend actions to protect the property of the corporation.—*Kalb v. American Nat. Bank*, 21 O. C. C. 1 (1900).

Authority of president to sign notes — presumption.

In the absence of statute or by-law limiting his authority, the president of a corporation, as its legal head, is presumed to be authorized to bind the corporation by his acts in its name, and notes so executed by him are presumptively valid against the corporation.—*Dexter, etc., Bank, v. Friend*, 90 Fed. 703 (1898).

Power of president to sign notes.

Notes of a corporation signed in its name by its president and secretary, payable to its president's order, are presumptively unauthorized, and subsequent indorsees, though for value and in good faith and before maturity, take with notice.—*Arnkens v. Rouse*, 26 W. L. B. 221 (1891). See *Ry. Co. v. Bank*, 56 Oh. St. 351 (1897).

Power of president to sign cognovit notes.

The president of a corporation has no power, by virtue of his office, to execute a bond and warrant of attorney, for the entry of judgment by confession against the corporation. Such power is vested in the board of directors only, but the president's authority may be changed beyond the powers inherent in his office by the consent and acquiescence of the directors in permitting him to take control of the business of the corporation. Where, therefore, it appears that the president had no au-

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thority to sign a cognovit note for the corporation, and that there was no ratification of such action by the directors or a majority of the stockholders, a judgment against the corporation on such cognovit note could be set aside.—*Smead Foundry Co. v. Chesbrough*, 18 O. C. C. 783 (1895); s. c., 6 C. D. 670.

Authority of president to sign notes — liability of corporation.

A negotiable note executed in the name of a corporation by an officer or agent having no authority to issue such paper in its behalf, is void; but if the officer or agent have authority to issue notes of the corporation for any purpose, such note is valid and enforceable against the corporation in the hands of a bona fide holder, although executed for an unauthorized purpose.—*Dexter, etc., Bank v. Friend*, 90 Fed. 703 (1898).

Power of president.

The president of a corporation to whom a bond has been delivered by the board of directors in trust for sale has no right to convert such bond to his own use in payment of a claim due him from the corporation, without the consent of the board of directors.—*Greenville Gas Co. v. Reis*, 54 Oh. St. 549 (1896).

Authority of president and secretary to issue stock.

The president and secretary are the corporation for the purpose of issuing and transferring stock, their acts being the acts of the corporation.—*Ry. Co. v. Bank*, 56 Oh. St. 351, 378 (1897); reversing 24 W. L. B. 98, and other cases. See § 3254.

Authority of secretary as to stock.

See *Farmers' Bank v. Deebold Safe, etc., Co.*, 47 W. L. B. 585 (1902).

Power of president and secretary to execute mortgage.

See *Bosche v. Toledo Display Horse Co.*, 14 O. C. C. 289 (1897); s. c., 7 C. D. 374.

Power of vice-president to sign notes.

Where no authority is conferred upon the vice-president of a company by its regulations or by-laws, and when he has not been accustomed to sign notes for it, the company is not liable on notes signed by him.—*Morris v. Griffith*, 34 W. L. B. 191 (1895).

Duties of treasurer.

Where a charter creates the office of treasurer, it becomes one of his duties from the nature of his office to receive and account for money, and the sureties on his official bond conditioned that he shall perform his duties according to the regulations of the charter are responsible for money which may come into his hands as treasurer.—*Portage Co. Ins. Co. v. Wetmore*, 17 Oh. 330 (1848).

Treasurer of preliminary organization again elected for corporation — liability to account to corporation.

Where, at the preliminary meeting to effect the incorporation of an association not for profit, a party is elected treasurer, and after the incorporation is effected is again elected as treasurer, and all the moneys in her hands came to her practically after such new election, if she was then elected treasurer of the corporation, then the corporation is entitled to an accounting for such moneys.—*Muhlhauser v. The Cleveland Hospital*, 21 O. C. C. 88 (1900).

Secretary is not laborer.

The services performed by the secretary of a company are not labor within § 6355, although he at times performed manual labor.—*Green v. Weller*, 6 O. C. C. 351 (1892); s. c., 3 C. D. 488. See *In re Armleder, etc., Co.*, 20 O. C. C. 699 (1900).

Directors are not operators.

The directors of a company are not operators within the statute giving operators and laborers a first lien on assets in the hands of an assignee.—*Williams v. Southard*, 40 W. L. B. 287 (1898).

Power of attorney to make and indorse notes to his own order.

See, as to duty of indorsee to inquire as to authority of an agent and as to implied agency from previous acts, *Holmes v. Hayes*, 52 Oh. St. 617; s. c., 32 W. L. B. 346 (1894); *Arnkens v. Rouse*, 26 W. L. B. 221 (1893).

Liability of officer for unauthorized acts.

An officer of a company who executes negotiable paper in the name of the corporation is liable to a bona fide purchaser of the paper in an action for damages for falsely representing his authority where he had no authority to issue paper for any purpose, and the notes are consequently void; but where he had authority to execute notes in the business of the corporation, although he abused his authority by executing them for an unauthorized purpose, he is not liable to the holder, as the notes are binding on the corporation as represented, and his liability is to the corporation alone.—*Dexter, etc., Bank v. Friend*, 90 Fed. 703 (1898).

Removal of officers for cause.

See paper by W. E. Talcott, 17 W. L. B. 130.

Powers of cashier of bank.

The cashier of a bank cannot make for his bank a contract in regard to a subject-matter outside of the usual business of the bank, and outside of the business usually performed by cashiers.—*First Nat. Bank v. Mansfield Savings Bank*, 10 O. C. C. 233 (1894); 6 C. D. 452.

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Power of president of bank to borrow money.

See *Armstrong v. Chemical Nat. Bank*, 83 Fed. 566 (1897); s. c., 76 Fed. 339.

Power of officers of bank fixed by custom.

See *Armstrong v. Chemical Nat. Bank*, 83 Fed. 566 (1897).

§ 3248. **POWERS OF DIRECTORS AND TRUSTEES.**—The corporate powers, business, and property of corporations formed under this title must be exercised, conducted, and controlled by the board of directors, or, where there is no capital stock, by the board of trustees; a majority of the directors must be citizens of the state; all directors and all the executive officers must be holders of stock in an amount to be fixed by the by-laws, and trustees of corporations must be members thereof; and whenever the office of director or trustee becomes vacant, the board of directors or trustees may fill the same for the unexpired term by appointment, unless the by-laws otherwise provide; and no person shall be appointed or act as a receiver of any railroad or other corporation within this state unless he be a resident citizen of this state.

Qualifications of directors.

In the absence of statute requiring it, the directors need not be stockholders.—*State ex rel. v. McDaniel*, 22 Oh. St. 354 (1872).

Same subject.

Where one of the directors acting in a transaction for a company has ceased to own stock in it, he will be recognized as a de facto officer, and the transaction held valid, although he was his status not collaterally, but directly attacked, the office would be declared vacant.—*Campbell Ptg. Co. v. Bellman Bros. Co.*, 11 O. C. C. 360 (1896); s. c., 5 C. D. 389.

Same subject.

A person who holds one share of stock in a corporation may serve as a director thereof, although he is a party to an outstanding executory contract providing that he shall, at the option of the purchaser named therein, sell his single share of stock at a price named therein. So long as that option has not been exercised, the stock is still his.—*Kuhn v. Woolson Spice Co.*, 13 O. C. C. 547 (1897).

Same subject.

A director will be presumed to be a stockholder until the contrary appears. And where there are but five stockholders, each will be presumed to be a director.—*Butterfield v. Radde*, 6 J. & S. (N. Y.) 1 (1874); *Gates v. Tippecanoe Stone Co.*, 9 O. C. C. 99, 103 (1894); s. c., 6 C. D. 23.

Same subject.

Where a corporation required to have resident officers elected a nonresident treasurer, the court enjoined the corporation from compelling the resident treasurer from turning over the securities, moneys, etc., of the corporation to the nonresident treasurer.—*Matthews v. Trustees*, 2 Brewst. (Pa.) 541 (1868).

Same subject.

A person who holds and owns no stock in a corporation may be voted for and elected a director thereof, and afterward qualify him-

self by acquiring one or more shares as owner in good faith and in his own right.—*Greenough v. Alabama, etc., R. R. Co.*, 64 Fed. 22 (1894).

Same subject.

Where the statute requires directors to be stockholders and to reside in the state, if either qualification ceases the office ceases, and it is not a qualification if a share of stock is transferred without compensation to a director merely to qualify him, he having no real interest in the stock.—*Bartholomew v. Bentley*, 1 Oh. St. 37 (1852). See *Henderson v. Hogan*, 1 W. L. B. 227 (1876); *State ex rel. v. Bryce*, 7 Oh. (pt. 2) 82 (1836).

Same subject.

As to residence of directors of consolidated railroad companies, see § 3385.

Same subject.

As soon as a director parts with all beneficiary interest in and control over the stock which he is required to hold, and causes the officers of the corporation to have knowledge of such fact by a request for a transfer of stock, he no longer possesses the qualifications which the statute declared to be essential, and the statute executing itself operates to divest him of title to the office which he had ceased to be qualified to hold.—*Commercial Nat. Bank v. Colwell*, 132 N. Y. 250 (1892).

Same subject.

Where an association is organized under § 3686 et seq., its directors must be members.—*State ex rel. v. Mfgs., etc., Ass'n*, 50 Oh. St. 145 (1893).

Same subject.

Where the charter of a company provides that no director of any other company, or the partner of a director of any other company, shall be a director of that company, it applies as well to foreign as to domestic corporations.—*State ex rel. v. Buchanan, Wright*, 233 (1833).

Directors and Trustees — Powers, etc., § 3248.

Same subject.

Where a corporation moves all its property and business to another state, its directors, though losing their residence here, are still de facto officers, and may bind the company.—*Lattimer v. Mosaic Glass Co.*, 13 O. C. C. 163 (1896); s. c., 7 C. D. 430.

Care required of directors of corporations.

Directors of corporations are required to use ordinary care in the management of its affairs, to be determined in view of all the circumstances under which they are placed with reference to the affairs of the company.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Rights of innocent purchasers of qualification shares.

Where a corporation issues to one of its directors a share of stock to qualify him, he agreeing to reconvey the same on ceasing to be a director, a person purchasing said share in good faith, without notice, has a superior right to that of the company.—*Dueber, etc., Co. v. Dougherty*, 62 Oh. St. 589 (1900).

Power of stockholders to control the board.

A contract of consolidation, which provides that no evidence of funded debt or leases imposing fixed charges shall be created without the consent of a majority in interest of the holders of preferred stock, does not conflict with this section.—*Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11 (1889).

Same subject.

It may be well doubted whether a general meeting of the stockholders of a company can be legally held for any other purpose than the election of a board of directors. Such a meeting as to any other purpose or object could only be in its character advisory to the board of directors. It would have no power to take under its charge or put under the charge of others the affairs of the company.—*Dayton, etc., R. R. Co. v. Hatch*, 1 Dis. 84, 91 (1855). See *Sims v. Street R. R. Co.*, 37 Oh. St. 556, 565 (1882); *Donner v. Dayton, etc., R. R. Co.*, 1 C. S. C. 130, 140 (1871).

Contracts depriving the board of power.

It seems that a contract with a company, e. g., stock subscriptions, cannot be so made as to deprive the board of directors of general control of the corporate business.—See *Port Clinton, etc., R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 Oh. St. 544, 560 (1862).

Acts of de facto directors.

Where persons are de facto directors, their acts are entitled to the same respect as if they were lawfully elected, unless called in question in a direct proceeding.—*Campbell P'tg. Co. v. Bellman Bros. Co.*, 11 O. C. C. 360 (1896); s. c., 5 C. D. 389; *Raymond v. Spring-*

grove, etc., Ry. Co., 21 W. L. B. 103 (1889); *Ehrman v. Union, etc., Ins. Co.*, 35 Oh. St. 324, 339 (1880); *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Oh. St. 225 (1864); *First, etc., Society v. First, etc., Society*, 25 Oh. St. 128, 133 (1874).

The whole board must manage.

The business of a corporation must be managed by the whole board lawfully elected. For the company to exclude three of the directors from the exercise of the duties of their office is contrary to the laws of the state, and a denial of the right given by the law to the stockholders, to have those directors elected by them serve as such.—*State ex rel. v. Ohio, etc., Ry. Co.*, 6 O. C. C. 412; s. c., 3 C. D. 516; s. c., 49 Oh. St. 668 (1892).

When vacancies cannot be filled.

Where a corporation has been inactive for a long time, and its board of directors has done nothing, it will be presumed that the officers have resigned and abandoned the offices, and they cannot, by filling the vacancies in the board, reorganize the corporation.—*Bartholomew v. Bentley*, 1 Oh. St. 37 (1852).

Same subject.

If a majority of the directors of a corporation regularly elected resign or disqualify themselves by transferring their stock, the remaining directors, being a minority, have no power to fill vacancies.—*Moses v. Tompkins*, 84 Ala. 613 (1887).

Power of board over unissued stock.

The board of directors of a company has power to sell or dispose of that portion of the authorized capital stock not taken before the corporation was authorized.—*Sims v. Street R. R. Co.*, 37 Oh. St. 556 (1882). See *Dayton, etc., R. R. Co. v. Hatch*, 1 Dis. 84 (1855); *Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 197 (1897); *James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 261 (1858).

Same subject.

Directors will not be restrained from selling a part of the unsubscribed capital stock to persons friendly to them when they do so at public sale, and at no pecuniary loss to the company.—*Lomis v. Dexter*, 20 W. L. B. 5 (1888).

Same subject.

Directors cannot issue treasury stock to themselves without the payment of a valuable consideration.—*Straman v. North Baltimore Water Works Co.*, 8 O. C. C. 89 (1893); s. c., 4 C. D. 339.

Power to sell property.

The directors of a corporation, not the stockholders, are the proper body to make sale of corporate property.—*Donner v. Dayton, etc., R. R. Co.*, 1 C. S. C. 130, 140 (1871).

Power of trustees of religious society to sell real estate.

The trustees of a religious society organized under § 3241 have no power to dispose of the society's real estate without the consent of members.—*South Kenton, etc., Ass'n v. Espy*, 17 O. C. C. 524 (1899); s. c., 9 C. D. 695.

Power to institute suits.

The power of commencing and disposing of the company lawsuits is in the directors.—*Wadsworth v. Davis*, 13 Oh. St. 123, 130 (1862). See *Kalb v. American Nat. Bank*, 21 O. C. C. 1 (1900).

General powers of directors.

A provision in a charter "that the directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well-ordering of the interests of the proprietors not contrary to the laws of the state." is not intended to give unlimited power, but the exercise of discretion within the scope of the authority conferred.—*Beatty v. Lessee of Knowles*, 4 Pet. (U. S.) 152 (1830).

Duty to keep books.

The powers conferred upon directors impose corresponding duty to make such by-laws and to keep such accounts and books as are necessary in the proper exercise of the powers.—*Freon v. Carriage Co.*, 42 Oh. St. 30, 40 (1884).

Powers of nonresident receivers.

See *Caldwell v. Pittsburg, etc., R. R. Co.*, 33 W. L. B. 134 (1894). See § 3415.

Contract of directors with their corporations.

Because of their fiduciary relations, directors of a corporation cannot purchase for their company from themselves and others their own property or property in which they are largely interested, and pay for the same with corporate funds. And if they do buy such property, and so pay for it, an action lies on behalf of the company to compel them to account for the corporate funds even if the minority of the directors have no interest in the property sold, and if all the stockholders ratify the purchase of the property.—*Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887).

Same subject.

A contract between a corporation and its officers is not void per se, but is merely voidable at the option of the corporation, provided there is no estoppel.—*Browne v. U. S., etc., Co.*, 6 N. P. 254 (1899); s. c., 20 O. C. C. 351. See *Sims v. Street R. R. Co.*, 37 Oh. St. 556, 566 (1882); *Taylor v. Miami Exporting Co.*, 6 Oh. 176, 223 (1833); *Larwill v. Burke*, 19 O. C. C. 449 (1900).

Same subject.

The sale of stock made to one member of the board of directors with the consent of the others, and the payment of the par value thereof, when the transaction is free from fraud and is beneficial to the corporation, will not be set aside at the instance of a stockholder when no action has been taken to withhold such stock from subscription or sale.—*Sims v. St. R. R. Co.*, 37 Oh. St. 556 (1882). See *Taylor v. Miami Exporting Co.*, 6 Oh. 176, 223 (1833).

Purchase of corporate property by directors.

A director cannot purchase property of the corporation either directly or indirectly, except for full consideration, and a sale, if made, will be set aside upon objection made by the corporation, its stockholders, or even a bondholder.—*Secor v. Maumee Rolling Co.*, 1 N. P. 100 (1894); s. c., 1 Dec. 80.

When directors may act for two companies.

A contract made between two corporations through their respective boards of directors is not voidable at the election of one of the parties thereto from the mere circumstance that a minority of its board of directors were also directors of the other company.—*U. S., etc., Co. v. Atlantic, etc., R. R. Co.*, 34 Oh. St. 450 (1878). See *Goodin v. Cincinnati, etc., Canal Co.*, 18 Oh. St. 169, 182 (1868); *Henry v. Pittsburg, etc., Ry. Co.*, 2 N. P. 118, 154 (1895).

Directors are charged with notice of board proceedings.

The director of a corporation dealing in its property on his own account is chargeable with notice of the action of the board of directors as to such property whether he was present or not at the meeting which took such action.—*Greenville Gas Co. v. Reis*, 54 Oh. St. 549 (1896).

Notice to two directors will not work ratification.

The fact that two directors of a company know that a person is performing services for the company, without authority, will not bring notice to the board of directors, nor work a ratification by the board of the contract of hiring.—See *East Cleveland, etc., Ry. Co. v. Everett*, 19 O. C. C. 205 (1900).

When knowledge of director imputed to corporation.

A corporation may be charged with knowledge of a transaction through its agents in the same manner and to the same extent as private persons, but it must be while the director is engaged in the business of the corporation and is authorized to transact it. Notice to a director not engaged in the precise business intrusted to him is not notice to the company.

Directors and Trustees — Powers, etc., § 3248.

For instance, the knowledge of the payee of a note, who is the director of a bank, that there is a defense to the note, does not bind the bank.—*Loomis v. Eagle Bank*, 1 Dis. 285 (1857); s. c., 10 Oh. St. 327; *Ry. Co. v. McCoy*, 42 Oh. St. 251 (1884).

Same subject.

If the position of the director is adverse to that of the corporation, such, for instance, as that of the vendor of real estate purchased by the corporation, then the knowledge had by such officer cannot be imputed to the corporation.—*Alt v. Weber*, 20 W. L. B. 467 (1888); *Antioch College v. Carroll*, 25 W. L. B. 289, 294 (1890).

Notice to special agent.

A company is bound by notice to its special agent as to matters intrusted to him.—*Mass., etc., Ins. Co. v. Eshelman*, 30 Oh. St. 647 (1876).

Notice under § 3208.

The service of a notice under § 3208 upon the director of a railroad company is a service upon an officer of the company within the meaning of that section.—*Ry. Co. v. McCoy*, 42 Oh. St. 251 (1884).

Admissions by officers.

A corporation is not bound by an admission made by an officer after a transaction to one not connected with the transaction, when the corporation is not called upon to say anything.—*Slaus, etc., Co. v. Smith*, 11 O. C. C. 213 (1895); s. c., 5 C. D. 79. See *Ry. Co. v. McLean*, 1 O. C. C. 112 (1885); s. c., 1 C. D. 67; *Cincinnati, etc., Co. v. Cincinnati*, 19 O. C. C. 607 (1899).

Admissions by stockholders.

Admissions of stockholders not officers are not admissible to charge the corporation.—*Hogg v. Zanesville Mfg. Co., Wright*, 139 (1832).

Liability for acts of agents.

A corporation is liable for the acts of its agents done within the scope of the agency conferred on them. An act, though willfully fraudulent and negligently done by an agent, is within the scope of his agency, and charges the principal as to innocent third parties where the acts done—the making of the contract, transfer of stock—are within the powers conferred on him as an agent. In other words, if the extent of the agency included the legitimate doing of an act of the kind done, then it will be liable, though the act done was a fraud as to it.—*Ry. Co. v. Bank*, 56 Oh. St. 351, 388 (1897); *Citizens, etc., Bank v. Blakesley*, 42 Oh. St. 645 (1885).

Power of agent to sign street improvement petition.

See *Minor v. Board of Control*, 20 O. C. C. 4 (1899).

Powers of agents.

A corporation is a mere fiction created by law, and must therefore act through some human agency or it cannot act at all. These agencies necessarily differ in character: many simply represent it as agents, others represent it as a corporation in what they do, and their acts are its acts as much as the act of an individual done by himself in his own behalf. This is so as to all acts appointed by law and its own rules to be done by a particular agent or agents, and can be done by no other officer or agent of the company, as is the case in issue and transfer of stock.—*Ry. Co. v. Bank*, 56 Oh. St. 351, 378 (1897).

Power of agent to sign notes.

Where the managing agent of a corporation executes a note in its name to secure a debt on which it is primarily liable to the creditor, but on which, as between it and a third person, signing the note, it is surety, the company is liable thereon, though no express authority had been given the agent to so execute the note.—*Andres v. Morgan*, 62 Oh. St. 236 (1900).

Agency implied from acquiescence.

A corporation is bound in the same manner as an individual is to third persons who have dealt with the accredited agents of the company in good faith, and in ignorance of the want of authority of the agent, when that authority depends on the proceedings of the stockholders and directors, and they have silently acquiesced in the exercise by the agent.—*Armstrong v. Bank*, 83 Fed. 556 (1897); *Baldwin v. Hillsboro, etc., R. R. Co.*, 10 W. L. B. 337 (1853); *Powell Tool Co. v. McDonald*, 13 W. L. B. 64 (1885).

Liability of agent on notes improperly executed.

The agents of a corporation are personally liable where they sign notes in their own name with a mere description of office, or where the office is described in the notes and their names are signed with no description.—*Eells v. Shea*, 20 O. C. C. 527 (1900); *Titus v. Kyle*, 10 Oh. St. 444 (1859); *Collins v. Buckeye, etc., Ins. Co.*, 17 Oh. St. 215 (1867); *Bank v. Cook*, 38 Oh. St. 442 (1882); *Robinson v. Kanawha Valley Bank*, 44 Oh. St. 441 (1886). See *Second, etc., Bank v. Wilcox*, 2 O. C. C. 325 (1887); s. c., 1 C. D. 511; *Barnhisel v. Comm. Bank*, 14 O. C. C. 124 (1897); s. c., 7 C. D. 533; *Snyder v. First Nat. Bank*, 22 O. C. C. 624 (1897).

Receiver is not agent of corporation.

A receiver of a corporation is not its agent, and a contract made by him for supplies, as for coal for a railroad, is not binding on the company after his discharge.—*Consolidated Coal, etc., Co. v. Cincinnati, etc., R. R. Co.*, 10 W. L. B. 42 (1883).

Directors and Trustees — Powers, etc., § 3248.

Liability of directors for issuing false statements.

Directors who issue or make false statements concerning the condition of their company are liable in an action for deceit by those who rely on the same, and are damaged; as, for instance, persons who loan money on shares of stock of the company as collateral security.—*Merchants, etc., Bank v. Thomas*, 28 W. L. B. 164; s. c., 31 W. L. B. 137 (1893); *Barnes v. Pogue*, 29 W. L. B. 382 (1893); *Barnes v. Swift*, 3 N. P. 291 (1894); s. c., 3 C. D. 688. See *Cable v. Bowlus*, 21 O. C. C. 54 (1900).

Power of directors to divide up capital — estoppel.

Where directors of a corporation undertake to divide up the entire capital of the company among the stockholders, if the company acquiesces no action will lie against them, on the theory that the money should have been paid over to the company and divided by it.—See *Larwill v. Burke*, 19 O. C. C. 513 (1900).

Trust relation of directors to stockholders.

A relation of trust and confidence exists between stockholders and directors, out of which grow the duties of the latter to so administer the trust as will best promote the interests of the former, to pay them their appropriate dividends from time to time, and upon the termination of the corporation to distribute to them their respective shares of the corporate property after the payment of its debts and liabilities. Every authority and power possessed by them must be exercised for the benefit of all alike.—*Rouse v. Merchants' Nat. Bank*, 46 Oh. St. 493, 502 (1889). See *Larwill v. Burke*, 19 O. C. C. 450 (1900); s. c., 19 O. C. C. 513. See *Arbuckle v. Woolson Spice Co.*, 21 O. C. C. 348 (1901).

Duty of directors of insolvent corporation.

See *Cheney v. Maumee Cycle Co.*, 20 O. C. C. 19 (1900).

Liability of directors for conducting unauthorized business.

The directors of a company are personally liable on contracts entered into by them in conducting a business wholly foreign to the objects and purposes of the company, although such contract was entered into in an associate name, which could properly be used in corporate as well as private business.—*Ridenour v. Mayo*, 40 Oh. St. 9 (1883). See *Mfgs., etc., Ass'n v. Lynchburg Drug Mills*, 8 O. C. C. 112 (1893); s. c., 4 C. D. 350. See notes to § 3239.

A corporation may follow its property.

A corporation may follow its property where it has been fraudulently disposed of by the directors into the hands of purchasers

with notice, and assert a lien upon it.—*Goodin v. Cincinnati, etc., Canal Co.*, 18 Oh. St. 169 (1868). See *Greenville Gas Co. v. Reis*, 54 Oh. St. 549 (1896); *Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887).

When directors liable to stockholders.

If a stockholder pledge his stock as collateral with directors of the corporation, and the latter enter into a conspiracy to depreciate the price of the stock by using their powers as directors for the purpose of buying it in for less than its value, there is a wrong not against the corporation only, but against the pledgor, for which there is a direct liability to him.—*Ritchie v. McMullen*, 79 Fed. 522 (1897); s. c., 10 O. F. D. 699.

Action by pledgee against directors.

A pledgee of shares of stock in a corporation has, merely by virtue of the pledge, no right of action against the stockholders of a corporation to recover damages for the negligence and mismanagement of the directors whereby the estates of the company were lost and the shares in the same rendered valueless.—*Barnes v. Swift*, 26 W. L. B. 110 (1891).

Liability for irregularities of action.

Where acts of directors have been injurious to no one, either stockholders or corporation, although irregular and informal, no action will lie.—See *Larwill v. Burke*, 19 O. C. C. 513 (1900).

Liability of directors for mismanagement.

Directors of a corporation are personally liable if they suffer corporate funds or property to be wasted or lost by gross negligence and inattention to the duties of their trust; and an action may be maintained against them for the amount of such losses.—See *Kalb v. American Nat. Bank*, 21 O. C. C. 1 (1900); *Meisse v. Loren*, 5 N. P. 307 (1898); s. c., 8 Dec. 448.

Liability of directors of railroad companies.

See § 3314.

Stockholder's suit, limitation of action.

As to when statute of limitations runs against an action against directors for malfeasance, see *Larwill v. Burke*, 19 O. C. C. 450 (1900); s. c., 19 O. C. C. 513.

Conversion of corporate property — rights of stockholders.

Where a corporation has disposed of all its property for the purpose of defrauding a stockholder, the latter may maintain an action to annul such transaction, making the corporation, its directors and other guilty persons parties.—See *Dye v. Hermes*, 32 W. L. B. 120 (1894); *Shaw v. Ohio Edison, etc., Co.*, 19 W. L. B. 292 (1888).

Directors and Trustees — Powers, etc., § 3248.

Action by stockholder.

A stockholder in a corporation may maintain a bill in equity against the corporation, the directors and other stockholders upon allegations of fraudulent practices for the purpose of obtaining an account of the stock and funds, and for the restoration of whatever may have been fraudulently withdrawn from the corporate funds.—Taylor v. Miami Exporting Co., 5 Oh. 162 (1831).

Nature of action.

The action may be equitable even if money damages only are sought.—Meisse v. Loren, 5 N. P. 307 (1898); s. c., 8 Dec. 448; s. c., 4 N. P. 100; s. c., 6 Dec. 258.

Who is proper plaintiff.

The liability of directors is to the corporation or to the one representing its interests, as, for instance, a receiver, and it should institute proceedings to compel the directors to account; but if the corporation or the receiver refuses to sue, or if the board guilty of the misdeeds complained of is still controlling the corporation, a stockholder may sue on behalf of the corporation making it and other proper parties defendants.—See Meisse v. Loren, 5 N. P. 307 (1898); s. c., 8 Dec. 448; Robinson v. Cleve., etc., Ry. Co., 5 N. P. 293 (1898); s. c., 7 Dec. 312; Larwill v. Burke, 19 O. C. C. 450 (1900); Egbert v. Third, etc., Bldg. Ass'n, 9 Dec. 646 (1899).

Same subject.

An action against directors for damages to corporate property caused by negligence or mismanagement can only be brought by or on behalf of the corporation, and not by a stockholder or one indirectly injured.—Zinn v. Baxter, 17 O. C. C. 283 (1898); s. c., 9 C. D. 731; s. c. (Sup. Ct.), 46 W. L. B. 271 (1901).

Parties plaintiff.

A creditor and a stockholder of a corporation may join as plaintiffs and bring an action for the benefit of all the corporate creditors and stockholders where they are very numerous, and it is impracticable to bring them all before the court, but other creditors may come in and be made parties defendant.—Meisse v. Loren, 5 N. P. 307 (1898); s. c., 8 Dec. 448.

Action for negligence follows stock.

Any rights a stockholder may have on account of the negligence or mismanagement of directors follows his stock on its sale by him.—Zinn v. Baxter, 17 O. C. C. 283 (1898); s. c., 9 C. D. 731; s. c. (Sup. Ct.), 46 W. L. B. 271 (1901).

Rights of equitable stockholders.

An equitable owner of stock, being the real party in interest, may bring in his own name an action against directors.—Larwill v. Burke, 19 O. C. C. 450 (1900).

Parties to stockholder's bill.

The corporation, the directors and other stockholders are proper parties to a stockholders' bill against directors for an accounting.—Taylor v. Miami Exporting Co., 5 Oh. 162 (1831). See Dodge v. Woolsey, 18 How. (U. S.) 331 (1855).

Stockholder's bill, motive.

It is no defense to a stockholder's bill against directors that the plaintiff has some interests other than in his stock which will be benefited by the relief sought.—Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118 (1895); s. c., 5 Dec. 41. See Kuhn v. Woolson Spice Co., 13 O. C. C. 547 (1897); s. c., 7 C. D. 289; Cincinnati Volksblatt Co. v. Hoffmeister, 43 W. L. B. 142 (1900); Stewart v. Little Miami R. R. Co., 14 Oh. 353, 358 (1846); Sommers v. Cincinnati, 8 A. L. Rec. 612, 624 (1880).

Same subject — puppet of competitor.

Prima facie every stockholder may come into court as representing all the shareholders to prevent an illegal act of the directors, and the court does not require any evidence that the remaining shareholders have concurred in the filing of the bill, because if the act be illegal it is presumed to be for the benefit of all that it should be stopped; but not so when it appears that the plaintiff is not moving in his own behalf, but is set in motion by some one who undertakes to pay the costs and to indemnify him against all risk; then the action can no longer be considered as under the direction of the plaintiff bona fide, but in the hands of another, for whom the plaintiff is a puppet, and the bill will be dismissed.—Gallagher v. Johnson, 31 W. L. B. 24 (1894); Kuhn v. Woolson Spice Co., 13 O. C. C. 547 (1897); s. c., 7 C. D. 289. See Buning v. Cincinnati, etc., R. R. Co., 1 O. C. C. 323, 325 (1896); s. c., 1 C. D. 178.

Same subject — estoppel.

A decree in a suit brought by the trustee of a mortgage for the foreclosure of the same does not estop the same person suing as a stockholder.—Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118 (1895); s. c., 5 Dec. 41.

When stockholders not in pari delicto from illegal contract.

See National Salt Co. v. United Salt Co., 12 Dec. 386 (1902).

Aquiescence of stockholders.

Where the directors of a company add a new feature to the corporate business, acting in good faith, and the stockholder acquiesced in such action, they are not liable for losses sustained by the corporation.—Bond v. Coe, 12 O. C. C. 281 (1893); s. c., 4 C. D. 10. See Larwill v. Burke, 19 O. C. C. 513 (1900); Foster v. Railway Co., 36 Fed. 627 (1888).

Nonconcurrence of stockholders.

Where the complaining stockholder represents a very small fraction of the stock of the company, it seems that the court will take into consideration the attitude of the holders of the balance of the stock.—*Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518, 523 (1887); s. c., 1 C. D. 618; *Robinson v. Cleveland, etc., Ry. Co.*, 5 N. P. 293, 305 (1898); s. c., 7 Dec. 312.

When injunction granted.

The fact that illegal or fraudulent acts have been committed by the board of directors of a corporation will not entitle a shareholder or creditor to an injunction where there is no threatened repetition of such acts.—*North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899); s. c., 8 Dec. 594.

When injunction not dissolved.

A temporary injunction against directors will not be dissolved where part of the officers are insolvent, the solvency of the company doubtful, and it is uncertain that they will use the corporate funds properly.—*Upson v. Rock, etc., Quarry Co.*, 2 C. L. Rep. 355 (1879).

What breaches of trust will be set aside.

A director is a trustee for the company, and whenever he acts against its interests, no matter how much he thereby benefits foreign interests of the individual stockholders, or how many individual stockholders act with him, he is guilty of a breach of trust, and a court of equity will set his acts aside at the instance of creditors or stockholders who are damaged thereby. Any act of the directory by which they intentionally diminish the value of the stock or property of the company is a breach of trust.—*Goodin v. Cincinnati, etc., Canal Co.*, 18 Oh. St. 169, 183 (1868).

Same subject — illustration.

Where a railroad company purchased a majority of the shares of stock in a canal company, and elected for the latter a board of directors who were in its interests, and then appropriated the lands and canal of the canal company as a right of way, paying therefor a price agreed upon by the directors of the two companies, but which was far below the actual value, it was held that the stockholders of the canal company could compel the railroad company to account for the actual value of the property.—*Goodin v. Cincinnati, etc., Canal Co.*, 18 Oh. St. 169 (1868).

Defenses of directors.

It is no defense on demurrer that some of the defendants have been directors longer than others. The court will fix the liabilities according to the circumstances.—*Meisse v. Loren*, 5 N. P. 307 (1898); s. c., 8 Dec. 448.

Settlement, when no defense.

When an action is brought by stockholders in a company against such company, and its assignee for the benefit of creditors, to set aside a deed of assignment for fraud or want of power to make the deed, a settlement between the company and its assignee, satisfactory to both, will not be a settlement as against the complaining stockholders, unless they consent to the same.—*Standard, etc., Co. v. Jones*, 45 W. L. B. 197 (1901); s. c., 64 Oh. St. 147.

Numbering causes of action.

An action by a depositor and stockholder of a bank on behalf of stockholders and creditors states equitable causes of action, and need not be separately stated and numbered.—*Meisse v. Loren*, 4 N. P. 100 (1897); s. c., 6 Dec. 258.

Cross-petitioners.

A creditor or stockholder may come in and be made a party defendant and join in the prayer of the petition. He should allege his interest in the matter as a stockholder or creditor, and he may adopt the allegations of the petition without restating the facts, or he may adopt a part and restate a part.—*Meisse v. Loren*, 5 N. P. 307 (1898); s. c., 8 Dec. 448.

Action by general creditor.

Query: Can a general creditor proceed in equity against the directors of a corporation before obtaining judgment and exhausting his remedies at law?—*Meisse v. Loren*, 4 N. P. 100 (1897); s. c., 6 Dec. 258; s. c., 5 N. P. 307 (1898); s. c., 8 Dec. 448; *North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899); s. c., 8 Dec. 594.

Trust relation of directors to creditors.

See notes to § 3266.

Action by stranger.

One who has sold his stock or lost the same through legal proceedings cannot maintain an action against the directors of a corporation for damages resulting from the impairment of the value of his stock caused by their negligence.—*Ziun v. Baxter*, 17 O. C. C. 283 (1898); s. c., 9 C. D. 731.

Stockholders' bill to enforce active duties of directors.

A stockholder cannot invoke the aid of a court of equity to enforce an active duty within the powers of the directors, though he may restrain ultra vires or fraudulent acts.—*Port Clinton R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 Oh. St. 544, 561 (1862). See *Straman v. North Baltimore Water Works Co.*, 8 O. C. C. 89, 101 (1893); s. c., 4 C. D. 339.

Injunction against cutting price.

Where two companies are competing in the same line of business, and one company lowers

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the price of its goods below what is considered the cost price thereof, the other company having acquired some of the shares of stock of such competing company, cannot go into a court of equity and ask for an injunction to restrain the managers and directors of such competing company from selling their goods at such a low price on the ground that the company is being operated in the interest of a third company.—*Kuhn v. Woolson Spice Co.*, 13 O. C. C. 547 (1897); s. c., 7 C. D. 289.

When equity will not interfere with directors.

A court of equity will not, on the application of a stockholder, interfere with the board of directors in its management and control of a corporation when acting within the scope of its authority and in the absence of fraud or breach of trust.—*Sims v. Street R. R. Co.*, 37 Oh. St. 556 (1882); *Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618; *Baltimore v. Hillsborough, etc., R. R. Co.*, 10 W. L. B. 337 (1853).

Same subject.

A court of equity will not interfere with the internal management of a corporation unless it becomes necessary to keep it within the scope of its powers, or to call to account some officer or agent for breach of trust.—*Cronin v. Potter's Co-op. Co.*, 29 W. L. B. 52, 58 (1892).

Stockholders' application for receiver.

A receiver will not be appointed on a mere showing that there is a difference of opinion as to the manner of conducting the affairs of the company.—*Straman v. North Baltimore Water Works Co.*, 8 O. C. C. 89 (1893); s. c., 4 C. D. 339.

Same subject.

A receiver will not be appointed on a stockholder's application, founded on the fraudulent acts of directors, unless an injunction will not afford full relief and protection.—*Behrens v. Equality Bldg. Ass'n*, 2 N. P. 259 (1895); s. c., 3 Dec. 275; *Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618; *Robinson v. Cleveland, etc., Ry. Co.*, 5 N. P. 293 (1898); s. c., 7 Dec. 312;

North Fairmount, etc., Co. v. Rehn, 6 N. P. 185, 191 (1899); s. c., 8 Dec. 594.

Appointment of receiver on application of directors.

A court has no power on the application of the directors of a company as such, without any showing of individual rights in the property of the company to appoint a receiver without notice to stockholders.—*Schone v. Consolidated, etc., Savings Co.*, 4 N. P. 216 (1897); s. c., 6 Dec. 246.

When receiver will be appointed.

A court of equity has authority, at the suit of a stockholder, to enjoin unlawful conduct on the part of the directors; and if it be made clearly to appear to the court that the appointment of a receiver is really necessary to effect the purpose of a suit, as, for instance, if it clearly appear that, unless the property is placed in the hands of an officer of the court, it will be fraudulently and instantly disposed of by the directors, a receiver may be appointed; but in the absence of such necessity, and where full relief may be afforded by injunction, the appointment of a receiver is an abuse of discretion.—*Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618.

Suit in equity—multiplicity of suits.

Chancery will not, at the suit of a stockholder, take jurisdiction of distinct and separate matters and unite with them the settlement of the transactions of a corporation in one suit, because such single litigation may prevent a sacrifice of property, and be most beneficial to stockholders and creditors.—*Merrill v. Lake*, 16 Oh. 373 (1847).

Suit—when one person owns all but one share.

When a person owning all but one share in a corporation converts the property to his own use, the stockholder owning the one share may bring suit against him and not against the company.—*Dye v. Hermes*, 32 W. L. B. 120 (1894).

Appointment of nonresidents as receivers.

See § 3415.

§ 3249. CORPORATION MAY ADOPT REGULATIONS.—Every corporation may adopt a code of regulations for its government, not inconsistent with the constitution and laws of the state.

Term of office.

Neither the incorporators nor the trustees first elected are authorized to adopt a by-law or regulation providing that they shall hold office during life, and in case of vacancy to fill the same by appointment.—*State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882).

Transfer of stock.

A corporation may regulate the mode and manner of transferring the legal title of stock issued by it.—See *Nat. Bank v. Lake Shore, etc., Ry. Co.*, 21 Oh. St. 221, 232 (1871).

Same subject.

A by-law which provides that a stockholder desiring to sell his stock must sell to the com-

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pany, is void as violating public policy.—*Fassler v. Whiteley*, 17 W. L. B. 141 (1887).

Regulations must be reasonable.

See *Hagerman v. Ohio Bldg., etc., Ass'n*, 25 Oh. St. 186, 202 (1874); *Forest City, etc., Ass'n v. Gallagher*, 25 Oh. St. 208.

By-laws violating the constitution are void.

State ex rel. v. Cincinnati, 23 Oh. St. 445 (1872).

Regulations concerning treasurer.

The power to appoint a treasurer is not derived by the corporation from its by-laws, but its charter. The power and duty of the treasurer is not derived from the by-laws, but the charter. The corporation would have no power to confer authority or impose duties upon the treasurer as such not consistent with the office of treasurer.—See *Portage County Ins. Co. v. Wetmore*, 17 Oh. 330 (1848).

Regulations concerning corporate existence.

A court of equity will not decree the dissolution of the company because of a by-law limiting its life, nor will it by decree in personam against the stockholders enforce a dissolution.—*Cronin v. Potters' Co-op. Co.*, 29 W. L. B. 52 (1892).

By-laws adopted unanimously.

A by-law adopted unanimously has no greater force than it would have if it had been adopted by a majority and attested by the officers of the meeting instead of being subscribed by all the stockholders.—*Wangerien v. Aspell*, 47 Oh. St. 250, 260 (1890); *Cronin v. Potters' Co-op. Co.*, 29 W. L. B. 52, 58 (1892).

Power of directors.

Where the directors of a hospital are empowered to make by-laws and regulations, a city council cannot be authorized by special act to approve or reject such by-laws.—*State ex rel. v. Cincinnati*, 23 Oh. St. 445 (1872).

Unreasonable by-law.

The directors cannot pass any unreasonable by-laws, as, for instance, one prohibiting the

Regulations prohibiting recourse to courts.

A regulation or by-law which precludes a member from going into court to assert a right, but requiring him to submit to the tribunal provided for by the order, of which he is a member, is void.—*Myers v. Lucas*, 16 O. C. C. 545 (1898); s. c., 8 C. D. 431.

By-laws governing expulsion.

See *Cheney v. Ketcham*, 5 N. P. 139 (1897); s. c., 7 Dec. 183; *Blumenthal v. Cincinnati, etc., Exchange*, 7 W. L. B. 327 (1882).

By-law established by custom.

A by-law of a corporation may be created and made binding upon the members thereof by custom, where such custom is shown to be a uniform rule of action and acquiesced in by all the members.—*Stafford v. Produce Exchange Banking Co.*, 16 O. C. C. 50 (1898); s. c., 8 C. D. 483.

Estoppel to deny by-laws.

A person acquiring membership in a corporation by virtue of one of the provisions of its by-laws, is estopped to deny his obligation to be bound by rules and regulations which are a part of the same by-laws governing his conduct as such member, on the ground that such by-laws had not been legally adopted.—*Cheney v. Ketcham*, 5 N. P. 139 (1897); s. c., 7 Dec. 183; *State ex rel. v. Cincinnati, etc., Exchange*, 4 N. P. 244 (1897); s. c., 6 Dec. 363.

This section is directory.

A corporation is not obliged to pass regulations, this section being directory.—See *Proprietors, etc., Bank v. Wade*, 7 W. L. J. 95 (1849).

§ 3250. **TRUSTEES OR DIRECTORS MAY ADOPT BY-LAWS.**—The trustees or directors of a corporation may adopt a code of by-laws for their government, not inconsistent with the regulations of the corporation, or the constitution and laws of the state, and may change the same at pleasure.

transfer of stock paid for by the secured note of the subscriber.—*Andes Ins. Co. v. Waters*, 1 W. L. B. 172 (1876).

Construction of by-laws and regulations.

By-laws and regulations are subject to the same rules of construction as statutes.—*Burke v. Home, etc., Ass'n*, 7 W. L. B. 114 (1882).

§ 3251. **HOW REGULATIONS MAY BE ADOPTED.**—Regulations may be adopted or changed by the assent thereto, in writing, of two-thirds of the stockholders, or, if there is no capital stock, of the members, or by a majority of the stockholders or members, at a meeting held for that purpose, notice of which has been given by the acting president personally to each member or stockholder, or by publication in some

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newspaper of general circulation in the county in which the corporation is located, or in the counties through which its improvement does or will pass.

Amendment of regulations.

The fact that the constitution and by-laws of a corporation are signed by the members does not make them any more binding, for whether signed or not, they are the law of the corporation, binding upon all of its members, until altered or amended, and the circumstance that they were signed does not take away the right and power of amendment which is incidental to all corporations.—*Wangerien v. Aspell*, 47 Oh. St. 250, 260 (1890); *Cronin v. Potters' Co-op. Co.*, 29 W. L. B. 52 (1892).

Same subject.

The by-laws of a corporation may provide that they shall not be altered or amended

without the consent of all, or some fixed proportion of the members, in which case to be binding an amendment or alteration must secure the assent of the stipulated number.—*See Wangerien v. Aspell*, 47 Oh. St. 250, 260 (1890).

Same subject.

Where the by-laws contain no provision for amendment they are amendable under this section.—*Wangerien v. Aspell*, 47 Oh. St. 250, 260 (1890); cited in *Morris v. Griffith*, 34 W. L. B. 191 (1895). See notes to § 3249.

Proof of by-laws.

See *Hagerman v. Ohio*, etc., Ass'n, 25 Oh. St. 186 (1874).

§ 3252. WHAT MAY BE PROVIDED FOR BY REGULATIONS.—A corporation, by its regulations, when no other provision is specially made in this title, may provide for—

1. The time, place, and manner of calling and conducting its meetings.
2. The number of stockholders or members constituting a quorum.
3. The time of the annual election for trustees or directors, and the mode and manner of giving notice thereof.
4. The duties and compensation of officers.
5. The manner of election, or appointment, and the tenure of office, of all officers other than the trustees or directors.
6. The qualification of members, when the corporation is not for profit.

Change of place of business.

This section does not seem to authorize a change of the principal place of business of a corporation, but if it does, it can have no application to manufacturing companies for they are provided for by § 3855.—*Mercantile Trust Co. v. Aetna Iron Works*, 4 O. C. C. 579, 588 (1890); s. c., 2 C. D. 718.

Treasurer—when suit may be brought for default.

Suit may be brought against the treasurer of a company as soon as he has made default and company need not wait till his successor is elected.—*Marlborough Ass'n v. Peters*, 60 N. E. 396 (Mass. 1901).

Treasurer.

See as to regulations of duties of treasurer, *Portage Co. Ins. Co. v. Wetmore*, ante, § 3249; as to regulations as to tenure of office and election, see *Lutterby v. Herancourt Brewing Co.*, 12 Dec. 67, 76 (1901).

Executive committee—powers.

Under an appointment, giving the executive committee of a corporation power to discharge the duties of the board of directors, but not to incur debts except for current expenses unless specially authorized, their authority to mortgage the realty of the company to pay current debts is denied.—*Ohio Valley Nat. Bank v. Walton*, etc., *Iron Co.*, 30 W. L. B. 382 (1893). See *Morris v. Griffith*, 34 W. L. B. 191 (1895).

§ 3253. HOW PAYMENT OF STOCK SUBSCRIPTIONS ENFORCED.—If an installment of stock remain unpaid for sixty days, after the time it is required to be paid, whether such stock is held by an assignee, transferee, or the original subscriber, the same may be collected by action, or the directors may sell the stock so unpaid at public auction, for the installment then due thereon, first giving thirty days' public notice of the time and place of sale, in some newspaper in general circulation in the county where the delinquent stockholder resided at the time of making the subscription, or of becoming such assignee or transferee, or of his actual residence at the time of the sale; or, if such stockholder resides out of the state, such publication shall be made in the county where the principal office of the company is located; if any resi-

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due of money remain after paying the amount due on the stock, the same shall, on demand, be paid to the owner; and if the whole of the installment be not paid by the sale, the remainder shall be recoverable by an action against the subscriber, assignee, or transferee. (May 1, 1852, 50 v. 274, § 7; March 14, 1853, 51 v. 484, § 1.)

Mutuality of subscription.

A subscription made on the opening of books by the corporation is enforceable notwithstanding the company has not been fully organized by election of directors.—*Milford, etc., Turnpike Co. v. Brush*, 10 Oh. 111 (1840).

Abandonment of subscription.

If a company does any act which amounts to an admission of the existence of a contract, it cannot claim that the subscription has been abandoned.—*Iron R. R. Co. v. Fink*, 41 Oh. St. 321, 331 (1884).

Waiver of company rights.

If a company elects to waive its rights under this section, the subscriber may pay his subscription and obtain all the right of a stockholder.—*Iron R. R. Co. v. Fink*, 41 Oh. St. 321, 322 (1884).

Liability of person signing another's name.

Where a person signs a subscription to stock in the name of another person without authority, his own name nowhere appearing in the paper, he cannot be held liable.—*Cincinnati Hotel Co. v. Marsh*, 9 W. L. B. 176 (1863).

Subscription payable in land.

On a subscription payable in land, the recovery is not the nominal value of the stock, but is the land and damages for the delay, or if there be no land, then proper compensation in damages for the loss of the land.—*Dayton, etc., R. R. Co. v. Hatch*, 1 Dis. 84 (1855).

Payment by note.

A stockholder who has paid his subscription by his note for the amount due, has the relation of borrower from the company, and has no other or greater rights than those who paid for their stock and borrowed nothing.—*Union, etc., Ins. Co. v. Curtis*, 35 Oh. St. 343 (1880); *Union, etc., Ins. Co. v. Latham*, 1 W. L. B. 127 (1876).

Forfeiture of stock.

A company cannot, without following the statute, forfeit the stock of a subscriber and appropriate the amount paid to the use of the company.—*Iron R. R. Co. v. Fink*, 41 Oh. St. 321, 329 (1884).

Injunction against forfeiture.

A forfeiture of stock by order of the directors, although doubtless good between the stockholders and the corporation, may be fraudulent as to outside parties, and therefore may be enjoined at their instance.—*Upson v. Rocky, etc., Quarry Co.*, 2 C. L. Rep. 355 (1879).

When right of action accrues.

A right of action on a subscription to capital stock does not accrue until a call is made for payment.—*Gibson v. Columbia, etc., Bridge Co.*, 18 Oh. St. 396 (1868); *Iron R. R. Co. v. Fink*, 41 Oh. St. 329 (1884); *Warner v. Callender*, 20 Oh. St. 190 (1870).

Statute of limitations.

An action to recover on a stock subscription being founded on an instrument in writing, the limitation is fifteen years.—*Gibson v. Columbia, etc., Bridge Co.*, 18 Oh. St. 396 (1868); *Iron R. R. Co. v. Fink*, 41 Oh. St. 321, 329 (1884); *Warner v. Callender*, 20 Oh. St. 190 (1870).

Same subject — demand notes.

Where the subscribers to the stock of a company give notes payable on demand for the amount of their stock, such notes must be construed in connection with the nature of the corporate business, and in view of the object intended by the parties. Therefore it will be held that the notes were intended to be payable on the call of the directors, and hence the statute of limitations would be no more available as a defense in an action on the notes than if the action were on the subscriptions.—*Kilbreath v. Gaylord*, 34 Oh. St. 305 (1877).

Pleading — calls.

In an action to recover on a stock subscription, the facts of the call by the directors and notice of the same should be pleaded with convenient certainty of time and place.—*Pa., etc., Canal Co. v. Webb*, 9 Oh. 136 (1839); *Mansfield, etc., R. R. Co. v. Hall*, 26 Oh. St. 310 (1875).

Same subject — issue of stock.

A readiness and willingness to issue and deliver certificates of stock should be alleged.—*James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 261 (1858).

Same subject — conditional subscription.

In an action on a railroad subscription contract, conditioned to be paid in installments as might from time to time be called for by the directors, provided the same should be expended upon a certain line of road to be thereafter located by the company, the petition is defective unless it shows that the road has been constructed along the line designated, or an offer and readiness to expend the money subscribed according to the condition; that the company acceded to the conditions of the subscription and facts showing that it had become absolute.—*Trott v. Sarethett*, 10 Oh. St. 241 (1859).

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Effect of misnomer.

A subscription payable to the president and directors of a company is enforceable in the name of the company.—*Milford, etc., Turnpike Co. v. Brush*, 10 Oh. 111 (1840).

Demand before suit.

See *Proprietors, etc., v. Wade*, 7 W. L. J. 95 (1849).

Action by receiver on dissolution.

A receiver appointed to collect the assets of a company on dissolution, must commence actions at law to recover on stock subscriptions. It is not proper practice to join in one suit in equity all delinquent stockholders as defendants, those who reside out of the county where the suit is brought, as well as those who reside within such county, and issue summons to another county to obtain service upon such nonresidents; and where nonresidents are so brought in and served, a motion to set aside service will be sustained.—*Smith v. Johnson*, 57 Oh. St. 486 (1898).

Defense — failure to pay ten per cent.

It is no defense that the defendant stockholder has failed to pay ten per cent. of his subscription at the time the same was made.—*Henry v. Vermilion, etc., R. R. Co.*, 17 Oh. 187 (1848).

Same subject — act of forfeiture.

It is no defense that the company has committed an act which would entitle the state to forfeit its charter; as, for instance, that it failed to commence work within the time prescribed by its charter.—*Milford, etc., Turnpike Co. v. Brush*, 10 Oh. 111 (1840).

Same subject — abandonment of work.

It is no defense that the company has failed to complete the work contemplated nor that it has abandoned a part of the same when no condition to that effect is expressed in the subscription.—*Armstrong v. Karshner*, 47 Oh. St. 276 (1890).

Same subject.

A company will not be held to have abandoned the enterprise if it makes such progress as it can with its available means.—*Gibson v. Columbia, etc., Bridge Co.*, 18 Oh. St. 396 (1868).

Same subject — alteration of subscription.

In an action on a stock subscription which after its execution had been materially altered without the knowledge or consent of the maker, the plaintiff cannot recover the amount due on the original subscription without showing that the alteration was not fraudulently made.—*Bery v. Marietta, etc., Ry. Co.*, 26 Oh. St. 673 (1875).

Same subject — change of other subscription.

It is no defense to an action on a subscription that another subscriber has, by secret agreement with the directors, been permitted to change his subscription by reducing the number of shares when that subscription was relied on by other subscribers, and the circumstances attending the change were such as amounted to fraud upon other subscribers, and rendered the change a nullity.—*Jewett v. Valley, etc., Ry. Co.*, 34 Oh. St. 601 (1878).

Same subject — change of subscription.

It is no defense that a secret agreement was made with the directors of a company allowing the subscriber to reduce the number of shares subscribed for, the subscription being held out as valid for the full amount to induce others to subscribe, such agreement being void.—*Jewett v. Valley, etc., Ry. Co.*, 34 Oh. St. 601, 609 (1878). See *Bates v. Lewis*, 3 Oh. St. 459 (1854).

Same subject — change of nature of stock.

If a company so changes the nature and character of its capital stock as to make it substantially a new stock and entirely different from what the defendant agreed to receive, in effect destroying the subject-matter of the contract, there can be no recovery.—*James v. Cincinnati, etc., R. R. Co.*, 2 Dis. 261 (1858); *Covington, etc., Bridge Co. v. Sargent*, 1 C. S. C. 354 (1871).

Same subject — amendments to charter.

The acceptance of an amendment to its charter by the company, materially changing its business, is a defense.—*Marietta, etc., R. R. Co. v. Elliott*, 10 Oh. St. 57 (1859).

Same subject — change of termini.

It is a defense to an action on a subscription to the stock of a railroad company that the company has changed its termini.—*Marietta, etc., R. R. Co. v. Elliott*, 10 Oh. St. 57 (1859). Contra, *Jewett v. Valley Ry. Co.*, 34 Oh. St. 601 (1878).

Cancellation of subscriptions.

A corporation may cancel a subscription on the ground of mistake.—See *Biggio v. Sandheger*, 8 N. P. 13, 15 (1900). See § 3239, power to buy stock.

Same subject — change of route.

An immaterial change of the route of a turnpike or railroad company is no defense.—*Milford, etc., Turnpike Co. v. Brush*, 10 Oh. 111 (1840). See *Pa., etc., Canal Co. v. Webb*, 9 Oh. 136 (1839); *Armstrong v. Karshner*, 47 Oh. St. 276 (1890). See § 3272 et seq.

Same subject — fraud.

False representations as to the future intention or expectation of the company will not defeat a recovery, especially where there is no

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intent to deceive.—*Armstrong v. Karshner*, 47 Oh. St. 276 (1890); *Freeman v. Muth*, 3 W. L. B. 914 (1878).

Defense — former judgment.

See *Hanes v. Dayton, etc.*, R. R. Co., 40 Oh. St. 95 (1883).

Same subject — nul tiel corporation.

See *Raccoon River Nav. Co. v. Eagle*, 29 Oh. St. 238 (1876).

Estoppel of stockholder to deny existence of corporation.

See § 3236, note.

Rescission for fraud.

A subscriber to stock may maintain an action to rescind his subscription when he was induced to subscribe through the fraudulent representations of the company.—*Nugent v. Cincinnati, etc.*, R. R. Co., 2 Dis. 302 (1858).

Set-off.

See *Dungan v. Safford*, 41 Oh. St. 15 (1884).

Liability of transferrers.

Unless a special agreement is made, there is no liability by subscribers who have transferred their subscriptions of stock and paid all calls to the time of transfer.—*Gilmore v. Bank of Cincinnati*, 8 Oh. 62, 71 (1837).

Same subject.

A transfer to an irresponsible party will not release a stockholder from payment.—See *Gaff v. Flesher*, 33 Oh. St. 107 (1877).

Same subject.

A transfer to a fictitious person is a nullity, and does not operate to release a subscriber.—*Muskingum, etc.*, Turnpike Co. v. Ward, 13 Oh. 120 (1884). See *Krohn v. Central, etc.*, Bridge Co., 4 N. P. 270 (1897); s. c., 6 Dec. 552.

Subrogation of transferee.

An original stockholder who has been compelled to pay calls on stock after he has assigned it, is entitled to be subrogated to the rights of the corporation against the delinquent assignee upon clear proof of the acceptance of the transfer by the assignee.—*Tripp v. Appleman*, 35 Fed. 19 (1888).

Liability of transferee.

The transferee of stock impliedly assumes all the obligations which rested on the former holder, and is liable for calls to the same extent as the former holder before the transfer was made.—*Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890); *Gilmore v. Bank of Cincinnati*, 8 Oh. 62, 71 (1837).

Enforcement by creditors in equity.

A creditor's bill will lie against a stockholder of an incorporated company to compel him to pay over to a judgment creditor the

amount of his subscription which had not been paid to the company.—*Gilmore v. Bank of Cincinnati*, 8 Oh. 62, 71 (1837); *Henry v. Vermilion, etc.*, R. R. Co., 17 Oh. 187 (1848).

Calls after insolvency.

For the purposes of an action by creditors, subscriptions will either be regarded as due, or a court of equity will itself make the calls and enforce their payment.—*Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890); *Henry v. Vermilion, etc.*, R. R. Co., 17 Oh. 187, 191 (1848).

Action by creditor, joinder of parties.

In an action by a creditor to reach unpaid subscriptions, stockholders may be called to answer in the county in which the judgment debtor has lawfully proceeded against them, though they may reside in a different county.—*Ewin v. Cincinnati, etc.*, R. R. Co., 2 W. L. M. 42 (1859).

Same subject.

The assignee of the company and a judgment creditor and all the stockholders may be joined. *Sayler v. Simpson*, 12 Dec. 148 (1888).

Want of remedy at law — pleading.

If it be alleged that by reason of an assignment for the benefit of creditors or other circumstances, the assets of the company have been put beyond the reach of process at law, it need not be alleged that judgment has been obtained and execution issued without avail.—*Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890); *Peter v. Farrell, etc.*, Machine Co., 53 Oh. St. 534, 557 (1895).

Stockholders cannot question creditor's judgment.

A stockholder cannot defend on the ground that the judgment of the creditor plaintiff is irregular, the corporation having made a defense or been duly served, the judgment cannot be collaterally impeached.—*Henry v. Vermilion, etc.*, R. R. Co., 17 Oh. 187, 191 (1848).

Action by creditor — pleading.

In a suit by a creditor as against a general demurrer it is sufficient to state that the defendants held stock, the amounts severally held, that it was never fully paid, and that a specified amount is due from each.—*Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890).

Jurisdiction.

At the instance of a creditor, a court of equity will take cognizance of a suit to subject unpaid subscriptions, notwithstanding an assignee may be in charge of the corporate assets.—See *Painesville, etc.*, Bank v. King Varnish Co., 8 O. C. C. 563 (1894); s. c., 4 C. D. 511.

Statute of limitations as to creditors.

Unless circumstances intervene to make it inequitable, a creditor may file a bill to col-

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leet stock subscriptions within fifteen years.—See *Warner v. Callender*, 20 Oh. St. 190 (1870).

Same subject.

The right of creditors may be lost by delay or laches.—*Gilmore v. Bank of Cincinnati*, 8 Oh. 62, 71 (1837).

Where creditor's action is to set aside fraudulent payment of subscriptions. See *Saylor v. Simpson*, 12 Dec. 148 (1888).

Joinder of actions to reach unpaid subscriptions and stockholders' liability.

See § 3260 et seq., and notes.

Lien of judgment creditor, filing creditors' bill.

See *Dunbar v. Harrison*, 18 Oh. St. 24 (1868); *Miers v. Zanesville, etc., Turnpike Co.*, 13 Oh. 197 (1844).

Enforcement by receiver — contribution.

When a suit is brought by a receiver of an insolvent corporation against a subscriber, and judgment is rendered for the balance due on a stock subscription, the court appointing the receiver has power to so control his conduct as to direct him to collect only such part of the judgment as will be the debtor's fair proportion of the sum necessary to discharge the debts.—*Clark v. Thomas*, 34 Oh. St. 46 (1877).

Injunction against directors.

An injunction will be granted on the application of a creditor seeking to subject unpaid subscriptions, when it is necessary to prevent the directors from fraudulently disposing of the funds arising from the collection of subscriptions.—*Upson v. Rocky, etc., Quarry Co.*, 2 C. L. Rep. 355 (1879).

Defense — capacity of plaintiff.

The fact that the plaintiff is a creditor as well as assignee of the company is no defense.—*Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890).

Defense — agreement to pay in property.

In an action by creditors, stockholders who have attempted to secure by agreement the privilege of paying their subscriptions in goods or otherwise except in money as contemplated by the charter, will not be allowed the benefit of such stipulations. Such an agreement will be considered as a fraud upon other stockholders, and the amount due must be paid in money.—*Henry v. Vermilion, etc., R. R. Co.*, 17 Oh. 187 (1848). See *Noble v. Callender*, 20 Oh. St. 199 (1870).

Payment in property at inflated value.

Where a corporation takes property in payment of a subscription at an inflated valuation though in good faith, the transaction will

be regarded as a subscription for the full amount agreed upon, and credit will be given for the actual value of the property. The balance left after applying this credit will be deemed a debt due from the subscriber to the corporation, and therefore corporate assets subject to claims of creditors.—*Gates v. Tippecanoe Stone Co.*, 57 Oh. St. 75 (1897). See *Lloyd v. Preston*, 146 U. S. 630 (1892).

Same subject.

Where the members of an insolvent partnership convert their business into a corporation, turning over to the corporation all the assets of the partnership in payment of their stock subscriptions, but the corporation also assuming all the liabilities of the partnership, nothing should be counted as a payment of the stock subscriptions, and the subscribers to such stock remain liable to the creditors of the corporation for their subscription.—*Ford v. Lamson*, 17 O. C. C. 539 (1899); s. c., 9 C. D. 374; *Preston v. Cincinnati, etc., R. R. Co.*, 36 Fed. 54 (1888); s. c., 6 O. F. D. 127. See *Saylor v. Simpson*, 12 Dec. 148 (1888).

Liability on stock sold below par.

If necessary to protect creditors who become such after the sale of stock by a corporation below par, the difference between the discount price and the par value of stock so sold may, it seems, be held as assets of the company for the benefit of creditors; that the court will consider all the equities of the case and may, in a proper case, leave such assets to be reached after stockholders' liability has been exhausted.—See *Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 198 (1897); *Sturges v. Stetson*, 3 O. F. D. 497 (1858); *Fosdick v. Sturges*, 1 Biss. (U. S.) 248 (1858).

Defense — fraud.

A subscriber who delays to act when he has been defrauded until a creditor starts a suit to subject unpaid subscriptions, cannot, as against creditors, defend on that ground.—*Painesville, etc., Bank v. King Varnish Co.*, 8 O. C. C. 563 (1894); s. c., 4 C. D. 511. See *Mansfield v. Woods*, 29 W. L. B. 111 (1893); *Ryan v. Miami, etc., Ry. Co.*, 10 A. L. R. 263 (1881).

Defense — invalidity of issue of stock.

A subscriber to stock who acts as a stockholder cannot defend on the ground of the invalidity of the issue of the stock as against creditors.—*Clark v. Thomas*, 34 Oh. St. 46 (1877).

Defense — stock in name of other party.

It is no defense to a claim for unpaid subscriptions that the stock stands in the name of another party, as equitable holders are liable.—*Lloyd v. Preston*, 146 U. S. 630 (1892).

Set-off.

In an action by a creditor to reach stock subscriptions, a stockholder cannot set off a

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claim due him from the company.—Painesville, etc., Bank v. King Varnish Co., 8 O. C. C. 563 (1894); s. c., 4 C. D. 511; Union, etc., Ins. Co. v. Jones, 35 Oh. St. 351 (1880).

Defense — illegality of corporation.

A stockholder, when called upon by creditors to pay the balance due on stock subscriptions, cannot defend on the ground that the incorporation was illegal, as, for instance, that the subscriptions were made before the articles were filed.—Royce v. Tyler, 2 O. C. C. 175 (1887); s. c., 1 C. D. 428. See Warner v. Callender, 20 Oh. St. 190 (1870); Mansfield v. Mutual, etc., Ins. Co., 29 W. L. B. 111 (1893).

Defense — ouster of corporation.

Where a corporation de facto in a proceeding in quo warranto has been ousted from the franchise of being a corporation, such ouster is no defense to a suit by a creditor against stockholders.—Rowland v. Meader Furniture Co., 38 Oh. St. 269 (1882).

Defense — notification to company of termination of liability.

It is no defense as against creditors that the subscriber has notified the company that he would not be liable for debts on the assumption that the corporate existence was without authority of law.—Gaff v. Flesher, 33 Oh. St. 107 (1877).

Defense — subscription not to be paid.

It is no defense, as against creditors, that a subscription was not to be paid, but was to be used solely to prove to the public that the stock had been subscribed, and to prevent the control of the company from passing to other parties.—Bates v. Lewis, 3 Oh. St. 459 (1854).

Agreement as to individual liability.

A stipulation in a mortgage that stockholders should in no way be individually liable

for the debts of the company does not release stockholders from liability to creditors on stock subscriptions.—Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (1889). See Preston v. Cincinnati, etc., R. R. Co., 36 Fed. 54 (1888).

Liability of stockholders to de facto company.

The stockholders in a de facto company stand in the same relation to creditors as stockholders of a de jure corporation.—Rowland v. Meader Furniture Co., 38 Oh. St. 269 (1882).

Cancellation of subscription.

In an action by creditors it is no defense that certain of the defendants, under an arrangement with one of the promoters of the enterprise, drew up and signed a cancellation of their subscriptions.—Royce v. Tyler, 2 O. C. C. 175 (1887); s. c., 1 C. D. 428; Warner v. Callender, 20 Oh. St. 190, 198 (1870).

Defense — change of subscription.

An oral agreement made between a subscriber to the capital stock of a company and its president that another should take a certain number of shares of the stock subscribed for, and pay to the corporation a proportionate share of the subscription, is not available as a defense to an action brought to enforce the payment of the subscription for the benefit of creditors.—Painesville, etc., Bank v. King Varnish Co., 8 O. C. C. 563 (1894); s. c., 4 C. D. 511.

Creditor's action against state.

No action will lie by a creditor against the state to compel the payment of stock subscriptions.—Miers v. Zanesville, etc., Turnpike Co., 11 Oh. 273 (1842).

§ 3254. STOCKHOLDERS ENTITLED TO CERTIFICATES OF STOCK; RECORD.—Stockholders shall be entitled to receive (certificates) of their paid-up stock in the company; and the president and secretary of the company shall on demand, execute and deliver to a stockholder a certificate showing the true amount of the stock held by him in the company. And it shall be the duty of the directors of such corporation, when organized, to keep a record of all stock subscribed and transferred, and of the secretary or recording officer of such corporation to register therein all subscriptions and transfers of stock. For that purpose a book shall be kept and whenever any certificate or certificates of stock are assigned and delivered by a stockholder, the assignee thereof shall be entitled on demand to have the same duly transferred upon said book by such secretary or recording officer, whose duty it shall be at the same time to enroll therein also the name of said assignee as a stockholder, and the books and records of such corporation shall at all reasonable times be open to the inspection of every stockholder. (April 14, 1884, 81 v. 196; R. S. 1880.)

Duty to issue certificate of stock.

A corporation is bound under this section, through its proper officers, to issue to each subscriber, who has fully paid for his stock, a certificate truly representing his interest in the corporation.—State ex rel. v. Carpenter,

51 Oh. St. 83 (1894); Freon v. Carriage Co., 42 Oh. St. 30, 36 (1894).

Duty of company as to stock.

A company is charged with a duty of observing care in the issue of stock, and of

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supervising their agents charged with the performance of the duty. It owes this duty to all persons dealing in its stock, and if by reason of its negligence in this regard spurious stock is issued, it is liable in damages to any one purchasing it for value without knowledge of its fraudulent character; and a failure of the purchaser to inquire at the office of the company is not such contributory negligence as will deprive him of the right to recover, although such inquiry would have disclosed the fraudulent character of the stock.—*Cincinnati etc., Ry. Co. v. Citizens' Nat. Bank*, 56 Oh. St. 351 (1897). See *Robison v. Cleveland, etc., Ry. Co.*, 13 Dec. 1.

Duty where stock is held by trustees.

See *Fuller v. Cleveland, etc., Ry. Co.*, 8 N. P. 605 (1901); *Robison v. Cleveland, etc., Ry. Co.*, 13 Dec. 1.

Power of president and secretary to issue stock.

The acts of the president and secretary of a corporation in issuing stock are the acts of the corporation, for in such acts they represent it as a corporation, not as ordinary agents.—*Cincinnati, etc., Ry. Co. v. Citizens' Nat. Bank*, 56 Oh. St. 351 (1897). See *Farmers' Bank v. Diebold Safe, etc., Co.*, 47 W. L. B. 585 (1902).

Form of stock records.

This section does not provide in what form the records shall be kept, nor for a book of any special kind.—*Freon v. Carriage Co.*, 42 Oh. St. 30 (1884); *Harpold v. Stobart*, 46 Oh. St. 397, 400 (1889).

Issue of stock without surrender of outstanding certificate.

Where a certificate of stock is issued in favor of an officer, and is by him pledged, any future certificates issued to evidence the same shares and pledged to the company itself are void for want of a valid transfer, the original certificate not being surrendered as required by law. Such facts are notice to the company of the rights of others.—*Lee v. Citizens' Bank*, 2 C. S. C. 298 (1872).

Assignment in blank.

Stock may be assigned and an attorney appointed in blank.—*Lee v. Citizens' Bank*, 2 C. S. C. 298 (1872).

A certificate of stock is not classed as a negotiable instrument.

Farmers' Bank v. Diebold Safe, etc., Co., 47 W. L. B. 585 (1902). See *Railway Co. v. Bank*, 56 Oh. St. 351, 383 (1897).

Legal title to stock.

The legal title to stock is in the person appearing on the company books as owner, and he is entitled to vote thereon and receive dividends.—See *Norton v. Norton*, 43 Oh. St. 522 (1885); *National Bank v. Lake Shore, etc., Ry. Co.*, 21 Oh. St. 221 (1871).

Transfer of equitable title.

Although a transfer on the books of the company may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed, and the company is bound to respect such equity from the time it receives notice of it.—*Conant v. Reed*, 1 Oh. St. 298 (1853); *Haldeman v. Hillsborough, etc., R. R. Co.*, 2 Handy, 101 (1855). See *Straman v. North Baltimore, etc., Co.*, 8 O. C. C. 89, 99 (1893); s. c., 4 C. D. 339; *Armstrong v. Herancourt Brewing Co.*, 26 W. L. B. 39, 40 (1891); *Krebs v. Forbriger*, 21 W. L. B. 313 (1889).

Same subject.

A certificate of stock, being of the same nature as a chose in action, may be the subject of an equitable assignment by mere delivery without an indorsement or written transfer; and a proper transfer so as to permit the transferee to convert his equitable into a legal title may be compelled in equity as against the transferor or his personal representative.—*Lawler v. Kell*, 4 N. P. 218 (1897); s. c., 6 Dec. 311.

Reservation of dividends.

In the transfer of stock in a company no valid reservation can be made of any portion of a future dividend.—*Marble v. Van Wert Nat. Bank*, 3 O. C. C. 464 (1888); s. c., 2 C. D. 265.

Assignment with notice of prior assignment.

Whoever takes an assignment of stock, with notice of a prior assignment which conveyed the legal title, acquires no interest therein.—*Creed v. Lancaster Bank*, 1 Oh. St. 1 (1852).

Transfer to trustee.

A shareholder has the right, for a legitimate and proper purpose, to transfer his stock to another, as trustee for him, or for another person, and may stipulate that the trust shall continue for a specified period, or indefinitely, and that during its continuance the trustee shall have the legal title thereto and the right to vote upon it.—*State ex rel. v. Ohio, etc., Ry. Co.*, 6 O. C. C. 415 (1892); s. c., 3 C. D. 518.

Transfer to fictitious person.

A transfer to a fictitious person is void, and leaves the parties as they were before the transfer.—*Krohn v. Central Bridge Co.*, 4 N. P. 270 (1897); 5 Dec. 113; *Muskingum Turnpike Co. v. Ward*, 13 Oh. 120 (1844); *Gaff v. Flesher*, 33 Oh. St. 107 (1877).

Power of executor to sell stock.

An executor of a will has no right or power to execute a power of attorney authorizing a person to transfer, sell and indorse certificates of stock.—*Allen v. Globe Ins. Co.*, 19 W. L. B. 198, 200 (1888); affirmed 32 W. L. B. 374.

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Person may be stockholder without certificates.

When a subscription is made and paid by a stockholder he becomes a stockholder. It is not necessary to issue a certificate of stock.—See *Henderson v. Hogan*, 1 W. L. B. 227 (1876); *Cincinnati, etc., Ry. Co. v. Third Nat. Bank*, 1 O. C. C. 199; s. c., 1 C. D. 109, 207 (1885).

Evidence as to stockholders.

The books of a corporation are admissible as evidence to show that one is not a stockholder therein who claims to be such.—*Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (1886). See *Tripp v. Appleman*, 35 Fed. 19 (1888); s. c., 6 O. F. D. 71.

Lis pendens as to stock.

The doctrine of *lis pendens* does not apply to certificates of shares of stock transferable by blank indorsement and power of attorney.—*Krebs v. Forbriger*, 21 W. L. B. 313 (1889).

Presumption of validity of issue.

There is a presumption that the issue of stock is regular and valid until the contrary is shown.—*Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (1886); *Citizens' Nat. Bank v. Cincinnati, etc., Ry. Co.*, 11 W. L. B. 86 (1884); *Perin v. Cincinnati, etc., Ry. Co.*, 18 W. L. B. 382 (1887).

Proof as to invalidity of stock.

Where a corporation disputes the validity of a certificate of stock issued by the secretary, and bearing the genuine signature of the president and secretary thereof, and the corporate seal, the burden of proving such certificate to be invalid rests upon the corporation.—*Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (1886).

Suit to annul questionable stock.

Spurious certificates of stock issued under apparent authority, undistinguishable from genuine certificates, are clouds upon the title of the genuine stockholders which a court of equity will remove. The directors of the corporation may institute a suit for that purpose as the representatives of the genuine stockholders and in their behalf, and if they refuse to bring such suit a stockholder may bring it, making the corporation a co-defendant.—*Robison v. Cleveland, etc., Ry. Co.*, 5 N. P. 293 (1898); s. c., 7 Dec. 312.

Same subject.

Where an officer of a corporation has wrongfully issued stock in his own name and pledged it to secure loans, and all the holders claim such certificates to be genuine, and commence actions against the company on its refusal to transfer said shares, the company may unite all holders in an action to cancel the certificates so as to remove the cloud upon the title of the holders of the genuine certificates and prevent a multiplicity of suits.—*Cincinnati,*

etc., Ry. Co. v. Citizens' Nat. Bank, 22 W. L. B. 248; s. c., 56 Oh. St. 351.

Transfer of stock owned by the state.

See *Harper v. Ampt*, 32 Oh. St. 291 (1877).

Stockholder as witness under old law.

See *Little Miami R. R. Co. v. Martin*, 10 W. L. J. 54 (1852); *Methodist Church v. Wood*, 5 Oh. 283 (1831).

Record of subscriptions and transfers of stock.

It is not necessary that the secretary or directors of a corporation themselves keep the record of subscriptions and transfers of stock, required by § 3254, Rev. Stat. By the appointment of a transfer agent and registrar, the duties imposed by that section are devolved upon them. *Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Records as evidence.

The record kept under this section may be used as evidence.—See *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362, 392 (1892); s. c., 3 C. D. 493.

Transfers as against a lien of company on stock.

See *Conant v. Reed*, 1 Oh. St. 298 (1853); *Downer v. Zanesville Bank*, *Wright*, 477 (1833); *Bellevue Bank v. Higbee*, 4 O. C. C. 222 (1889); s. c., 28 W. L. B. 336; s. c., 2 C. D. 512; *Lee v. Citizens' Bank*, 2 C. S. C. 298 (1872); *Franklin Bank v. Commercial Bank*, 4 A. L. R. 705 (1876); *Towle v. Felch*, 40 W. L. B. 186 (1896); *Stafford v. Bank*, 61 Oh. St. 160 (1890).

Genuineness of transfer and identity—proof.

A corporation of which a transfer of stock is demanded may compel the genuineness of the transfer and the identity of the parties to be satisfactorily established; but where the evidence establishes such identity and genuineness the company cannot arbitrarily refuse to make the transfer.—*Krohn v. Central, etc., Bridge Co.*, 4 N. P. 270 (1897); s. c., 6 Dec. 552.

Duty of purchaser to inquire.

In the absence of any knowledge of fraud in its issue, there is no rule of diligence that requires one in purchasing stock to inquire beyond the genuineness of the certificate on its face. If the signatures of the president and secretary are genuine, and the seal has been affixed, and the paper on its face is a certificate of stock, it is unnecessary to inquire further even if it is issued to the secretary.—*Cincinnati, etc., Ry. Co. v. Citizens' Nat. Bank*, 56 Oh. St. 351, 379 (1897).

See also the following cases under the same facts: *Cincinnati, etc., Ry. Co. v. Third Nat. Bank*, 1 O. C. C. 199 (1885); s. c., 1 C. D. 109; *Citizens' Nat. Bank v. Cincinnati, etc., Ry. Co.*, 11 W. L. B. 36 (1884); *First Nat. Bank v. Cincinnati, etc., Ry. Co.*, 16 W. L. B.

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399 (1886); *Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (1886); s. c. affirmed, 25 W. L. B. 87; *Perin v. Cincinnati, etc., Ry. Co.*, 18 W. L. B. 382 (1887); *Cincinnati, etc., Ry. Co. v. Citizens' Nat. Bank*, 22 W. L. B. 248 (1889); s. c., 56 Oh. St. 351; *Cincinnati, etc., Ry. Co. v. Citizens' Nat. Bank*, 24 W. L. B. 198; s. c., 29 W. L. B. 15.

Exception.

Where the secretary of a company sold his stock to the president and transferred it by indorsement in blank and afterward criminally obtained possession of the certificate and pledged it, the pledgee obtained no title as against the real owner. *Farmers' Bank v. Diebold Safe, etc., Co.*, 47 W. L. B. 585 (1902).

Deceased stockholder, existence of will, duty of officers.

When certificates of stock of a deceased stockholder are presented to the officers of a corporation for transfer, and they are informed of the existence of a will, they are presumed to have knowledge of its contents, so far as they affect the title to the stock or the right to transfer the same.—*Allen v. Globe Ins. Co.*, 19 W. L. B. 198, 200 (1888).

Rights of assignee of delinquent subscriber.

If an installment of stock in a company remain unpaid by the original subscriber, an assignee of the stock, who is willing to comply with the corporate regulations respecting the issue of stock certificates and the transfer of stock, may, upon making a proper tender of the unpaid installment, with the interest thereon, maintain an action in equity against the corporation to compel it to issue to him a stock certificate.—*Iron R. R. Co. v. Fink*, 41 Oh. St. 321 (1884).

Remedy for refusal to transfer.

When the proper officers of a private corporation, organized for profit, refuse, on demand, to issue a certificate of stock to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or to enforce the issue and delivery of such certificate in equity, either of which he may pursue at his election. *Mandamus* is not the proper remedy.—*State ex rel. v. Carpenter*, 51 Oh. St. 83 (1894); *Freon v. Carriage Co.*, 42 Oh. St. 30 (1884); *Richardson v. Grand, etc., Mining Co.*, 1 W. L. B. 140 (1876). See *Allen v. Globe Ins. Co.*, 19 W. L. B. 198 (1888); *Krohn v. Central, etc., Bridge Co.*, 4 N. P. 270 (1897); s. c., 6 Dec. 552.

Joinder of actions.

Courts of equity will not refuse to entertain jurisdiction when, in connection with the relief of decreeing a transfer and issue of stock, a further and essential relief is asked, which courts of equity by their procedure are best adapted to furnish.—See *Arbuckle v. Woolson Spice Co.*, 21 O. C. C. 358 (1901); *Iron R. R. Co. v. Fink*, 41 Oh. St. 321 (1884).

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Waiver of rights.

The right to treat the refusal to transfer stock as a conversion may be waived.—*Andes Ins. Co. v. Waters*, 1 W. L. B. 172 (1876).

Measure of damages.

In an action for damages for the refusal to transfer shares, the damages are not limited to the market value of the stock. The measure of damages is its actual value to be determined under all the circumstances, such as the company's dividend-making capacity, the good-will, etc.—*Freon v. Carriage Co.*, 42 Oh. St. 30 (1884); *State ex rel. v. Carpenter*, 51 Oh. St. 83, 88 (1894).

Action by equitable owner.

Where the equitable owner of shares in a company, the certificate being outstanding in the name and possession of another party claiming title, demands of the company the transfer and delivery of a certificate of such shares, and meets with refusal, he has no right of action for the value of the stock.—*National Bank v. Lake Shore, etc., Ry. Co.*, 21 Oh. St. 221 (1871).

Right of pledgee to transfer.

A pledgee of stock in a corporation, when authorized by a blank power of attorney indorsed on the certificate and signed by the pledgor, may cause such shares to be transferred on the books of the company into his own name, and upon the refusal of the proper officers of such company to make the transfer when duly requested, the pledgee may maintain an action against the company for damages as for a conversion of the shares to its own use, but when the action is in equity and involves an accounting, no damages for conversion can be recovered.—*Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (1886); *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Oh. St. 208 (1881).

Statute of limitations.

The statute of limitations does not begin to run as against a transferee of stock seeking to compel a transfer until he has made a demand on the company for a transfer, and has been refused.—*Iron R. R. Co. v. Fink*, 41 Oh. St. 321 (1884).

Same subject.

An action by the transferee of a stock subscription to compel the issuance of a certificate of stock on the tender of the balance due, is not barred because more than fifteen years previous to his demand for stock his transferrer declined to pay the balance due on the subscription.—*Iron R. R. Co. v. Fink*, 41 Oh. St. 321 (1884).

Same subject.

Where stock has been transferred by indorsement in blank, and thereafter the company, at the instance of the original holder, and on the supposition that the stock has

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been lost, issues new stock to a second transferee of such owner, the statute of limitations does not commence to run against the first transferee until he has demanded a transfer and has been refused, or until he received notice of the transfer and issuance of stock to other parties.—*Cleveland, etc., R. R. Co. v. Robbins*, 35 Oh. St. 483 (1880).

By-law prohibiting transfer.

A by-law prohibiting the transfer on the books of the company of stock which has been paid by the notes and mortgages of the holders is unreasonable, and will not justify a refusal to transfer.—*Andes Ins. Co. v. Waters*, 1 W. L. B. 172 (1876).

Transfer to a corporation.

Inasmuch as one corporation cannot hold stock in another, it is not entitled to a transfer of stock purchased by it, and there is no liability on a refusal to transfer.—*Franklin Bank v. Commercial Bank*, 36 Oh. St. 350 (1881).

Parties.

The transferrer of stock is not a necessary party to a suit to compel the transfer of stock

unless such transferrer claims some interest in the stock.—*Krohn v. Central etc., Bridge Co.*, 4 N. P. 270 (1897); s. c., 6 Dec. 552.

Sale of stocks held by cities and counties.

See § 2675-6 et seq.

Right to inspect books.

The right to inspect the books of a corporation does not depend on the motive of the stockholder, and he is entitled to inspection at any reasonable time in person or by agent, and he may take copies of entries in books and records.—*Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Oh. St. 189 (1900); *Blymer v. Blymer*, 5 N. P. 71 (1898).

Remedy and pleading.

Injunction is the proper remedy, not mandamus, and a petition is good when it alleges that the plaintiff is a stockholder, a request for inspection, refusal to fix reasonable time or to allow inspection.—*Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Oh. St. 189 (1900).

Inspection of books under § 5290.

See *Arbuckle v. Woolson Spice Co.*, 21 O. C. C. 348 (1901).

§ 3254-1. RE-ISSUING OF CERTIFICATES OF STOCK LOST OR DESTROYED.

— In case any certificate of stock in any corporation be lost or destroyed, the owner thereof may file his petition in the probate court of the county where the principal business office of such corporation is located in this state, setting forth a pertinent description of such certificate, and a full statement of the facts relating to such destruction or loss, including the fact that he is the owner of such certificate, and was at the time of its loss or destruction, and had not assigned, transferred or disposed of the same, and that the same was not pledged to any one, or if so, stating to whom, and the facts relating thereto, and such petitioner shall make the corporation and any pledgee defendants to such proceeding, and shall serve a certified copy of such petition on some chief officer of such corporation, and on any such pledgee, on which copies the probate judge shall state over his signature when said petition will be heard, and said copies shall be so served not less than twenty days before the hearing, and such petitioner shall also publish, for three consecutive weeks, in some newspaper published and of general circulation in the county where the proceeding is pending, and in the county where the petitioner resides the notice containing the substance and prayer of such petition immediately before the day of hearing, and stating when and where the same will be heard. (April 23, 1891, 88 v. 336.)

§ 3254-2. HOW RE-ISSUE EFFECTED.— If the probate court, upon the hearing, find that the foregoing provisions have been complied with, and that such described certificate has been lost or destroyed, and that such petitioner at that time was and is the owner thereof, an order shall be made that such corporation issue and deliver a new certificate of stock to such petitioner for the original amount and kind of stock, and in case, at the time of such loss or destruction of such original certificate, the certificate was pledged to any one, and the pledgee yet has a claim against the same, then such order shall direct that such new certificate shall be delivered to such pledgee on such terms as the court may direct, and the corporation shall comply with said orders, and shall in no wise be prejudiced by complying with said orders, or by paying dividends on such new certificate, so long as it is not made known to it that such original certificate is in existence and owned by some person other than said

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petitioner; and all rights and liabilities attaching to said original certificate shall attach to said re-issued certificate, while in force, but upon the production of the original certificate to such corporation by the owner or pledgee, such re-issued certificate shall be cancelled and surrendered, and be void, and executors and administrators, on behalf of estates of deceased owners of any such lost or destroyed certificates of stock, shall be entitled to proceed under this act and have all the rights and benefits thereof. (April 23, 1891, 88 v. 336.)

Rights of original holders.

The issuing of certificates under a by-law providing for the issue of certificates in place of such as may have been lost or destroyed, does not affect the liability of the company to the holder of the original certificate. The object of the by-law is to enable persons whose certificates appear to have been lost or destroyed to obtain others on indemnifying the company against loss in case other parties should assert rights against the company under the original certificates, but it does not affect the rights of such original holders.—Cleveland, etc., R. R. Co. v. Robbins, 35 Oh. St. 483 (1880).

Same subject.

A company issuing new certificates for shares, of which the certificates are outstanding, is liable to the holders of such original certificates either to replace their stock or account for its value.—Cleveland, etc., R. R. Co. v. Robbins, 35 Oh. St. 483 (1880).

Same subject—dividends.

Where stock is transferred, but not entered on the books of the company, and thereafter

the transferrer, representing the certificates to be lost, obtains new certificates, the company is not liable to the transferee for the dividends declared and paid, for it was entitled to pay the dividends to the persons appearing as stockholders on its books.—Cleveland, etc., R. R. Co. v. Robbins, 35 Oh. St. 483 (1880).

Remedy.

Upon proof of the loss of his certificates, and upon giving bond to indemnify the company against loss by the original stock turning up in the hands of an innocent holder, the owner is entitled to peremptory writ of mandamus to compel the issuance of a new certificate.—Hof v. Western German Bank, 6 W. L. B. 665, 697 (1881).

When company loses stock.

When stock belonging to the corporation or in its possession is lost, no bond is required prior to reissue.—See Farmers' Bank v. Diebold Safe, etc., Co., 47 W. L. B. 585 (1902).

§ 3255. PAID-UP STOCK IS PERSONAL PROPERTY.—Shares of stock in any company shall be personal property, and when fully paid up shall be subject to levy and sale upon execution against the owner. (May 1, 1852, 50 v. 274, § 5.)

What certificate represents.

A certificate of stock in a private corporation evidences the equitable interest the owner of such stock has in the corporate property, and fixes the proportion of any and all dividends to which he is entitled, and which are made while he is the owner of such certificate, the legal title to it being in the corporation until divided among shareholders.—Marble v. Van Wert Nat. Bank, 3 O. C. C. 464 (1888); s. c., 2 C. D. 265; Lee v. Sturges, 46 Oh. St. 153 (1889). See State ex rel. v. Jones, 51 Oh. St. 492, 510 (1894); State v. Franklin Bank, 10 Oh. 91, 98 (1840).

Power of stockholder to dispose of stock.

In the absence of any law on the subject, and treated simply as property, no reason is apparent for limiting the power of disposition over corporate stock within narrower bounds than those pertaining to other species of property.—See Peter v. Union Mfg. Co., 56 Oh. St. 181, 207 (1897).

Shares are personal property.

Shares in a railroad company are personal property, and the widow of an owner is not

entitled to dower therein.—Johns v. Johns, 1 Oh. St. 350 (1853).

Presumption of gift of stock.

Where a person purchases stock and places the title in the name of a member of his own family, the presumption is that the stock was intended as a gift or advancement, but this presumption may be rebutted.—Creed v. Lancaster Bank, 1 Oh. St. 1 (1852).

General assignment for creditors includes stocks.

An assignment professing to convey all the real and personal estate, effects and credits of the assignor includes stocks.—Haldeman v. Hillsborough, etc., R. R. Co., 2 Handy, 101 (1855).

Borrowed stock.

When by the terms of a contract borrowed stock is to be returned on demand, it is meant that an equal number of shares of stock of the same company shall be returned, and no cause of action accrues until demand is made. See generally as to rights of parties.—Fosdick v. Greene, 27 Oh. St. 485 (1875).

Consideration of contract for sale of stock.

An agreement to transfer the stock of a corporation, whether solvent or insolvent, imports that the stock is of some value, and for the purpose of making a binding contract it is not important how valuable.—*Van Arsdale v. Brown*, 18 O. C. C. 52 (1896); s. c., 9 C. D. 488.

Bequest of stock.

An unconditional bequest of dividends is a bequest of the stock itself.—*Muskingum Turnpike Co. v. Ward*, 13 Oh. 120 (1844).

Power to exchange.

Power to sell stock does not include power to exchange the same.—*Cleveland v. Bank of Ohio*, 16 Oh. St. 236 (1865).

Illegal sale of stock.

Where the purpose of the purchaser of the stock is illegal the sale is illegal and void.—*Newark v. Elliott*, 5 Oh. St. 113 (1855).

Evidence as to sale of stock.

A witness may testify that he sold shares of stock and delivered the certificates thereof to a person named without producing the certificates for inspection.—*Cincinnati, etc., Ry. Co. v. Rawson*, 16 W. L. B. 423 (1886).

Action on contract for sale of stock.

An action on a contract for the sale of stock is not necessary for the plaintiff to prove an actual transfer of the stock or the execution of a power of attorney; but that it is sufficient to prove an offer to transfer with the ability to perform.—*Hager v. Reed*, 11 Oh. St. 626 (1860).

Contract of sale—rights when vendee refuses performance.

In a contract for the sale of stock on refusal of the vendee to accept the stock, the vendor may sell the stock for the best obtainable price, and if the proceeds of such sale are less than the amount named in such contract, together with the expense of sale, he may recover of the vendee such difference.—*Ashley v. Walker*, 15 O. C. C. 660 (1898); s. c., 8 C. D. 285.

Company lien on stock for debt of holder.

Where there is a custom between brokers and bankers that, on application of a broker, a bank will certify as to whether it has any lien on certain of its stock by reason of the holder thereof being indebted to it, a bank, by being asked by a broker to give such a certificate, is thereby put on inquiry, and charged with notice, as much as though told that a loan for a certain amount had been or was to be made to the holder of the stock by a certain person.—*Covington Bank v. Commercial Bank*, 65 Fed. 547 (1895).

Same subject.

A corporation may, by express stipulation in a certificate of stock by it issued, reserve a valid lien upon the stock to secure the debts of the holder to it; and such lien may be asserted against a transferee who receives the stock before, but does not present it for transfer on the stock-book of the company until after the original holder becomes indebted to the bank.—*Stafford v. Produce Exchange Banking Co.*, 61 Oh. St. 160, 169 (1899).

Interest held by pledgee.

As between the pledgor and the pledgee of stock, the pledgee holds neither the equitable nor the legal title, but only a special property.—*Krebs v. Forbriger*, 21 W. L. B. 313 (1889). See *Henkle v. Salem Mfg. Co.*, 39 Oh. St. 547 (1883).

Rights and duty of pledgee.

Where stocks are transferred as collateral security, with a power to the creditor to sell the same at private sale or auction, he may, when the debt becomes due, dispose of the same, after demand of payment and notice of the time and place of sale to the debtor; but the sale must be conducted in perfect good faith: the bailee is the trustee of the bailor, and his conduct will be carefully examined by the court. If the sale has not been made in the usual mode, but at short notice, or without notice, it will be declared invalid.—*Bates v. Wiles*, 1 Handy, 532 (1855). See *Lee v. Citizens, etc., Bank*, 2 C. S. C. 298 (1872).

Illegal sale—measure of damages.

The measure of damages, where stocks are sold without demand and notice, will be their highest market value any time between the day of sale and the commencement of suit.—*Bates v. Wiles*, 1 Handy, 532 (1855).

Demand by pledgee before sale.

Notice of intent to sell pledged stock is equivalent to a demand of payment.—*Harrison v. Friend*, 1 N. P. 39 (1893); s. c., 1 Dec. 258.

Sale by pledgee as against receiver.

A person holding stock as a pledge for the payment of a claim may sell the stock as against a receiver of the assets of the pledgor even though the amount due is in dispute.—*Harrison v. Friend*, 1 N. P. 39 (1893); s. c., 1 Dec. 258.

Estoppel of pledgor as against purchaser.

Where a pledgor delivers to his pledgee, as the pledge, a certificate for shares of stock in a corporation, and indorses the same with words of assignment in blank, and with an irrevocable power of attorney to transfer the same on the books of the corporation, also in

Stock Certificates, etc., § 3255.

blank, the pledgor is estopped to assert any title to said stock against an innocent purchaser for value from the pledgee, although the pledgee in making such sale has violated the contract of pledge as to terms of sale.—*Krebs v. Forbriger*, 21 W. L. B. 313 (1889).

Pledge or sale of stolen stock.

Where a stock certificate is stolen and pledged, the pledgee acquires no title, though it was pledged by the apparent owner.—See *Farmers' Bank v. Diebold Safe, etc., Co.*, 47 W. L. B. 585 (1902).

Pledge of fraudulently acquired stock.

Where stock fraudulently obtained is pledged to secure a pre-existing indebtedness, it may be recovered by the rightful owner.—*City of Cleveland v. Bank*, 16 Oh. St. 236, 269 (1865).

Pledge of stock—construction of contemporaneous contract for conditional sale of stock to pledgee.

See *Rumsey v. Lentz*, 59 Oh. St. 189 (1898).

Foreclosure, trial.

In a suit to foreclose a lien upon stock in an incorporated company created by pledge and for an order of sale, neither party is entitled to a trial by jury.—*Brigel v. Creed*, 46 W. L. B. 31; 65 Oh. St. (1901); s. c., 8 N. P. 456.

Agreement to pledge—rights of parties.

A surety on a note became such on the agreement of the principal to transfer to him as security a certificate of stock he then held, within a short time. Held, that the surety thereby acquired an equity in the stock which he could enforce against all persons having notice.—*Dueber, etc., Co. v. Daugherty*, 62 Oh. St. 589 (1900).

Sale on execution.

Prior to the passage of this act stock could not be levied upon and sold on execution without the consent of the owner, and if, notwithstanding, a sale was made on execution, it would only effect an equitable assignment of the creditor's rights.—*Lee v. Citizens' Nat. Bank*, 2 C. S. C. 298 (1872).

Stock may be reached by creditor's bill.

See § 5464.

Creditor's bill—motive.

That a creditor who seeks to reach the stock of his debtor in a corporation is induced to do so by other stockholders, with whom he has made plans for future management of the corporation, is no reason for denying him the remedy of a creditor's bill.—*McMullen v. Ritchie*, 64 Fed. 253 (1894); s. c., 8 O. F. D. 314.

Situs of stock.

For the purpose of seizure and subjection to legal process, the situs of stock is the domicile of the corporation.—*National Bank v. Lake Shore, etc., Ry. Co.*, 21 Oh. St. 221 (1871); *Ashley v. Quintard*, 90 Fed. 84 (1898); s. c., 10 O. F. D. 365.

Attachment of stock.

The interest of a stockholder in the property of a private corporation represented by certificates of stock, registered in his name, or of which he is the equitable owner, may be reached by garnishment process served upon the corporation.—*Norton v. Norton*, 43 Oh. St. 509 (1885); *National Bank v. Lake Shore, etc., Ry. Co.*, 21 Oh. St. 221 (1871). See *Prout v. Post*, 12 Dec. 141 (1900).

Attachment of stock by corporation.

A corporation may by garnishment process served upon itself subject the stock of one of its stockholders to the payment of debts to it.—*Norton v. Norton*, 43 Oh. St. 509 (1885).

Attachment of pledged stock.

Where stock that has been pledged is attached, only the surplus after the payment of the debt to the pledgee is reached by the attachment, and if the pledgee does not exercise his right to sell, the court may order a sale and distribution of the proceeds.—*Norton v. Norton*, 43 Oh. St. 509 (1885).

Attachment of dividends.

When stock in a corporation is attached, dividends made by the corporation and remaining in its hands after process in attachment has been served, follow the stock, and are subject to the same order of distribution.—*Norton v. Norton*, 43 Oh. St. 509 (1885).

Interest reached by attachment.

Where the debtor has assigned and transferred stock appearing in his name on the corporate books, an attachment only reaches his interest, though the transferee has made no attempt to obtain legal title.—*Haldeman v. Hillsborough, etc., R. R. Co.*, 2 Handy. 101 (1855). See *Prout v. Post*, 12 Dec. 141 (1900).

Attachment of stock in foreign corporation.

Shares of stock in a foreign corporation cannot be attached by levying the writ upon the certificate in the hands of a resident of Ohio, although owned by a nonresident.—*Simmons Hardware Co. v. Stokes*, 16 O. C. C. 145 (1898); s. c., 8 C. D. 431.

Attachment of stock in foreign corporation.

Though the Ohio statutes authorize the attachment of stocks and interests in stocks, and permit the garnishment of a foreign corporation doing business in the state in actions against nonresident defendants, and also re-

Power to borrow money, etc., § 3256.

quire a corporation garnishee to make disclosure of any stock held therein for the benefit of the defendant. such statutes presuppose that the debts or property to be subjected, and to which the disclosures relate, are within the dominion of the state, and do not bring within such dominion shares of stock in a foreign corporation whether the corporation as garnishee makes disclosure of their ownership by defendant or refuses to make such disclosure.—*Ashley v. Quintard*, 90 Fed. 84 (1898); s. c., 10 O. F. D. 365.

Is stock not fully paid up subject to execution?

As the right to levy on and sell stock is purely statutory, it would seem that stock not fully paid up could only be reached by a creditor's bill.

Right of stockholder to prosecute error to judgment against corporation.

See *Dunbar v. American Casket Co.*, 19 O. C. C. 585 (1900).

Appeal by stockholder.

See *Henry v. Jeanes*, 47 Oh. St. 116 (1890); s. c., 48 Oh. St. 443.

§ 3256. **POWER TO BORROW MONEY.**—A corporation may borrow money, not exceeding the amount of its capital stock, and issue its notes or coupon or registered bonds therefor, bearing any rate of interest authorized by law, and may secure the payment of the same by a mortgage of its real or personal property, or both;* and a private corporation may purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition. (May 6, 1902, 95 v. 290; April 15, 1902, 95 v. 151; R. S. 1880.)

NOTE.—The act of May 6th has no repealing clause. The act of April 15th repeals original section 3256. The most important variation between the two is the addition of the matter after the * in the act of May 6th.

General power to borrow.

When not prohibited, a corporation may borrow money to carry on the objects of its creation, and it may evidence and secure the loan by appropriate instruments.—*Larwell v. Hanover, etc., Society*, 40 Oh. St. 274, 282 (1883); *Hays v. Galion Gas Co.*, 29 Oh. St. 330 (1876); *Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889); *Burt v. Rattle*, 31 Oh. St. 116 (1876); *Bosche v. Toledo Display Horse Co.*, 14 O. C. C. 289 (1897); s. c., 7 C. D. 374. See notes to § 3239.

Defense of ultra vires.

Where a corporation in the exercise of apparent power to borrow secures from a person a loan of money, on the faith that the power exists, it will not be permitted to deny its power to escape payment.—*Hays v. Galion Gas Co.*, 29 Oh. St. 330 (1876).

Mortgage of corporate property by stockholders.

Where through a mistake a mortgage on the property of a corporation is executed by its stockholders instead of by the corporation, it will operate as an equitable prior mortgage as against a subsequent mortgage expressly made subject to it, and as against subsequent judgment creditors.—*Bundy v. Iron Co.*, 38 Oh. St. 300 (1882).

Execution in foreign state.

An Ohio corporation can execute in another state a valid mortgage on its property in

Ohio, notwithstanding it is doing business in such other state.—*Lattimer v. Mosaic Glass Co.*, 13 O. C. C. 163 (1896); s. c., 7 C. D. 430.

Loan in excess of capital stock.

A mortgage given to secure a debt in excess of the capital stock of a company is not void as to subsequent creditors with notice, if not objected to by the corporation.—*Central Trust Co. v. Columbus, etc., Ry. Co.*, 87 Fed. 815 (1898); s. c., 10 O. F. D. 328. See *Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889).

Power of selling committee.

A committee duly empowered by a corporation to sell an issue of bonds have power to employ a broker to sell such bonds.—*East Cleveland Ry. Co. v. Everett*, 15 O. C. C. 181 (1897); s. c., 8 C. D. 210. See *East Cleveland, etc., Ry. Co. v. Everett*, 19 O. C. C. 205 (1900).

Compensation of broker.

In the absence of special agreement a broker may recover the reasonable value of his services in selling bonds.—*East Cleveland Ry. Co. v. Everett*, 15 O. C. C. 181 (1897); s. c., 8 C. D. 210.

Sale below par.

Where the board of directors have not authorized the selling committee to sell for less than par, such committee has no authority to employ a broker to sell for less than par.—*East Cleveland Ry. Co. v. Everett*, 15 O. C. C. 181 (1897); s. c., 8 C. D. 210.

Duty of creditor to inquire.

A person dealing with a corporation should know that it has the legal power to make the

Mortgages, Bonds, etc., §§ 3256a, 3257.

loan and to execute the mortgage, but he is not bound to inquire whether the board of directors has had a meeting and passed a formal resolution authorizing the loan and mortgage, or that the directors are legally elected, or whether the directors took an active interest in the business of the corporation or not.—*Bosche v. Toledo Display Horse Co.*, 14 O. C. C. 289 (1897); s. c., 7 C. D. 374.

Power of officers.

A chattel mortgage executed by the president and secretary of a corporation, who are also members of the board of directors, to secure a debt of the corporation, although executed without the knowledge of the other directors at the time, is valid in the hands of the mortgagee, who is not aware of the fact.—*Bosche v. Toledo Display Horse Co.*, 14 O. C. C. 289 (1897); s. c., 7 C. D. 374.

See, as to power of officers to execute instruments, notes to § 3247.

Power of president to sell bonds.

See *East Cleveland, etc., Ry. Co. v. Everett*, 19 O. C. C. 205 (1900).

Assent of stockholders.

If the assent of two-thirds of the stockholders is necessary to the validity of a mortgage by the law of the state creating a corporation, which assent is to be filed with the clerk of the county the property is in, such law applies to a mortgage of land in this state, and the assent is to be filed with the county recorder. A guaranty of payment of a mortgage by two-thirds of the stockholders is a substantial assent.—*West v. Klotz*, 37 Oh. St. 420, 428 (1881).

Purchase by director on foreclosure.

Where the property of a corporation was sold under foreclosure decree to a director of the corporation for much less than its real value, the sale will be set aside on the motion of a bondholder offering adequate security that he would bid a much larger sum on the

property.—*Secor v. Maumee Rolling Mill Co.*, 1 N. P. 100 (1894); s. c., 1 Dec. 80.

Duty of trustee in mortgage.

A trustee holding bonds for a company must carry out his trust or surrender the bonds. He cannot use the bonds to pay debt of the company to him.—*Greenville Gas Co. v. Reis*, 54 Oh. St. 549 (1896).

Right of trustee to personal judgment on guaranty.

A trustee of a mortgage has no legal capacity as such after foreclosure and sale of the mortgaged property to maintain an action on behalf of the bondholders for a personal judgment against one who had promised the corporation to assume the bonds.—*Conner v. Bramble*, 6 N. P. 195 (1899); s. c., 9 Dec. 516.

Acceptance of mortgage.

A mortgage by a corporation need not be expressly accepted, but acceptance may be implied from circumstances, and a part of the mortgagees may accept, although others refuse to do so.—*Bundy v. Iron Co.*, 38 Oh. St. 300 (1882).

Mortgage by college.

See *President, etc., of Medical College v. Zeigler*, 17 Oh. St. 52 (1866).

Mortgages by railroad companies.

See § 3287 et seq.

Mortgages by Ohio river bridge companies.

See § 3548a.

Deficiency judgment, when corporation liable.

Where a loan upon a real estate mortgage is obtained by an individual, for the benefit of a corporation, and on foreclosure the proceeds of the sale are not sufficient to pay the loan, the corporation does not become liable.—See *De Camp v. Levoy*, 19 O. C. C. 335 (1900).

§ 3256a. **HOW CERTAIN CORPORATE MORTGAGES RECORDED.**—Such mortgage of real and personal property when heretofore or hereafter made by a company organized to operate a line or lines of telegraph, telephone, district telegraph messenger service, or for the purpose of supplying gas or electricity [or hot water] for lighting, fuel or other purposes, or hot water, or steam, for heating or fuel purposes, shall be held to be duly recorded if the same is recorded in the office of the recorder of deeds in the county and each of the counties in which the real or personal property intended to be mortgaged is situate or employed; and the mortgage so recorded shall be held to be a good and sufficient lien from the date of the filing of the same for record in each county where it is recorded as well upon the personal as the real property of the company. (May 6, 1902, 95 v. 366.)

§ 3257. **MAY ISSUE CONVERTIBLE BONDS, VOTE OF DIRECTORS.**—Upon the written assent of not less than three-fourths of the stockholders, representing at least three-fourths of the capital stock of the company actually paid, any company

Stockholders' liability, etc., § 3258.

may borrow money not exceeding one-half of the capital stock actually paid in, on such security, by way of mortgage, or otherwise, as may be agreed upon, and at a rate of interest not exceeding that allowed by law to be contracted for, and may, in the instruments evidencing the contract, stipulate that the holders of such instruments shall have the right to convert the amount borrowed, or any part thereof, into either common or preferred stock, such stock having been provided for by the proper action and certificate of the company; any action of the directors for borrowing money, issuing bonds, or involving an expenditure of money shall be by ye and nay vote, and record thereof shall be made showing the vote of each director voting upon the question. (March 25, 1870, 67 v. 26, §§ 1, 2, 3, 4.)

Liability of stockholders.

By this section it was not intended to authorize the creation of additional stockholders, and to exempt them from individual liability to creditors, but to enable such corporations, upon the terms provided in the act, to borrow money and guarantee its repayment, with the option on the part of the lenders to become stockholders.—Burt v. Rattle, 31 Oh. St. 116 (1876).

When stock regarded as debt.

Where a company, professing to act under the provisions of this section, issued certificates of preferred stock, so called, certifying that the corporation guaranteed to holders the payment of four per cent. semi-annual dividends, and the final payment of the entire amount at a specified time, with the right to convert the preferred stock into common stock, and the company at the same time executed and delivered to a trustee its bond and mortgage to secure the holders of such certificates. Held, that the holders of the certificates did not thereby become stockholders of the corporations, but its creditors, and that, as such, they had a lien upon the mortgaged property superior to that of the general creditors of the corporation or of its assignees.—Burt v. Rattle, 31 Oh. St. 116 (1876).

See as to increase of stock, §§ 3262, 3263.

Contracts giving veto power to preferred stock.

A contract of consolidation which prohibits the issuance of bonds without the consent of a majority in interest of the preferred stockholders seems to violate this section.—Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11, 16 (1889).

Right to conversion fellows bonds.

A stipulation for conversion is inseparably connected with the bond on which it is indorsed, and is only available to the holder of the bond so long as he continues to be such holder. The holder of a bond cannot assign to another the right of action for a breach of the stipulation for conversion, and yet retain the bond for the benefit of himself and future assigns.—Denny v. Cleveland, etc., R. R. Co., 28 Oh. St. 108 (1875).

Action for refusal to convert bonds—pleading.

In an action for a refusal to convert bonds, the petition is fatally defective in not averring that the plaintiffs were, and at the commencement of the action continued to be, the holders of the bonds, for the nonconversion of which they bring suit.—Denny v. Cleveland, etc., R. R. Co., 28 Oh. St. 108 (1875).

Power of directors.

See East Cleveland, etc., Ry. Co. v. Everett, 19 O. C. C. 205 (1900).

§ 3258. **STOCKHOLDERS LIABLE IN AN AMOUNT EQUAL TO THEIR STOCK.**—The stockholders of a corporation who are the holders of its shares at a time when its debts and liabilities are enforceable against them, shall be deemed and held liable, equally and ratably, and not one for another, in addition of their stock, in an amount equal to the stock by them so held, to the creditors of the corporation, to secure the payment of such debts and liabilities; and no stockholder who shall transfer his stock in good faith, and such transfer is made on the books of the company, or on the back of the certificate of stock properly witnessed or tendered for transfer on the books of the company prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof. (April 29, 1902, 95 v. 312; May 1, 1852, 50 v. 296, §§ 78-79; March 11, 1853, 51 v. 386; April 17, 1854, 52 v. 44; April 12, 1865, 62 v. 134; March 11, 1874, 69 v. 25; R. S. 1880.)

§ 3258. *Old Law.*—The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount

equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation. [R. S. 1880.]

Stockholders' liability, etc., § 3258.

Liability in absence of statute.

The stockholders in a corporation are not individually liable for its debts unless they are expressly made so by some charter provision.—*Carr v. Iglehart*, 3 Oh. St. 458 (1854).

Nature of liability.

The liability on stock held in severalty is not joint but several, and hence the judgment is not joint, although for the equal benefit of all the creditors.—*Mason v. Alexander*, 44 Oh. St. 318, 333 (1886); *Umsted v. Buskirk*, 17 Oh. St. 113 (1866).

Nature of liability.

The liability of stockholders to pay the debts of the corporation is not a primary obligation, but only a secondary and collateral obligation, enforceable only in case of the insolvency of the corporation.—*Swan v. Mansfield, etc.*, R. R. Co., 3 N. P. 225 (1896); s. c., 5 Dec. 297; *Bronson v. Schneider*, 49 Oh. St. 438 (1892); *Younglove v. Lime Co.*, 49 Oh. St. 663, 666 (1892); *Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 197 (1897); *Falkenback v. Paterson*, 43 Oh. St. 359, 370 (1885).

Stock in de facto corporations.

Stockholders in de facto and de jure corporations stand on the same footing as respects their liability to creditors, and such liability is not affected by a judgment of ouster against the corporation.—*Rowland v. Meader Furniture Co.*, 38 Oh. St. 269 (1882); *Gaff v. Flesher*, 33 Oh. St. 107 (1877); *Royce v. Tyler*, 2 O. C. C. 175, 182 (1887); s. c., 1 C. D. 428.

Corporations as stockholders.

Where stock in an insolvent corporation is held by another corporation, it is liable the same as an individual holder.—*Smith v. Newark, etc.*, R. R. Co., 8 O. C. C. 583 (1894); s. c., 4 C. D. 356.

Liability of pledgee.

One who holds shares of stock merely as collateral security for a debt without a transfer thereof to him on the books of the company, having merely an assignment and a power of attorney to transfer, is not liable as legal or equitable owner of the stock.—*Henkle v. Salem Mfg. Co.*, 39 Oh. St. 547 (1883). See *Norton v. Norton*, 43 Oh. St. 509 523 (1885); *Biggio v. Sandheger*, 8 N. P. 13 (1900).

Stock subscribed by infants.

It seems that an infant purchasing stock and holding the same after his majority and after the insolvency of the company is liable.—*Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164 (1886).

Liability on preferred stock.

Holders of preferred stock are subject to statutory liability equally with the common stockholders.—*R. R. Co. v. Smith*, 48 Oh. St. 219 (1891).

Stock bought below par.

Where a corporation in good faith sells a part of its stock below par, and afterward becomes insolvent, the difference between the discount price and the par value of the stock thus purchased should not be regarded as assets of the corporation, as between those stockholders who bought at a discount and those who did not. No stockholder should be permitted to assert the invalidity of such stock without consenting that its purchasers be placed in statu quo ante. The whole stock should be assessed for stockholders' liability, and then if any creditor is not paid in full, he may collect so much on the amount unpaid on the stock sold at a discount as may be necessary to satisfy claims against the corporation in full; but only if he became a creditor after the issue of such stock and in ignorance of the sale at a discount.—*Peter v. Union Mfg. Co.*, 56 Oh. St. 181 (1897).

Who are creditors?

Whoever has a claim against a corporation which falls within the terms "dues, debts, or liabilities," is a creditor of such corporation within the meaning of the section of the constitution.—*Herrick v. Wardwell*, 58 Oh. St. 294, 309 (1898).

A person holding a claim against the company for a tort committed by it is a creditor.—*Rider v. Fritchey*, 49 Oh. St. 285 (1892); s. c., 3 O. C. C. 89 (1888); s. c., 2 C. D. 251.

A stockholder who gives his notes to creditors of the corporation at its request and judgment is had on them, is a creditor, though he has not paid.—*Burwell v. Hazard Hame Co.*, 2 Cleve. L. R. 9 (1878).

Control of corporation over liability.

Where a stockholder has a claim against the corporation it cannot counterclaim against him on his liability as a stockholder.—*Jungkuntz v. West Liberty Association*, 6 W. L. B. 428 (1881).

A corporation has no power to change an obligation on which stockholders' liability is waived, into one carrying it.—*Hardman v. Cincinnati Ry. Co.*, 18 W. L. B. 264 (1887).

The security provided by this section is for the exclusive benefit of the creditors over which the corporate authorities have no control; and an attempted assignment of such liability by the corporation, though for the equal benefit of all the creditors, is inoperative. So an assignee or receiver of the corporation cannot bring a suit to enforce.—*Wright v. McCormack*, 17 Oh. St. 86 (1866); *Umsted v.*

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Buskirk, 17 Oh. St. 113 (1866); *White v. Ingersol*, 2 Cleve. L. Rep. 362 (1878). See also *North Fairmount B. & S. Co. v. Ashbrook*, 12 Dec. 10 (1901).

Contract to release stockholder's liability is void.

A stockholder is liable for losses, notwithstanding an agreement to the contrary entered into at the time he subscribed for his stock.—*North Fairmount, etc., Co. v. Ashbrook*, 12 Dec. 10 (1901).

Guaranty by stockholders.

Where stockholders being indirectly liable for corporation debts, in consideration of indorsements of company paper, agree to protect such indorsers against loss, they assume the relation of principal and surety rather than guarantors.—See fully as to rights and liabilities, *Wise v. Miller*, 54 Oh. St. 388 (1887).

Settlement agreements between stockholders.

An agreement entered into by solvent shareholders of an embarrassed corporation, that they will severally contribute to raise a fund to pay the corporate liabilities, creates a valid obligation; and if the share to be contributed by each is not expressly fixed by the terms of the agreement, each should contribute in the proportion that the number of shares of stock owned by him bears to the shares held by all the contributors; and if one of the stockholders agrees to surrender and cancel, and the other stockholders perform their part of the agreement, they and the corporation may set up the settlement contract in bar of a recovery in an action brought upon such note.—*Sterling Wrench Co. v. Amstutz*, 50 Oh. St. 484 (1893).

Waiver of liability.

The liability of stockholders can be waived by any creditor.—*Preston v. Cincinnati, etc., R. R. Co.*, 36 Fed. 54 (1888); s. c., 6 O. F. D. 127; *Hardman v. Cincinnati, etc., Ry. Co.*, 18 W. L. B. 264 (1887). See *Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889); *Hull v. Standard, etc., Co.*, 20 O. C. C. 533 (1900).

When liability attaches.

At the time the debt against the corporation is created or the liability incurred, the liability attaches to all the then stockholders and to all who may thereafter become stockholders.—*Harpold v. Stobart*, 46 Oh. St. 397, 404 (1889); *Brown v. Hitchcock*, 36 Oh. St. 667, 678 (1881); *Cleveland Gas Co. v. Collins*, 19 O. C. C. 247 (1899).

When the liability of a corporation is on a contract, the debt will be held to have accrued and the liability to have attached at the time of the execution of the contract.—*Herrick v. Wardwell*, 58 Oh. St. 294 (1898).

Voluntary payment by stockholder.

Where a stockholder of an insolvent corporation voluntarily pays the debts of the corporation, he cannot recover from another stockholder who was at the time of such payment solvent and within the jurisdiction, his pro rata share of such indebtedness.—*Burr v. Bates*, 3 O. C. C. 1 (1887); s. c., 1 C. D. 1.

Settlement notes given by stockholders.

A note given by a stockholder to a creditor of an insolvent corporation with the proviso that it shall be a credit on the maker's liability as a stockholder would be without meaning, as the proviso could not affect other creditors unless it is construed as a guarantee by the creditor to hold the stockholder harmless against any increase of liability on account of payment on the note; and a judgment on the note must so specify.—*Beebe v. Thomas*, 2 W. L. B. 107 (1877).

Effect of settlement between parties upon dissenting creditor.

Where the stockholders of a company, in full settlement of their liability, paid all the creditors but one a certain per cent. of their claims, that one creditor cannot thereafter recover from the stockholders more than he would have recovered had the suit been prosecuted to a final decree and the liability paid in full and divided pro rata among the creditors.—*Ryan v. Miami, etc., R. R. Co.*, 16 O. C. C. 530 (1898); s. c., 9 C. D. 401.

When right of action accrues.

Ordinarily, and when a corporation has property and continues to do business, a right of action accrues when a judgment has been recovered against it and execution has been returned unsatisfied, in part or whole.—*Younglove v. Lime Co.*, 49 Oh. St. 663 (1892); *Bronson v. Schneider*, 49 Oh. St. 438 (1892); *Barrick v. Gifford*, 47 Oh. St. 180 (1890); *Cowles v. Bartell*, 3 W. L. M. 41 (1860).

A right of action does not accrue when the corporation becomes insolvent in the sense simply that its property is insufficient for the payment of its liabilities.—*Younglove v. Lime Co.*, 49 Oh. St. 663 (1892); *Bronson v. Schneider*, 49 Oh. St. 438 (1892); *Barrick v. Gifford*, 47 Oh. St. 180 (1890). See *Baldwin v. Atwater Coal Co.*, 8 W. L. B. 296 (1882); *Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164 (1886).

The right of action does not accrue on the appointment of a receiver merely to carry on the business or to subvert some purpose of the stockholders or directors, and not on account of the insolvency of the company.—*Younglove v. Lime Co.*, 49 Oh. St. 663 (1892).

A creditor's right of action is complete when the corporation has done, or suffered to be done, any act which would render judgment and process against it impossible or of no avail and nugatory, as where its property has been placed in the hands of an assignee

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in insolvency or bankruptcy, or by the appointment of a receiver or dissolution of the corporation or by some other legal proceeding, its property has been put in process of application to the payment of its debts, so that creditors may proceed against the stockholders without first putting their claims in judgment against the corporation.—*Younglove v. Lime Co.*, 49 Oh. St. 663 (1892); *Bronson v. Schneider*, 49 Oh. St. 438 (1892); *Barriek v. Gifford*, 47 Oh. St. 180 (1890); *King v. Armstrong*, 50 Oh. St. 222, 238 (1893); *Peter v. Farrell Foundry, etc., Co.*, 53 Oh. St. 534, 557 (1895); *Morgan v. Lewis*, 46 Oh. St. 1 (1888); *Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164 (1886); *Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890). See *De Camp v. Levo*, 19 O. C. C. 335 (1900).

When the assets of the company are beyond the reach of process, as in the hands of an assignee or receiver for insolvency, creditors need not await final settlement or distribution by such officers, but may at once commence proceedings.—See *Younglove v. Lime Co.*, 49 Oh. St. 663 (1892); *Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890).

Quere.

Will a right of action accrue when, although denying in good faith its insolvency, a corporation has commenced to wind up its affairs under § 5687.—See *Fairmount, etc., Co. v. Rehn*, 6 N. P. 185, 189 (1899); s. c., 8 Dec. 594.

When action accrues against executor.

See *Bevitt v. Diehl*, 12 Dec. 383 (1901); s. c., 12 Dec. 315.

Transfer of stock.

A stockholder cannot, by a sale and transfer of his stock, defeat the ultimate right of existing creditors to proceed against him on account of such shares, if a resort to his liability becomes necessary for their protection.—*Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 204 (1897); *Rider v. Fritchey*, 49 Oh. St. 285, 295 (1892); *Brown v. Hitchcock*, 36 Oh. St. 667, 680 (1881).

A stockholder is not liable for debts created after a bona fide transfer of stock.—*Peter v. Union Mfg. Co.*, 56 Oh. St. 181 (1897); *Taylor v. West Liberty Wheel Co.*, 9 Am. L. Rec. 28 (1880).

A stockholder's liability as to future creditors is cut off by a transfer of his stock on the books of the company, although the stock was sold or given away to an insolvent person for the purpose of escaping liability, if the sale or gift is made in good faith and is absolute.

If the transaction was not bona fide, but was a mere ruse or device by which he sought to hold himself out as divested of his ownership, while by some understanding or agreement, expressed or implied, the transferee held it for him, he would remain an equitable stockholder and so liable.—*Peter v. Union Mfg. Co.*, 56 Oh. St. 181 (1897).

A transfer of stock to a fictitious person, being void, does not affect the liability of the owner.—*Muskingum Valley Turnpike Co. v. Ward*, 13 Oh. 120 (1844).

A transfer of stock in which the notes of the company are used in the purchase is void, and the transferors remain liable as stockholders.—*Willis v. Reed*, 5 W. L. B. 79 (1880).

Liability of assignees.

Assignees of shares of stock in a corporation are liable to the creditors by reason of their purchase of the stock, and they also stand in the relation of indemnitors to the assignors as to the liability of the latter on debts contracted while they held the stock.—*Wheeler v. Faurot*, 37 Oh. St. 26, 28 (1881); *Brown v. Hitchcock*, 36 Oh. St. 667, 680 (1881).

Liability of assignors.

A stockholder who has in good faith sold and assigned his stock to one who becomes a nonresident or insolvent is liable to creditors of the corporation for such portion only of the debts existing while he held the stock and remaining due (not in excess of the amount of stock assigned), as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders liable for the same debts who are within the jurisdiction, to be ascertained at the time judgment is rendered.—*Harpold v. Stobart*, 46 Oh. St. 397 (1889); *Brown v. Hitchcock*, 36 Oh. St. 667, 681 (1881); *Mason v. Alexander*, 44 Oh. St. 318 (1886); *Taylor v. West Liberty Wheel Co.*, 9 Am. L. Rec. 28 (1880).

Order of liability.

The stockholders at the time the suit is commenced are first liable, and after them, those who have assigned stock to insolvent or nonresident parties.—*Brown v. Hitchcock*, 36 Oh. St. 667 (1881).

Application of corporate assets.

The proceeds of the sale of assets of the corporation should be applied to reduce the aggregate of all debts, so that all stockholders, past and present, may be benefited.—*Taylor v. West Liberty Wheel Co.*, 9 Am. L. Rec. 28 (1880).

Liability of transferrers; right of creditors.

Where the holder of stock has transferred the same in good faith to one who is insolvent at the time stockholder's liability is subjected to payment of corporate debts, the transferrer becomes liable on debts contracted while he held stock, in case a sufficient fund is not raised by assessment on solvent stockholders to satisfy creditors. In such case the fund created by assessments on solvent persons who are stockholders at the time of the decree, should be applied pro rata upon all the debts of the corporation, and funds arising from assessments on persons who had been

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stockholders, but had assigned their stock, should be applied to the residue, if any, owing to those who were creditors at the time such stock was assigned.—*Wick Nat. Bank v. Union Bank*, 62 Oh. St. 446 (1900).

Equities between corporation and creditors.

Where some of the defendant stockholders claim to be creditors, and ask an adjustment of their rights, and a reply of the corporation alleging that they had agreed to manage the company for a time and pay specified debts, and asking an accounting and damages for breach of the agreement, is not to be dismissed, as not proper to be settled in the case.—*Morris v. Collamer, etc.*, R. R. Co., 2 C. L. R. 346 (1878).

It seems that when the assets of an insolvent corporation are not in a condition to be converted into money, creditors may assert their claims against the individual liability of stockholders without awaiting the distribution of corporate assets which are not subject to execution, but which, when reduced to money, should be applied to reimburse payments on individual liability.—See *Morris v. Collamer, etc.*, R. R. Co., 2 C. L. R. 347 (1878); *Younglove v. Lime Co.*, 49 Oh. St. 663 (1892); *Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890); *Cowles v. Bartell*, 3 W. L. M. 41 (1860).

Contribution between stockholders.

Each stockholder sought to be made liable has, in order that his liability may be confined to his just proportion, the right to insist that all stockholders within the jurisdiction and solvent who stand in the same relation to the debts with himself, shall be brought in and be held to their proportional liability in common with him; and such rights are enforceable in the original action.—*Harpold v. Stobart*, 46 Oh. St. 397, 404 (1889); *Wheeler v. Faurot*, 37 Oh. St. 26, 29 (1881); *Umsted v. Buskirk*, 17 Oh. St. 113 (1866).

When a suit is brought a stockholder has the right to bring in other stockholders and compel them to contribute their pro rata share of the indebtedness; but the right to contribution does not exist in the ordinary legal sense, or so as to make the stockholders bear the relation of sureties to each other.—*Burr v. Bates*, 3 O. C. C. 1, 6 (1887); s. e., 2 C. D. 1.

Entry of transfer on stock books.

A written contract of sale without entry on the stock books will not relieve a stockholder from liability for debts contracted by the corporation before transfer.—*Biles v. Looker Co.*, 17 O. C. C. 538 (1889); s. e., 9 C. D. 685.

Where, by reason of a defective entry on the company's stock books, the vendor of stock remains liable to creditors, he is entitled to a judgment against his vendee equal in amount to the judgment against him.—*Harpold v. Stobart*, 46 Oh. St. 397, 401 (1889).

The creditors have the right to resort to and rely upon the proper book of the company as showing who the stockholders are and the amount of stock held by each, and they are presumed to have relied on such records. While it is not necessary that a book of any special kind be adopted for that purpose, yet when one is selected and used, that becomes the stock book; and transfers to be valid must be made upon that.

When the stock book shows that a party is the owner of shares of stock, he is estopped as between himself and creditors to contradict the record provided the entry was placed in the stock book originally by his consent; and his consent will be presumed where the entry was correct when made.—*Harpold v. Stobart*, 46 Oh. St. 401 (1889). See *Wehrman v. Reakirt*, 1 C. S. C. R. 230 (1871).

Where the vendor of stock causes an entry of transfer to be made by the secretary of the company in a book then present at the office of the company other than the stock book, with the expectation that it will be entered in another book then at the residence of the secretary, but no transfer is made in the stock book and at the time the debts accrued and at the time of trial such vendor appears by the stock book to be the owner of the shares, such entry of transfer is not sufficient to relieve the vendor of liability, notwithstanding the sale was made in good faith and for value, and that the vendor believed he had done all that was necessary to effect a transfer of the stock, and the further fact that the company thereafter treated the vendor as the owner of the stock.—*Harpold v. Stobart*, 46 Oh. St. 397 (1889).

The stockholders of a corporation whose names appear on the stock book, or in the absence of such book, on the stubs of stock certificates as the holders of stock, are subject to a stockholder's liability for debts incurred by the corporation while such names are allowed to so remain. To avoid such liability it must appear on the stock book in the one case or on the stub of the stock certificate in the other, that the stock has been transferred to some one else. It is not sufficient if the stubs of new stock show it to have been issued from the original stock. The stubs of such original stock must show the transfer.—*Herrick v. Wardwell*, 58 Oh. St. 294 (1898).

Defenses of stockholders.

A stockholder who transfers his stock after a corporate debt has been created is not relieved from his statutory liability for such debt by an agreement for an extension of the time for its payment, although such agreement be made by the corporation and creditor after such transfer and without the knowledge or consent of the transferrer.—*Boice v. Hodge*, 51 Oh. St. 236 (1894); *Painesville Nat. Bank v. King Varnish Co.*, 8 O. C. C. 563 (1894); s. e., 4 C. D. 511. See *Wheeler v. Faurot*, 37 Oh. St. 28;

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Harpold v. Stobart, 46 Oh. St. 397; Taylor v. West Liberty Wheel Co., 9 Amer. L. Rec. 28 (1880); Hauenschild v. Standard Coffin Co., 8 N. P. 124 (1900).

It is no defense that a stockholder has sold and disposed of his stock with an indemnity against loss. His remedy is to bring in the indemnitor on a cross-petition and have the whole matter settled.—Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164 (1886).

When the creditor plaintiffs have not reduced their claims to judgment, the stockholders can only interpose such defenses to them as are available to the corporation.—Hardman v. Cincinnati, etc., Ry. Co., 18 W. L. B. 264 (1887); Stewart v. Triumph Ins. Co., 1 W. L. B. 103 (1876); R. R. Co. v. Smith, 48 Oh. St. 219 (1891).

Stockholders can plead any defense to judgment claims against the corporation that are personal and peculiar to stockholders, and which the company could not plead.—See Gaw v. Glassboro, etc., Co., 20 O. C. C. 416 (1900); Hardman v. Cincinnati, etc., Ry. Co., 18 W. L. B. 264 (1887).

Where the claims of the creditors consist of notes given by the corporation for amounts agreed upon on settlement of accounts and transactions between it and its creditors, and the stockholders by their answer seek to open up, surcharge and falsify the settlement for fraud of which they had knowledge more than four years before the commencement of the action, the statute of limitations is a good plea in bar to the relief sought by the stockholders.—R. R. Co. v. Smith, 48 Oh. St. 219 (1891).

Where the defendant stockholder alleges that the notes of the corporation on which his liability is based have been paid by a new note of the corporation after he transferred his stock, it is a good defense on demurrer.—Wheeler v. Faurot, 37 Oh. St. 26 (1881).

Defendants, who were stockholders at the time of the commencement of a creditors' suit to enforce their liability, cannot defend on the ground that they became stockholders after the liability of the corporation to the creditors was incurred.—See Bonewitz v. Van Wert Co. Bank, 41 Oh. St. 78 (1884); R. R. Co. v. Smith, 48 Oh. St. 219 (1891); Barrick v. Gifford, 47 Oh. St. 180 (1890).

It is no defense that the subscriptions to stock were made prior to the filing of the articles of the corporation when the records of the corporation show they were made subsequent to the filing of the articles.—Royce v. Tyler, 2 O. C. C. 175 (1887); s. c., 1 C. D. 428.

It is no defense that an arrangement was made with one of the directors of the corporation for a cancellation of certain subscriptions, and that such cancellation was prepared and signed.—Royce v. Tyler, 2 O. C. C. 175 (1887); s. c., 1 C. D. 428.

It is no defense that a certificate of stock has never been issued.—Royce v. Tyler, 2 O. C. C. 175 (1887); s. c., 1 C. D. 428.

It is no defense that a creditor has settled his claims against the company, or that he has filed his claim and claimed a lien in another case. Payment of such claims should be alleged.—Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164 (1886).

Where a subscription to stock was made three years before the corporation became insolvent, it is too late to introduce the defense to an action by a creditor of the corporation that the subscription was procured by fraud.—Painesville Nat. Bank v. King Varnish Co., 8 O. C. C. 563; s. c., 4 C. D. 511; Ryan v. Miami Valley Ry. Co., 10 A. L. R. 263 (1881).

Interest.

Interest may be included in the judgment rendered from the date of the beginning of the suit, although the amount of the recovery may exceed the stockholders' liability, when it is apparent at the beginning of the suit that the stockholders must be assessed the full amount of their liability.—Mason v. Alexander, 44 Oh. St. 318 (1886); Taylor v. West Liberty Wheel Co., 9 Amer. L. Rec. 28 (1880); Wehrman v. Reakirt, 1 C. S. C. R. 230 (1871).

If before the commencement of a suit it is not known that the stockholders must be assessed in the maximum amount, and that fact is not ascertained until the report of the referee comes in, interest can be charged against the stockholders only from the date of the confirmation of the referee's report.—Berger v. Commercial Bank, 5 N. P. 170 (1897); s. c., 5 Dec. 277.

Unless the petition contains a prayer for interest under § 5060, interest can only be charged against stockholders from the time of the decree.—Berger v. Commercial Bank, 5 N. P. 176, 179 (1897); s. c., 5 Dec. 277.

Enforcement of liability in foreign corporations.

Where the statutes of a foreign state provide a special remedy for the enforcement of the statutory liability of stockholders, our courts will not enforce it on the ground of comity.—Wyatt v. Moorehead, 4 N. P. 435 (1897); s. c., 7 Dec. 380.

Statutory liability in foreign corporations will only be enforced when it can be done under our procedure in like cases, or when the matter has been heard by a court of competent jurisdiction and the liabilities fixed pro rata on each stockholder.—Wyatt v. Moorehead, 4 N. P. 435 (1897); s. c., 7 Dec. 380. See Judson v. Stewart, 7 N. P. 160 (1897).

Enforcement of Kansas law in Ohio.

See Kulp v. Fleming, 65 Oh. St. 321, 47 W. L. B. 67 (1902); Blair v. Newbegin, 65 Oh. St. —, 47 O. L. B. 77 (1902).

Liability on increased stock under act of 1865.

See Turnbull v. Pomeroy Salt Co., 24 W. L. B. 133 (1890).

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Bond against liability.

As to the rights of a creditor under a bond given by a purchaser of property to stockholders to protect them against liability, see *Hatry v. Painesville, etc., Ry. Co.*, 1 O. C. C. 426 (1886); s. c., 1 C. D. 238; affirmed in 32 W. L. B. 281.

Liability in turnpike companies under act of May 3, 1852.

See *Palestine, etc., Turnpike Co. v. Wooden*, 13 Oh. St. 395 (1862); *Ireland v. Palestine, etc., Turnpike Co.*, 19 Oh. St. 369 (1869).

§ 3258a. **LIMITATION OF ACTION.**—An action upon the liability of stockholders can only be brought within eighteen months after the debt or obligation shall become enforceable against stockholders. (April 29, 1902, 95 v. 313.)

See notes under § 3260g.

§ 3259. **THE TERM "STOCKHOLDERS" DEFINED.**—The term "stockholders," as used in the preceding section, shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another. (R. S. 1880.)

Who are stockholders?—Liability of trustees.

The general rule is that the person in whose name the stock stands is the legal owner, and is liable whether he is a mere trustee for another or a pledgee holding the stock as collateral security. He is liable as a stockholder, and must look to his cestui que trust or pledgor for indemnity or reimbursement.—*Holcomb v. Gibson*, 39 W. L. B. 380 (1898) (Sup. Ct.); *Henkle v. Salem Mfg. Co.*, 39 Oh. St. 547, 552 (1883); *Stewart v. Triumph Ins. Co.*, 1 W. L. B. 103 (1876). See *Biggio v. Sandheger*, 8 N. P. 13 (1900).

Where a bank took its own stock in payment of a debt to it, and entered it on its books in the name of a stockholder as "trustee of the Citizens' Savings Bank," such stockholder, on the failure of the bank, is liable to the creditors as the legal owner of the stock.—*Holcomb v. Gibson*, 39 W. L. B. 380 (1898).

If a transfer of stock is not bona fide, but is a mere ruse or device by which the stockholder seeks to hold himself out to the world as divested of his ownership, while by some understanding or agreement, express or implied, the transferee held it for him, he would remain the equitable owner, and liable under the statute.—See *Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 208 (1897).

If a sale and transfer is absolute, and made in good faith, the former owner does not thereafter remain the equitable owner by reason of the fact that the worthless stock passed either by gift or sale into the ownership of an insolvent transferee, and that the sole object of the former holder in entering into the transaction was to escape liability for future debts of the corporation.—*Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 208 (1897).

When legatee of stock liable.

One who receives a bequest of stock, which is not thereafter transferred on the books, and there is no evidence of his acceptance of the bequest, cannot be held liable as a stockholder. The estate is liable.—See *De Camp v. Levoy*, 19 O. C. C. 335 (1900); *Biggio v. Sandheger*, 8 N. P. 13 (1900).

This section cited in *Cincinnati, etc., Ry. Co. v. Third Nat. Bank*, 1 O. C. C. 199, 207 (1885); s. c., 1 C. D. 109; *Freon v. Carriage Co.*, 42 Oh. St. 30, 36 (1884).

Cumulative remedy.

The object of this section is to give a cumulative remedy so that, when the person in whose name the stock stands on the books is financially irresponsible, the creditors may inquire further and pursue the equitable owner.—*Holcomb v. Gibson*, 39 W. L. B. 380 (1898).

§ 3260. **WHERE COMPLAINT FOR ENFORCEMENT OF LIABILITY FILED.**—Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability. (April 16, 1900, 94 v. 359; 91 v. 88; R. S. 1880.)

See notes under § 3260f.

§ 3260a. **ACTION BY COURT; APPOINTMENT OF RECEIVER.**—The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers. (April 16, 1900, 94 v. 360.)

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§ 3260b. **ENFORCEMENT OF LIABILITY UPON INSOLVENT CORPORATION.**— If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders, and enforce the same by its judgment, as in other cases. (April 16, 1900, 94 v. 360.)

§ 3260c. **NOTICE TO NON-RESIDENT STOCKHOLDERS; COLLECTION OF UNPAID INSTALLMENTS OF STOCK.**— In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to non-resident stockholders as provided in sections 5048, 5049, 5050, 5051 or 5052 of the Revised Statutes, and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company. (April 16, 1900, 94 v. 360.)

§ 3260d. **COURT TO ASCERTAIN AND ADJUDGE LIABILITIES OF OFFICERS AND STOCKHOLDERS; PROSECUTION BY RECEIVER.**— If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder. (April 16, 1900, 94 v. 360.)

§ 3260e. **NOTICE TO CREDITORS.**— Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment. (April 16, 1900, 94 v. 360.)

§ 3260f. **DISTRIBUTION OF PROPERTY AND ASSETS OF INSOLVENT CORPORATION.**— Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors. (April 16, 1900, 94 v. 360.)

NOTE.—The following cases apply to the provisions of § 3260 et seq.

Similarity to Minnesota and Wisconsin statutes.

See Revised Statutes, Wisconsin, 1898, § 3223 et seq.; *Booth v. Deer*, 96 Wis. 516 (1897).

See General Statutes, Minnesota, 1891, § 5563 et seq.; *Hanson v. Davison*, 76 N. W. 254 (1898); *Bank v. Real Estate Co.*, 63 N. W. Rep. 1068 (1895); *Spooner v. Bay St. Louis Syndicate*, 51 N. W. Rep. 377 (1892); *Nelson v. Jenks*, 51 Minn. 108 (1892); *Clarke v. Opera House Co.*, 58 Minn. 16 (1894); *Johnson v. Fischer*, 30 Minn. 173 (1883); *Arthur v. Wilkins*, 44 Minn. 409; *Hale v. Hardon*, 95 Fed. 747 (1899).

Old section.

The old section was merely a codification of the equity principles laid down by the courts, with the addition that the right to commence the suit was given to a stockholder. — See *Hamilton v. Home Ins. Co.*, 1 N. P. 329 (1895); s. c., 3 Dec. 389; *Burr v. Bates*, 3 O. C. C. 1, 8 (1887); s. c., 2 C. D. 1; *Swan v. Mansfield, etc., R. R. Co.*, 3 N. P. 225, 229 (1896); s. c., 5 Dec. 297.

Action cannot be maintained for trivial amount.

See *Carr v. Iglehart*, 3 Oh. St. 457 (1854).

Stockholders' liability — Enforcement, etc., § 3260f.

Nature of action.

The suit is in equity, and the equities and liabilities of the parties as between themselves may be marshaled in accordance with the rules of equity, and adjusted in the final judgment.—*R. R. Co. v. Smith*, 48 Oh. St. 219 (1891); *Bullock v. Kilgour*, 39 Oh. St. 543, 546 (1883); *Wheeler v. Faurot*, 37 Oh. St. 26, 29 (1881); *Brown v. Hitchcock*, 36 Oh. St. 667, 681 (1881). See *Ryan v. Miami, etc., R. R. Co.*, 16 O. C. C. 530 (1898); *s. c.*, 9 C. D. 401; *Morris v. Collamer, etc., R. R. Co.*, 2 Cleve. L. Rec. 347 (1878); *Wehrman v. Reakirt*, 1 C. S. C. R. 230 (1871).

The action is an equitable one, and the court may withhold final judgment until the exact amount each stockholder should pay can be ascertained, or so mold its decree as to require the several stockholders to pay their proper proportion of the liabilities after the exhaustion of the corporate assets, and retain control over the cause and the parties until their ultimate rights shall be determined and adjusted.—See *Younglove v. Lime Co.*, 49 Oh. St. 663, 667 (1892).

The suit is in equity for the benefit of all the creditors, and when a part of the creditors institute a suit on behalf of all, no creditor can acquire priority or institute a separate suit in his own behalf.—*Wright v. McCormack*, 17 Oh. St. 86 (1866); *Umsted v. Buskirk*, 17 Oh. St. 113 (1866); *Lamont v. Home Ins. Co.*, 10 W. L. B. 413 (1883); *Johnson v. Carpenter*, 21 O. C. C. 168 (1900).

Joinder of actions.

The statutory liability of stockholders and the payment of unpaid stock subscriptions may be enforced in the same action by a creditor, notwithstanding the corporation has made an assignment for the benefit of its creditors, the assignee being before the court and consenting that both issues may be tried, or even if the person who is assignee, being also a creditor of the company, brings the actions.—*Painesville Nat. Bank v. King Varnish Co.*, 8 O. C. C. 563 (1894); *s. c.*, 4 C. D. 511; *Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890).

A judgment creditor may join an action to compel the payment of unpaid subscriptions, and an action to enforce the individual liability of the stockholders of his debtor.—*Warner v. Callender*, 20 Oh. St. 190 (1870).

When a corporation is insolvent, and its assets in the hands of a receiver, a creditor may, by cross-petition, seek the enforcement of the statutory liability of the stockholders, although his claim has not been reduced to judgment.—*Peter v. Farrell Foundry, etc., Co.*, 53 Oh. St. 534 (1895).

An action against a corporation on a claim and an action against the stockholders of a corporation on their individual liability cannot be joined.—*Lee v. Fraternal, etc., Ins. Co.*, 1 Handy, 217 (1854).

In an action under chapter 5 of division 7 of title 1 of the Revised Statutes, a creditor may intervene and join in his cross-petition a

cause of action for money payable to the corporation by a stockholder thereof on account of stock issued to him, with a cause of action against all the stockholders to enforce payment of their statutory liability.

See *Peter v. Farrell Foundry, etc., Co.*, 53 Oh. St. 534, 551 (1895).

An action to enforce the liability of incorporators under § 3244 may be joined with an action under this section.—*Hessler v. Cleveland Punch, etc., Co.*, 61 Oh. St. 621 (1899).

Under § 3260 as amended and supplemented, 94 O. L. 359, a creditor may join a cause of action to compel payment of unpaid subscriptions for stock, and a claim to enforce the statutory liability of its stockholders for the satisfaction of his debt in the same manner as he could before the passage of such act. Nor does it make any difference that his claim is not reduced to judgment.—*Lilley v. Kinnear*, 13 Dec. 65.

Parties.

All the stockholders at the time of the commencement of the suit, and all persons ultimately liable as stockholders, viz., persons who have assigned their stock after the creation of corporate debts, are necessary parties.—*Bonewitz v. Van Wert Co. Bank*, 41 Oh. St. 78, 80; *Bullock v. Kilgour*, 39 Oh. St. 543, 546 (1883); *Wheeler v. Faurot*, 37 Oh. St. 26.

It is error to proceed with the cause until all of the stockholders within the jurisdiction are brought in.—*Bonewitz v. Van Wert Co. Bank*, 41 Oh. St. 78, 80; *Lemar v. Stephens*, 27 W. L. B. 301 (1892).

The suit being for the benefit of all creditors, all the stockholders must be parties.—*Brown v. Hitchcock*, 36 Oh. St. 667, 681 (1881); *Younglove v. Lime Co.*, 49 Oh. St. 663, 667 (1892); *Smith v. Newark, etc., R. R. Co.*, 8 O. C. C. 583 (1894); *s. c.*, 4 C. D. 356.

In an action by a creditor of a corporation on behalf of all the creditors against the stockholders to collect the statutory liability, it is not necessary or proper to make the other creditors parties to the action, either in the court of common pleas or in a higher court, on appeal or on error. In such cases the action is prosecuted by the plaintiff for the common benefit of all the creditors for the creation of a fund for pro rata distribution among them, and whatever the plaintiff does in good faith in that behalf inures to the common benefit of all, and binds all.—*Herrick v. Wardwell*, 58 Oh. St. 294 (1898). See *Johnson v. Carpenter*, 21 O. C. C. 168 (1900).

Duty of creditor plaintiff.

It would seem that where a creditor plaintiff on behalf of all creditors was acting in bad faith, or without due regard to the interests of the case, it would be within the discretion of the court to turn the case over to some other creditor, or the case should be turned over in case the plaintiff creditor effects a settlement with the stockholders, or dismiss the same.—See *Johnson v. Carpenter*, 21 O. C. C. 168 (1900).

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If the plaintiff fails to bring in all the parties, the defendants may take steps to make them parties.—*Burr v. Bates*, 3 O. C. C. 1, 4 (1887); s. c., 2 C. D. 1.

Right to dismiss action.

It seems that before other interested parties intervene, the plaintiff in a representative suit may dismiss the same.—See *Dreidame v. Germania Investment Co.*, 8 N. P. 405 (1901).

Parties.

Creditors may sue such stockholders as they see fit, and recover from them their pro rata proportion of the indebtedness, the defendant stockholders only having the right to bring in other stockholders for the purpose of contribution, and if the plaintiffs are willing to relinquish the amount the stockholders not parties would have to contribute, the defendants could not complain.—*Sturges v. Mansfield, etc., R. R. Co., C. C. Richland Co.*; affirmed *Penna. Co. v. Sturges*, 56 Oh. St. 733 (1897).

The corporation is a necessary party.—*Umsted v. Buskirk*, 17 Oh. St. 113 (1866).

Parties to appeals.

When there is an issue and a determination of the same between the vendor and vendee of stock as to their respective liability, an appeal taken to the circuit court by the vendor carries up the case as to the vendee, whether he appeals in his own right or not.—*Harpold v. Stobart*, 46 Oh. St. 397 (1889).

Statute of limitations.

The action is on a liability created by statute, and must be commenced within six years from the time it accrues.—*Younglove v. Lime Co.*, 49 Oh. St. 663 (1892); *Bronson v. Schneider*, 49 Oh. St. 438 (1892); *Barriek v. Gifford*, 47 Oh. St. 180, 183 (1890); *Hawkins v. Furnace Co.*, 40 Oh. St. 507 (1884).

Each creditor's claim is distinct, and a bar to one is no bar to the action.—*Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164 (1886).

A suit commenced by one creditor on behalf of himself and all other creditors of an insolvent corporation is in the nature of a demand for all, and saves the running of the statute of limitations as against all creditors who may come in and assert their claims before the final determination of the action.—*Barriek v. Gifford*, 47 Oh. St. 180 (1890).

A plaintiff who negligently fails to make solvent stockholders within the jurisdiction parties until the right of action against them is barred, will not be permitted to increase the assessment against solvent stockholders duly served by reason of such deficiency, but all solvent stockholders within the jurisdiction, whether served or not, will be treated as in court for the purpose of the assessment, and the loss must fall upon the plaintiff and other creditors of the corporation.—*Smith v. Newark, etc., R. R. Co.*, 8 O. C. C. 583 (1894); s. c., 4 C. D. 356.

It does not begin to run against the right of creditors of a corporation to enforce the liability of persons who have assigned stock held by them when the debts were incurred until failure by reason of their insolvency to collect from the assignees of such stock.—*Kilgour v. Pendleton*, 8 W. L. B. 23 (1882); s. c., 11 Am. L. Rec. 38 (1882). See *Bullock v. Kilgour*, 39 Oh. St. 543 (1883).

The statute does not begin to run as to a due but disputed claim until it is settled and adjusted.—*Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164, 165 (1886).

The statute does not begin to run as against creditors until their claims are due, though a right of action may have previously accrued as to others.—*Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164, 165 (1886).

A stipulation in a policy of insurance limiting the time within which an action may be brought thereon has reference to the time within which suit is to be brought on the policy against the corporation; and where judgment has been obtained against the corporation in a suit brought within the time limited by such stipulation, it is no defense for a stockholder, when sued on a statutory liability, that the suit against him was not commenced within the time so specified.—*Davis v. Stewart*, 26 Oh. St. 643 (1875); *Stewart v. Triumph Ins. Co.*, 1 W. L. B. 103 (1876).

Limitation in action against executor or heirs of deceased stockholder.

See *Bevitt v. Diehl*, 12 Dec. 383 (1901); s. c., 12 Dec. 315.

Pleading.

Where a suit is brought with a view of having it referred to a master in chancery to report who are and have been stockholders, with a view of further relief, it is in the first instance sufficient if the petition shows that the plaintiff has brought in all who were stockholders when the corporation became insolvent and at the time suit was begun, or given valid reasons for not so doing, although persons may be found who, by reason of once having been stockholders, must be made parties before a final decree will be entered.—*Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890).

A petition which avers that each of the defendants except the corporation is the holder of a specified number of shares of the capital stock of the corporation, contains a sufficient allegation that the defendants are stockholders. It need not be averred in terms that the defendants are owners of the stock held by them.—*R. R. Co. v. Smith*, 48 Oh. St. 219 (1891).

In an action against an insolvent street railroad company, an averment that the "company is a corporation duly incorporated under the laws of the state of Ohio" is a sufficient averment that it was incorporated under a law enacted since the adoption of the

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present constitution, for the court will judicially notice that no statute existed prior to the present constitution authorizing the incorporation of a street railroad corporation; and if incorporated since the adoption of the constitution, it must be subject to the liability.—*Rider v. Fritchey*, 49 Oh. St. 285 (1892).

If a petition contains the necessary averments to charge the defendant stockholders, it is not demurrable because, for aught that appears, the plaintiff is the only creditor and the defendants the only stockholders.—*Umsted v. Buskirk*, 17 Oh. St. 113 (1866). See *Hall v. Standard Coal Co.*, 7 N. P. 157 (1897).

A petition is bad unless it alleges that the defendants held their stock at the time the debts were incurred.—*Hooker v. Kilgour*, 2 C. S. C. R. 350 (1873).

The answer of a defendant is not sufficient if it only denies that he was a stockholder at the time the note sued on was given or the judgment rendered. Such an answer implies that the defendant was a stockholder at some time.—*Hardman v. Cincinnati, etc., Ry. Co.*, 14 W. L. B. 346 (1885).

An answer is not sufficient if it merely denies that the defendant ever had any stock in his possession, for the reason that such answer is evasive.—*Hardman v. Cincinnati, etc., Ry. Co.*, 14 W. L. B. 346 (1885).

An answer containing a defense on the ground that there are stockholders who have not been made parties should disclose the names of such parties, although this question should be raised on the hearing before the referee.—*Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164 (1886).

If a defendant claims he made a donation to the company and did not take stock, he should make such proof under a denial. It is a matter of evidence which should not be pleaded.—*Hardman v. Cincinnati, etc., Ry. Co.*, 15 W. L. B. 164 (1886).

An answer of a defendant alleged to be a stockholder will be ordered to be made more definite and certain where he denies the allegations of the petition for want of knowledge. He should admit or deny positively the allegations as to his liability as a stockholder.—*Hardman v. Cincinnati, etc., Ry. Co.*, 14 W. L. B. 346 (1885).

Where action must be brought.

An action cannot be rightly brought in a county within the meaning of § 5038 and § 5030 when none of the defendants reside there, although one of them entered his appearance on a summons mailed to him in another county.—*Lamont v. Home Ins. Co.*, 10 W. L. B. 413 (1883).

An action to enforce a liability of stockholders in an insurance company is not an action against the insurance company within the meaning of § 5026, and if it were, the cause of action being the insolvency of the company, it arose at the main office of the company.—

Lamont v. Home Ins. Co., 10 W. L. B. 413 (1883).

Same subject.

The action may be brought in any county in which any defendant may be rightly sued and served, and process may be issued to other counties for other defendants, including the insolvent corporation.—See *Swan v. Railroad Co.*, 4 Dec. 71 (1895); *Hull v. Standard Coal Co.*, 7 N. P. 157 (1897).

Appointment of receiver.

In an action to enforce payment of stockholders' liability a receiver may be appointed after judgment to collect and distribute the fund, and such receiver may, by authority of the court appointing him, prosecute actions in his own name as such receiver to enforce payment of judgment rendered for such statutory liability.—*Clarke v. Thomas*, 34 Oh. St. 46 (1877); *Zieverink v. Kemper*, 50 Oh. St. 208 (1893).

Actions by receivers.

See as to proof of admission of judgments against stockholders in actions by receivers, *Zieverink v. Kemper*, 50 Oh. St. 208 (1893).

Attachment.

An action to enforce statutory liability is an action upon a demand arising upon contract within the meaning of § 5521, relating to attachments on the ground of nonresidence.—*Dabney v. Pappenheimer Co.*, 41 W. L. B. 329 (1889); s. c., 20 O. C. C. 707; *Northern Nat. Bank v. Maumee Rolling Mill Co.*, 2 N. P. 260 (1894); s. c., 2 Dec. 67; *Cleveland Gas Co. v. Collins*, 19 O. C. C. 247 (1899); s. c., 6 N. P. 218.

Where the writ of attachment is sought, an affidavit sufficiently shows the nature of the plaintiff's claim where it states that the defendant is a stockholder, that the action is brought to enforce the statutory liability of the stockholders, and that the claim sued against the defendant is on his liability as such stockholder for the corporate debts.—*Northern Nat. Bank v. Maumee Rolling Mill Co.*, 2 N. P. 260 (1894); s. c., 2 Dec. 67.

Nonresident stockholders.

Where all the stockholders are not before the court, and it does not appear that those not served with process could not be served it is error to render judgment against the stockholders in court on a mere finding that those not served were nonresidents.—*Bonewitz v. Van Wert Co. Bank*, 41 Oh. St. 78 (1884).

Enforcement against nonresidents in other states.

See *Appeal of Aultman*, 98 Pa. St. 505 (1881); *Barnes v. Wheaton*, 80 Hun (N. Y.), 8 (1894); *Cleveland, etc., Ry. Co. v. Kent*, 87 Hun (N. Y.), 329 (1895); *Post v. Toledo, etc., R. R. Co.*, 144 Mass. 341 (1887); *Nimick v.*

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Mingo Iron Co., 25 W. Va. 184 (1884); Rice v. Merrimack Hosiery Co., 56 N. H. 114 (1875); Howarth v. Angle, 47 L. R. A. (N. Y.) (1900) 725; Childs v. Cleaves, 50 Atl. Rep. (Me.) 714 (1901).

Enforcement against nonresidents in federal courts.

See State Nat. Bank v. Sayward, 91 Fed. 443 (1899); Newberry v. Robinson, 36 Fed. 841 (1888); Hale v. Hardon, 95 Fed. 747 (1889); Kirtley v. Holmes, 45 W. L. B. 213 (1901).

Finding of referee as to insolvency — set aside.

See De Camp v. Levoy, 13 O. C. C. 335 (1900).

Insolvent and nonresident stockholders.

The right of the stockholders to contribution between themselves is not paramount to the right of the creditors to be paid, and if it is impossible to reach all the solvent stockholders or subject them to the jurisdiction of the court without unreasonable delay, those who are found within the jurisdiction of the court may be required to pay the indebtedness of the company to the extent of their individual liability without prejudice to their right to subject their co-stockholders to a contribution by other subsequent proceedings.—Wehrman v. Reakirt, 1 C. S. C. R. 230, 234 (1871).

Attorney fees.

The court has power to order reasonable counsel fees to the plaintiff's attorney, to be paid out of the proceeds of the judgments, even though some creditors may have employed their own counsel.—Mason v. Alexander, 44 Oh. St. 318, 337 (1886); Hessler v. Cleveland Punch, etc., Co., 61 Oh. St. 621 (1899).

It is error to tax a counsel fee for the plaintiff and include the same in the judgment as a part of the costs.—See Rider v. Fritchey, 49 Oh. St. 285, 296 (1892).

When attorney fees less than \$300 are allowed, the supreme court has no jurisdiction.—Minch v. Kirk-Christy Co., 45 W. L. B. 136 (1901).

Equitable set-off.

An assignment by a stockholder of his claim against the corporation after its insolvency, and after the claim or note became due, does not affect the right to set off his liability against the dividend due on his claim.—Barber v. Leader Sewing Machine Co., 7 O. C. C. 411 (1893); s. c., 4 C. D. 658; King v. Armstrong, 50 Oh. St. 222 (1893).

Set-off.

A stockholder cannot set off as against his liability an indebtedness of the company to him.—Painesville Nat. Bank v. King Varnish Co., 8 O. C. C. 563 (1894); s. c., 4 C. D. 511;

Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164 (1886).

Contest of claims.

A creditor can except to the allowance of any other claim upon the ground that it is not of such a nature that stockholders are liable upon it.—Hardman v. Cincinnati, etc., Ry. Co., 15 W. L. B. 164 (1887).

Action against estate of deceased stockholders.

An action may be maintained against the estate of a deceased stockholder without first exhibiting an account of the liability to his personal representatives.—Hall v. Standard Coal Co., 7 N. P. 157 (1897); Wanz v. Park Hotel Co., 1 O. C. C. 105 (1885); s. c., 1 C. D. 63.

Reference.

In these cases the names of the creditors and the amount due each from the corporation are usually ascertained by a reference to a master or referee, notice being published by order of the court for creditors to present their claims. In case of a contested claim an issue should be ordered to be made up and tried, to ascertain and fix the amount due to the creditor from the corporation. While the issue and trial as to such contested claim is a proceeding in the case, it is distinct from the proceedings against the stockholders, the one being to establish the validity of a creditor's claim against the company, and the other to collect a fund from the stockholders for the common benefit of all the creditors.—Herrick v. Wardwell, 58 Oh. St. 294, 307 (1898).

Presumption.

Where it appears that a court has heard and determined a suit to enforce stockholders' liability, it will be presumed that the essential facts were alleged and proved.—Swan v. Mansfield, etc., R. R. Co., 3 N. P. 225, 227 (1896); s. c., 5 Dec. 297.

Continuance.

Before the enactment of this section, where the indebtedness of the company was greatly in excess of the capital stock, and it appeared that a defendant, prior to the beginning of the action, had transferred his stock to a solvent stockholder within the jurisdiction, and owned it when a part of the debts were created, but who is not a party to the suit, it is not error to the prejudice of either stockholders or creditors for the court to adjudicate as between other stockholders who are parties and the creditors, and continue the case for further proceedings as to the liability of the vendor and vendee of the stock as between themselves and as between them and the creditors.—Mason v. Alexander, 44 Oh. St. 318 (1886).

Burden of proof.

The burden is on the plaintiff creditor to prove a defendant to be a stockholder.—

Trustees — Liability, etc., of, § 3261.

Henkle v. Salem Mfg. Co., 39 Oh. St. 547, 552 (1883).

Judgment.

Judgment may be rendered against the stockholders before the court for their pro rata share of the debts, taking into account the liability of all the solvent stockholders.—Burr v. Bates, 3 O. C. C. 1, 4 (1887); s. c., 2 C. D. 1.

Finality of judgments.

Where a judgment has been rendered against a defendant for an amount certain, as being the extent of his statutory liability, the plaintiff cannot thereafter, by supplemental petition, recover an additional amount upon a liability which existed when the first judgment was rendered.—Bullock v. Kilgour, 39 Oh. St. 543 (1883); s. c., 8 W. L. B. 23; 11 Am. L. Rec. 38 (1882).

A final judgment in a suit to enforce stockholders' liability estops all the creditors from prosecuting any further action to enforce the liability; and such judgment is final as to the liability of stockholders so long as it remains unreversed or otherwise vacated.—Swan v. Mansfield R. R. Co., 3 N. P. 225 (1896); s. c., 5 Dec. 297.

A creditor is not concluded by a decree in a former action on behalf of all creditors unless he was an actual party to such former adjudication, or had notice thereof and an opportunity to become a party thereto, and refused and neglected to avail himself thereof.—Hamilton v. Home Ins. Co., 1 N. P. 329 (1895); s. c., 3 Dec. 389. See Swan v. Mansfield, etc., R. R. Co., 3 N. P. 225 (1896); s. c., 5 Dec. 297.

Where, in an action to enforce the statutory liability of stockholders in a corporation, the petition contains all the appropriate averments, and on the trial there has been a finding that all the allegations are true, and a judgment that the defendant stockholders pay the creditors the amount found due them as may be apportioned among the solvent defendants, the judgment, until reversed or vacated by proper authority, is a final determination of all the plaintiff's claims, and appropriate proceedings thereafter in carrying the judgment into effect after proceedings in an appellate court do not include a retrial of, or inquire into any question of fact involved in it, but relate to the apportionment of the liability among the solvent stockholders according to their respective ownerships as deter-

mined by the judgment, and a valid increase cannot be made against a stockholder on any greater number of shares.—Baltimore, etc., R. R. Co. v. Smith, 54 Oh. St. 562 (1896); Smith v. Newark, etc., R. R. Co., 8 O. C. C. 583 (1894); s. c., 4 C. D. 356.

In the absence of fraud or collusion, all the defendants are concluded by the final judgment, the proceedings throughout being for the benefit of all creditors.—Herrick v. Wardwell, 58 Oh. St. 294, 306 (1898).

Property transferred by a stockholder not subject to judgment.

Property transferred by a stockholder of a corporation at a time when it was going and solvent cannot be followed into the hands of bona fide purchasers and subjected to the payment of the debts of the corporation upon the subsequent insolvency of the company.—First Nat. Bank v. Rice, 22 O. C. C. 183 (1900).

Application of proceeds.

Where a creditor holds claims, part of which are secured, he cannot apply the proceeds of a judgment to the unsecured claims. The court will pro rata the same.—National Bank v. Garn, 13 O. C. C. 447, 457 (1902).

Credits on appeal.

Where an appeal is taken it vacates the judgments appealed from, and payments made on such judgments should be credited to the parties in the appellate court.—Harpold v. Stobart, 46 Oh. St. 397, 399 (1889).

Consolidation of cases.

See Newberry v. Alexander, 44 Oh. St. 346 (1886).

Bankrupt stockholders.

A stockholder's statutory liability is a provable debt against the estate of the bankrupt stockholder whenever the circumstances are such that a stockholder's liability suit would lie. The claim against the bankrupt being unliquidated, the court will, upon application, direct the manner of liquidation, and may direct the creditor applying for liquidation of the claim to institute a stockholder's liability suit, or to proceed with a suit pending, or, if the facts are simple and undisputed, the court may itself undertake to determine the amount of the liability and the creditors to whom it should be paid.—In re Rouse, Bankrupt, 40 W. L. B. 220 (1898).

§ 3261. **TRUSTEES PERSONALLY LIABLE FOR DEBTS CONTRACTED.**—The trustees of a corporation created for a purpose other than profit, shall be personally liable for all debts of the corporation by them contracted. (April 17, 1854, 52 v. 44, § 78.)

Liability when stock is issued.

The trustees of a corporation not for profit are liable for all its debts by them contracted, notwithstanding its articles of incorporation contain a provision for capital stock and a

declaration that it is intended to promote the prosperity of the city in which it is located.—Snyder v. Chamber of Commerce, 53 Oh. St. 1 (1895).

Capital Stock — Increase of, § 3262.

Nature of liability.

The liability of trustees under this section is secondary, collateral and conditional to the principal obligation of the corporation, and can be resorted to by creditors only in case of the insolvency of the corporation, or where payment cannot be enforced against it by ordinary process.—*Walbrecht v. Pucketat*, 9 W. L. B. 335 (1883).

Action to enforce liability.

See § 3260 et seq.

Nature of action against trustees.

After obtaining judgment against the corporation on his claim, the creditor cannot maintain an action against the trustees as individually liable on the claim which would give two judgments on the same contract. The plaintiff's remedy is by a bill in equity in the nature of a creditor's bill alleging the impossibility of making the claim out of the corporation and asking relief from the trustees.—*Horstman v. Rix*, 4 W. L. G. 131 (1859).

What are debts of the corporation.

The trustees were held liable in a case where the indebtedness was incurred in behalf of the corporation, and for its benefit. After it was created the trustees authorized the giving of the note of the corporation for the indebtedness. The creditor refused to take the note of the corporation, but took the note of the individuals, which, on renewal later, was changed into the note of the corporation.—*Mahaffey v. Rogers*, 10 O. C. C. 24, 26 (1894); s. c., 6 C. D. 88.

What are debts of the corporation.

The certificates of membership and insurance under which the insured becomes a member of a corporation formed for mutual insurance under § 3686, R. S., is not after loss such a debt of the corporation as makes the trustees liable therefor under this section.—*Manufacturers' Fire Ass'n v. Lynchburg Drug Mills*, 8 O. C. C. 112 (1893); s. c., 4 C. D. 350.

What are debts of the corporation.

It seems that a mutual fire association could enter into contracts, as, for instance, supplies,

rent, salaries, etc., for which the trustees would be liable.—*See Manufacturers' Fire Ass'n v. Lynchburg Drug Mills*, 8 O. C. C. 112 (1893); s. c., 4 C. D. 350.

Ultra vires.

A member of a mutual fire association cannot hold the directors liable on his policy and certificate of membership on the ground that it is ultra vires.—*Manufacturers' Fire Ass'n v. Lynchburg Drug Mills*, 8 O. C. C. 112 (1893); s. c., 4 C. D. 350.

Res adjudicata.

Where trustees of a mutual society were sued as personally liable for its debt, and judgment was rendered for them, and on suing them thereafter as a corporation (a mutual society) the justice who heard the first case can testify he decided against their personal liability because the corporation was not insolvent, thus showing there was no res adjudicata.—*Mahaffey v. Rogers*, 10 O. C. C. 24 (1894); s. c., 6 C. D. 88; affirmed without report, 37 W. L. B. 292 (1897).

Liability in mutual societies under act of 1872.

Section 95 of the general corporation act (S. & C. 310), the original of this section, does not make the trustees of a benefit society incorporated under the act of 1872 personally liable, though no stock is issued.—*Strobridge v. Winchell*, 7 Am. L. Rec. 743 (1879); s. c., 4 W. L. B. 408.

Liability in insurance companies organized under § 3631-24 et seq.

The trustees of a company organized under § 3631-24 et seq. are not personally liable for a death loss upon a policy issued by the company while they were in office as such trustees, but the policy holders and beneficiaries under such policies must trust to the companies and the protection afforded them by those sections.—*Kelly v. Bender*, 22 O. C. C. 144 (1901).

Hospital corporation not liable for negligence of nurse.

See *Conner v. Sisters of Poor*, 7 N. P. 514 (1900).

§ 3262. INCREASE OF CAPITAL STOCK.—A corporation for profit, after its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which its capital stock is divided, by the unanimous written consent of all original subscribers, if done prior to organization, and after organization then by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known; or such increase may be made at any meeting of the stockholders at which all the holders of such stock are present in person, or by proxy, and waive in writing such notice by publication and by letter; and also agree in writ-

Capital Stock — Preferred — Reduction of, etc., §§ 3263, 3264.

ing to such increase, naming the amount of increase to which they agree; and a certificate of such action of the corporation shall be filed with the secretary of state. (March 11, 1872, 69 v. 24; February 18, 1873, 70 v. 37; R. S. 1880; February 16, 1883, 80 v. 23; May 11, 1886, 83 v. 134; April 5, 1893, 90 v. 141.)

What is an increase.

The sale of the balance of the stock of a company left after the original subscription is not an increase of stock.—See *Sims v. Street R. R. Co.*, 37 Oh. St. 556, 564 (1882); *Painesville Nat. Bank v. King Varnish Co.*, 8 O. C. C. 563 (1894); s. c., 4 C. D. 511.

Irregularities in issue.

Irregularities in the proceedings to increase the stock will not defeat an action to recover on a subscription for such increased stock for the purpose of paying debts, where such subscriber, having knowledge of the facts, acquiesced until the company became insolvent.—*Clarke v. Thomas*, 34 Oh. St. 46 (1877). See *Tillinghast v. Bailey*, 86 Fed. 46 (1897).

Rights when whole of stock not taken.

Where stock was issued by a mining company under the act of 1877, and the subscribers refused to pay for a part, the company has the right to dispose of such stock or enforce the agreement, although the whole of the increased stock was never taken.—*Clarke v. Thomas*, 34 Oh. St. 46 (1877).

Right of mining company to increase.

An increase of stock by a mining company in 1868 was governed by the act of 1854 (S. & C. 369), as amended in 1865 (S. & C. 237).—See *Clarke v. Thomas*, 34 Oh. St. 46 (1877).

Increase under acts of 1854 and 1865.

See *Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 123 (1890).

Taxation.

Stock in a corporation is the individual property of the holder. If the corporation in-

creases its capital, and, instead of dividing the increase among the shareholders, sells the new stock at a premium, this premium divided among the original shareholders is not a dividend, but their private gain, and is not subject to a tax on dividends or profits.—*State v. Franklin Bank*, 10 Oh. 91 (1840).

Stock must be distributed ratably among existing stockholders.

Each stockholder has a right to an opportunity to subscribe for and take the new or increased stock in proportion to the old stock held by him.—See *State v. Franklin Bank*, 10 Oh. 91 (1840).

Rights of existing stockholders when stock sells for a bonus.

See *State v. Franklin Bank*, 10 Oh. 91 (1840).

Stock was required to be fully paid before increase under old law.

The existing capital stock of a company must be fully paid up before the right to increase its capital stock accrues. This is a condition precedent to such right, and means that the stock shall be actually paid for in full at its par value, and a corporation cannot work a fraud upon the law by disposing of its shares at less than par under the form of a sale, instead of by way of subscription.—*Peter v. Union Mfg. Co.*, 56 Oh. St. 181, 200 (1897).

This section is cited in *Snyder v. Chamber of Commerce*, 53 Oh. St. 11 (1895); *Miller v. Ratterman*, 47 Oh. St. 157 (1890).

§ 3263. **MAY INCREASE BY PREFERRED STOCK.**— Upon the assent in writing of three-fourths in number of the stockholders of any corporation, representing at least three-fourths of its capital stock, the corporation may, to increase its capital stock, issue and dispose of preferred stock, as is authorized in section 3235a; and upon any such increase of stock, a certificate shall be filed with the secretary of state, as is provided in the preceding section. (May 12, 1902, 95 v. 624; March 6, 1874, 71 v. 19, §§ 1, 2.)

See notes to § 3235.

Cannot issue part preferred and common.

Power to make the increase of stock preferred stock does not include the power to issue partly preferred and partly nonpreferred stock.—*Covington, etc., Bridge Co. v. Sargent*, 1 C. S. C. R. 354 (1871).

May prefer unissued stock.

The existing shareholders may give a preference to subscribers to unissued stock for the purpose of inducing subscriptions.—See *Painesville Nat. Bank v. King Varnish Co.*, 8 O. C. C. 563 (1894); s. c., 4 C. D. 511.

§ 3264. **REDUCTION OF CAPITAL STOCK.**— The board of directors of any such corporation may, with the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on the books of the company, reduce

Bonds, Coupon, etc.—Corporate Property, etc., §§ 3265, 3266.

the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor; but the rights of creditors shall not be affected or impaired thereby; and a certificate of such action shall be filed with the secretary of state. (May 11, 1886, 83 v. 134; R. S. 1880; April 3, 1868, 65 v. 51, §§ 1, 2, 3, 4, 5 [S. & C. 309; S. & S. 242]; May 1, 1852, 50 v. 274, § 74.)

Purchase of shares by the corporation.

A purchase of its own shares by a corporation to protect a debt due it is not a reduction of its capital stock, though the secretary of

the company may have marked the certificates "canceled."—*Morgan v. Lewis*, 46 Oh. St. 1, 7 (1888). See *Allen v. De Lagerberger*, 20 W. L. B. 368 (1888).

§ 3265. **CHANGE OF BONDS AUTHORIZED.**—A corporation which has lawfully issued or may hereafter lawfully issue its registered or coupon bonds, may, upon request of the holder thereof, change such registered bonds into coupon bonds, or such coupon bonds into registered bonds either by substitution, or proper indorsement thereon; and all liens, securities, and rights which existed or accrued to such original bonds shall continue to such substituted or indorsed bonds, the same as if such substitution or indorsement had not been made. (April 7, 1876, 73 v. 123, §§ 1, 2.)

§ 3266. **CORPORATE PROPERTY TO BE EMPLOYED ONLY FOR THE OBJECTS OF THE CORPORATION.**—No corporation shall employ its stocks, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation. (May 1, 1852, 50 v. 274, § 73 [S. & C. 309].)

Powers of corporations.

See § 3239, notes.

Misappropriations and remedies.

See § 3248, notes.

Preferences by insolvent corporations.

A corporation for profit, organized under the laws of this state, after it has become insolvent and ceased to prosecute the objects for which it was created, cannot by giving some of its creditors mortgages on the corporate property to secure antecedent debts without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors.—*Rouse v. Merchants' Nat. Bank*, 46 Oh. St. 493 (1889).

Exception—preference by going concern.

A mortgage executed by a corporation to secure a pre-existing debt is not necessarily invalid for the reason that the company was known to be insolvent, where the company is at the time in the possession of its property, and in active prosecution of its business, and intends to continue therein unless prevented by other creditors; and the object of the mortgage is, on its part, not to give a preference to one creditor over another, but simply to obtain an extension of credit.—*Ford v. Lamson*, 17 O. C. C. 539 (1899); s. c., 9 C. D. 374; *Damarin v. Huron Iron Co.*, 47 Oh. St. 581 (1890); *Bosche v. Toledo Display Horse Co.*, 14 O. C. C. 289 (1897); s. c., 7 C. D. 374.

Same subject.

A going concern cannot create and give to one of its creditors a secret inchoate prefer-

ence, and let its other creditors continue to extend credit to it, and then after insolvency let such creditor come in and make his claim.—*Benedict v. Market Nat. Bank*, 4 N. P. 231 (1897), 19 O. C. C. 408; s. c., 6 Dec. 320.

Same subject.

Even a mortgage or preference given by an insolvent but going concern is invalid if given with intent to create a preference.—*Remington v. Central Press, etc., Co.*, 3 N. P. 253 (1896); s. c., 4 Dec. 337.

Preference by Ohio corporation in foreign state—remedy.

Quære, can an Ohio corporation, having no charter power to prefer a creditor, make a preference in a foreign state. See as to rights and remedies, *Kit Carter Cattle Co. v. McGillin*, 7 N. P. 575 (1900); s. c., 21 O. C. C. 210.

Agreement to execute mortgage.

An agreement by a bank that it would advance a corporation money to a certain amount to enable it to carry on its business, provided that such firm at any time the bank should deem it necessary should execute to it a mortgage upon the personal property of such firm and eventually such mortgage was so executed, is not a preference by an insolvent corporation.—*Campbell, etc., Mfg. Co. v. Bellman Bros. Co.*, 11 O. C. C. 360 (1896); s. c., 5 C. D. 389.

Preference by cognovit note.

A judgment taken on a cognovit note given by a corporation several months before it made an assignment, but on which judgment was taken, execution issued and levy made

Directors, Change of Number of — Annual Statements, etc., §§ 3267-3269.

only a few hours before the deed of assignment of the corporation was filed, is valid, and gives a good lien, and is not affected by a resolution of the directors on the day of the assignment authorizing the president to confess judgment.—*In re Winchell Mfg. Co.*, 1 N. P. 136 (1894); s. c., 1 Dec. 310.

When is corporation insolvent.

A corporation is insolvent when it is unable to pay its debts in the ordinary course of business as they mature.—*Remington v. Central Press, etc., Co.*, 3 N. P. 258 (1896); s. c., 4 Dec. 337.

Ohio rule followed by United States supreme court.

In cases involving the right of an insolvent Ohio corporation to make a preference, the United States courts will follow the rules laid down by our courts.—*Smith Middlings Purifier Co. v. McGroarty*, 24 W. L. B. 110 (1890), 136 U. S. 237.

Preference to director.

An insolvent corporation with no expectation of being able to continue its business, cannot rightfully secure or pay debts owing to its directors.—*Ford v. Lamson*, 17 O. C. C.

539 (1899); s. c., 9 C. D. 374; *Cheney v. Maumee Cycle Co.*, 20 O. C. C. 19 (1900).

Preference not ground for attachment.

A wrongful preference by a corporation of one creditor does not furnish a ground for attachment by another creditor.—*Stone v. Bank*, 8 O. C. C. 636 (1894); s. c., 4 C. D. 354.

Transfer is voidable, remedy of creditors.

A transfer creating a preference is not void, but voidable only, and the remedy of creditors is to treat the transferee as a trustee for the benefit of all the creditors and invoke the aid of the court to enforce the trust. A levy or attachment cannot be made by creditors on the property transferred.—*Bryant v. Johnson*, 12 O. C. C. 102 (1896); s. c., 5 C. D. 333; *Phillips v. Ammon-Stevens Co.*, 2 N. P. 187 (1895); s. c., 3 Dec. 418.

Attachment by creditor.

An attachment and levy by a creditor on the assets of a corporation carrying on its business although in fact insolvent, will give a valid lien on the assets levied upon.—*Ford v. Lamson*, 17 O. C. C. 539 (1899); s. c., 9 C. D. 374.

§ 3267. **CHANGE IN NUMBER OF DIRECTORS.**—A company may, by a vote of a majority of its stock, at any regular meeting of the company, increase the number of directors to any number not greater than fifteen, or decrease the number before or after such increase to any number not below five; provided, that at any stockholders' meeting, called in the manner and as provided in section three thousand two hundred and forty-six, and notice of which has been given in accordance with the provisions thereof, any corporation, incorporated for manufacturing purposes, may, by a vote of a majority of its stock, increase the number of its directors as hereinbefore provided, who shall hold their offices respectively until the next annual election for directors, and until their successors are elected and qualified. (May 15, 1886, 83 v. 163; R. S. 1880.)

See *Mower v. Staples*, 32 Minn. 284 (1884).

Term of office cannot be shortened.

The tenure of office of directors elected at a regular meeting cannot be shortened by a code of regulations adopted after their elec-

tion, nor by decreasing the number of directors.—*Lutterby v. Herancourt Brewing Co.*, 12 Dec. 67 (1901).

§ 3268. **ANNUAL STATEMENT FOR STOCKHOLDERS.**—Every corporation organized under the laws of this state shall make a statement annually of its financial condition, setting forth its assets and liabilities, and shall furnish to each stockholder a true copy of the same, together with a list of the stockholders thereof and their place of residence. (R. S. 1880.)

§ 3269. **WHEN PROVISIONS OF THIS CHAPTER DO NOT APPLY.**—The provisions of this chapter do not apply when special provision is made in the subsequent chapters of this title, but the special provision shall govern, unless it clearly appear that the provisions are cumulative; and no corporation shall by anything in this title be relieved from any liability in actions now pending or causes of action heretofore accrued. (R. S. 1880.)

See *State v. Long*, 48 Oh. St. 509 (1891); *State v. Pioneer Live Stock Co.*, 38 Oh. St. 347 (1882).

Dividends, etc., § 3269-1.

§ 3269-1. Sec. 1. **CORPORATE DIVIDENDS TO BE PAID FROM SURPLUS PROFITS ONLY.**—Be it enacted, etc., that it shall not be lawful for the directors of any corporation organized under the laws of this state to make dividends except from the surplus profits arising from the business of the corporation. (April 11, 1888, 85 v. 182.)

What are dividends.

Dividends in a company consist of that portion of its profits which the directors separate from the general stock, and apply to the benefit of the stockholders.—*State v. Farmers' Bank*, 11 Oh. 94 (1841).

Same subject.

The term "dividend," while usually applied to the distribution of the profits among the stockholders, is equally applicable to a distribution of a part or the whole of the capital of the company.—*Larwill v. Burke*, 19 O. C. 450 (1900); s. c., 19 O. C. 513.

Payment of interest or dividends out of capital.

A company has no power to pay interest or dividends on its stock out of its capital stock, and a contract so to do cannot be enforced.—*Painesville, etc., R. R. Co. v. King*, 17 Oh. St. 534 (1867); *Ohio College, etc. v. Rosenthal*, 45 Oh. St. 183, 194 (1887); *Miller v. Ratterman*, 47 Oh. St. 141, 158 (1890); *Ryan v. Miami, etc., Ry. Co.*, 10 A. L. R. 263 (1881); *Wood v. Pearce*, 2 Dis. 411 (1859).

Guaranty of dividends on preferred stock.

A general guaranty of dividends by a railroad company, on its preferred stock, is not a guaranty of dividends in any event, but only in the event that dividends are earned.—*Miller v. Ratterman*, 47 Oh. St. 141 (1890).

Reservation of dividends.

At the time of the sale and transfer of stock no valid reservation of future dividends can be made.—*Marble v. Van Wert Nat. Bank*, 3 O. C. C. 464 (1888); s. c., 2 C. D. 265.

To whom dividends are payable.

Dividends are prima facie payable to the registered stockholders, and a company will be protected in a payment so made in the absence of notice of equitable titles. But where a person holds a full and perfect equitable title to stock, of which the corporation has notice, he is also entitled in equity to the dividends thereafter accruing upon it.—*Cleveland, etc., R. R. Co. v. Robbins*, 35 Oh. St. 483 (1880); *Conant v. Seneca County Bank*, 1 Oh. St. 298 (1853).

When husband's creditors can reach wife's profits.

Although at a wife's request her husband attended to the management and control of a corporation in which she was interested, and by his skill and labor helped to produce valuable results, property bought with money coming from her share of the profits, cannot

be subjected to the payment of the husband's debts.—*See First Nat. Bank v. Rice*, 22 O. C. C. 183 (1900).

Stock dividends not capital.

By the terms of the act of 1875 (72 v. 143), no reduction of the freight and passenger rates of a railroad company could be made by the legislature unless its net profits exceeded ten per cent. on its capital. *Held*, that in determining what profits had been made, stock dividends cannot be considered as capital.—*Iron Ry. Co. v. Furnace Co.*, 49 Oh. St. 102 (1892).

Dividends in insurance company.

A stockholder in a joint insurance company, who has failed to pay an assessment on his stock, made to bring the assets of the company up to the amount of capital stock required by law, is not entitled to payment of dividends afterward declared by such company until he has paid such assessment. It is proper for the company to credit the amount of the dividend against the unpaid assessment standing charged against his stock on its books.—*Rhodes v. Equitable Life Ins. Co.*, 3 O. C. C. 501 (1888); s. c., 2 C. D. 288; affirmed 27 W. L. B. 160.

Lien of company on dividends.

See Bellevue Bank v. Higbee, 4 O. C. C. 222 (1889); s. c., 2 C. D. 512; affirmed 28 W. L. B. 336.

Dividends due the state.

See Seymour v. Milford, etc., Turnpike Co., 10 Oh. 476 (1841).

Taxation of dividends.

See State v. Farmers' Bank, 11 Oh. 94 (1841).

Bequest of dividends.

An unconditional bequest of dividends of stock is a bequest of the stock.—*Collier v. Collier*, 3 Oh. St. 369 (1854).

Title to earnings.

The net earnings of a corporation are the property of the corporation until such time as a dividend is declared, dividing the surplus among its stockholders.—*Adams v. Shields*, 17 O. C. C. 129 (1898); s. c., 9 C. D. 558; *Marble v. Van Wert Nat. Bank*, 3 Oh. C. C. 464 (1888); s. c., 2 C. D. 265.

Scrip dividends.

As to dividends paid by scrip certificates payable in money or representing stock, *see Adams v. Shields*, 17 O. C. C. 129 (1898); s. c., 9 C. D. 558.

Dividends — Surplus Profits, etc., §§ 3269-2-3269-4.

Dividends follow stock.

Where the right to dividends is in question as between a pledgee of stock and attaching creditors, the dividends follow the stock.—*Norton v. Norton*, 43 Oh. St. 509 (1885).

When dividends do not follow stock.

See *City of Ohio v. Cleveland, etc.*, R. R. Co., 6 Oh. St. 489 (1856).

Guaranty of dividends by third person.

Where a person subscribes for stock in a company relying on the verbal promise of another that the stock would earn a dividend of fifteen per cent. within one year, the contract is not within the statute of frauds.—*Moorehouse v. Crangle*, 36 Oh. St. 130 (1880).

Injunction against payment of dividends.

An injunction against the payment of dividends will not be granted on account of the intention of the directors to pay dividends on stock, the genuineness of which is questioned, when such stock is only a small fraction of the whole stock, and it does not appear that the payment will irreparably injure the plaintiff.—*Robison v. Cleveland, etc.*, Ry. Co., 5 N. P. 293, 306 (1898); s. c., 7 Dec. 312.

Statute of limitations.

An action for dividends payable on demand is not barred until there has been a demand and refusal.—*Larwill v. Burke*, 19 O. C. C. 450, 513 (1900).

Action for dividends is one at law.

See *Larwill v. Burke*, 19 O. C. C. 450, 513 (1900).

§ 3269-2. **Sec. 2. UNPAID INTEREST DUE CORPORATION NOT TO BE INCLUDED IN PROFITS.**—In the calculation of the profits of any corporation previous to a dividend, interest then unpaid, although due, on debts owing to the company, shall not be included. (April 11, 1888, 85 v. 182.)

§ 3269-3. **Sec. 3. SURPLUS PROFITS; HOW ASCERTAINED; PROHIBITING ADVERTISEMENT OF CAPITAL NOT SUBSCRIBED AND PAID IN.**—In order to ascertain the surplus profits, from which alone a dividend can be made, there shall be charged in the account of profit and loss, and deducted from the actual profits —

1. All the expenses paid or incurred, both ordinary and extraordinary, attending the management of the affairs and the transaction of the business of the corporation.
2. Interest paid, or then due or accrued on debts owing by the corporation.
3. All losses sustained by the corporation, and in the computation of such losses, all debts owing to the corporation shall be included which shall have remained due without prosecution, and no interest having been paid thereon for more than one year, or on which judgment shall have been recovered, and shall have remained for more than two years unsatisfied, and on which no interest shall have been paid during that period; and no such corporation shall advertise a larger amount of capital stock than has actually been subscribed and paid in; also, shall not advertise a greater dividend than what has been actually earned and credited or paid to its stockholders or members. (April 11, 1888, 85 v. 182, 183; April 10, 1889, 86 v. 228.)

§ 3269-4. **Sec. 4. PENALTY FOR VIOLATION OF SECTION 3.**—Every director who shall violate, or be concerned in violating, any provision in the preceding sections of this act contained, shall be liable personally to the creditors and stockholders respectively of the corporation of which he shall be a director, to the full extent of any loss they may respectively sustain from such violation. (April 11, 1888, 85 v. 182, 183.)

Wrongful payment of dividends.

See *Excelsior Water, etc., Co. v. Pierce*, 90 Cal. 131 (1891); *Braun v. Riggle*, 7 Ky. Law Rep. 519 (1886).

Advertisements as to stock subscribed, etc.

Where directors of a corporation caused a notice to be published that they and the stockholders were personally responsible for the debts of the company, when the charter

did not make them so responsible, a creditor of the corporation who extended credit to it on the faith of such notice may maintain an action against the directors for deceit.—*Westervelt v. Demorest*, 46 N. J. Law, 37 (1884). See *Cross v. Sackett*, 16 How. Pr. (N. Y.) 62 (1858); *Cazeaux v. Mali*, 25 Barb. (N. Y.) (1857); *Morse v. Swits*, 19 How. Pr. (N. Y.) 275 (1859); *Salmon v. Richardson*, 30 Conn. 360 (1862); *Fenn v. Curtis*, 23 Hun, 384 (1881). See notes to § 3248.

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 - § 3372. Not to discriminate between way and through freight.
 - § 3373. Nor against points in the state.
 - § 3373-1. Railroad companies must furnish equal facilities to shippers of same class; damages.
 - § 3373-2. Message for passenger delayed by accident or collision must be sent.
 - § 3374. Rates of passenger fare prescribed.
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 - § 3375a. Riding on freight trains.
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 - § 3377. When three preceding sections do not apply.
 - § 3378. Rates of fare and freight on branch roads.
 - § 3378a. Certain contracts for sale of railroad property not valid against creditors or innocent purchasers unless recorded or copy filed with secretary of state.
 - § 3378b. In written contracts for leasing such property, parties may provide for conditional sale of same; parties may provide that the property shall remain in the lessor or vendor until purchase money paid.
 - § 3378c. Secretary of state to file contracts; his fees, etc.
 - § 3378d. Construing application of foregoing sections.
 - § 3378-1. Authorizing railway companies to issue storage or warehouse certificate.
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 - § 3380a. Consolidated companies may consolidate.
 - § 3381. Proceedings to effect such consolidation.
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 - § 3382-1. Defects in consolidation agreements; how cured; proviso.
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- § 3382-3. Authorizing the curing of defects in certain railroad consolidation agreements; proviso.
- § 3383. Election of directors.
- § 3384. Property of the old companies vests in the new.
- § 3384a. Consolidated companies may dispose of stock and bonds acquired by consolidation.
- § 3384b. Consolidated company may issue its own stock in lieu of purchase money; rights; franchises, etc., of railroad acquired by purchase vested in consolidated company.
- § 3385. Principal office to be established; as to directors and general office.
- § 3386. Actions against new company.
- § 3387. Taxation of road partly in state.
- § 3388. Stockholder refusing to consolidate to be paid highest market price or must arbitrate.
- § 3388a. Last section applies only to domestic corporations.
- § 3390. Notice to be given of application for appointment of arbitrators.
- § 3391. Effect of the agreement of consolidation as evidence.
- § 3392. In actions against new company certain proof dispensed with.
- § 3392-1. Two or more companies owning a railroad may make division of interests and dispose of same.
- § 3392-2. Proceedings when such companies cannot agree upon division.
- § 3392-3. The cost of additions or improvements; how paid.
- § 3392-4. Partition not to be compulsory.
- § 3392-5. Company selling interest in road may purchase or condemn land along chartered route.
- § 3392-6. To which companies this act applies.
- § 3393. When proceedings for reorganization may be had.
- § 3394. Meeting of creditors and proceedings thereat.
- § 3395. What must be certified to the secretary of state.
- § 3396. The property and powers of the new company.
- § 3397. Further powers of the new company.
- § 3397a. Issue of stock or securities by companies organized or reorganized under agreements; terms of such agreements to appear on stock and securities issued; rights of holders.
- § 3398. Lien of mortgages, etc.
- § 3398a. Lien for labor performed for railroad company.
- § 3398b. How such lien enforced.
- § 3398c. In case of sale, court to retain amount of lien.
- § 3398d. What to be done in case judgment recovered.
- § 3399. These provisions applicable to other corporations — foreign corporations.
- § 3400. The property mortgaged may be sold without appraisalment.
- § 3401. When creditors of companies may agree on capitalization.
- § 3402. Secretary of state to publish notice of the agreement.
- § 3403. Other creditors may sign the agreement.
- § 3404. Right of those who do not sign.
- § 3405. When the court to make order touching costs.
- § 3406. Agreement may be between each interest and the company.
- § 3407. When the road is used by two companies.
- § 3408. When stock or bonds are held in a fiduciary capacity.
- § 3409. When a company may sell its road-bed, etc.
- § 3410. The transfer to be by deed.
- § 3411. Two-thirds in interest by stockholders must consent.
- § 3412. What interest dissenting stockholders may retain.
- § 3413. Title to property vests in grantee.
- § 3414. Certain rights of way forfeited.
- § 3415. May sue and be sued without leave of court.
- § 3416. Where action may be brought, and service.

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- § 3417. Application of funds, and lien thereon.
- § 3418. Where receiver must deposit money.
- § 3419. How purchaser of railroads may acquire franchise.
- § 3420. Certain roads may be sold at judicial sale.
- § 3421. The receiver must petition therefor.
- § 3422. Order for appraisement of road.
- § 3423. Notice of sale to be published.
- § 3424. Confirmation of sale, and deed.
- § 3425. How proceeds of sale distributed.
- § 3426. Who may purchase such property.
- § 3426a. Purchaser of railroad at judicial sale may sell same. Grant to be recorded.
- § 3426b. Railroad company, and any number of persons, may become purchasers; purchasers may become incorporated and may pay in stocks and bonds.
- § 3427. Appointment of railroad police; their qualifications, term of office, and revocation of commission.
- § 3428. Oath; record of commission; powers and liabilities of such police.
- § 3429. Power of such police to enforce regulations of road and make arrests.
- § 3430. Such police to wear badges, when.
- § 3431. Compensation of police.
- § 3432. When powers cease.
- § 3433. When a passenger conductor is a policeman.
- § 3434. When conductor may eject a passenger.
- § 3435. When he may arrest a passenger.
- § 3436. Penalties against conductors for violations of certain sections.

§ 3270. **GENERAL POWERS.**—A railroad company now existing or hereafter created may maintain and operate, or construct, maintain, and operate a railroad, with a single or double track, with such side tracks, turn-outs, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in the articles of incorporation, commencing at or within, and extending to or into any city, village, town, or place named as a terminus of its road. (April 29, 1872, 69 v. 203, § 4.)

General powers.

A railroad corporation has, like any other corporation, only such powers as are expressly granted and such as are necessary to carry into effect the powers expressly granted. Or, it may be stated, that a railroad company has its express powers and such incidental powers as are directly and immediately appropriate to the execution of the specific power granted, but not those of remote and slight relation to it.—*Straus v. Eagle Ins. Co.*, 5 Oh. St. 59 (1855); *White's Bank v. Toledo Ins. Co.*, 12 Oh. St. 601 (1861); *Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887). See notes to § 3239. See § 6761, notes.

Power to cross highways.

The right to build a road in a certain direction implies power to cross highways.—*State v. Montclair Ry. Co.*, 35 N. J. L. 328 (1872); *Lewis v. Germantown, etc., R. R. Co.*, 16 Phila. (Pa.) 608 (1881).

Power to sell subscriptions.

Power to sell a railroad because of lack of means to complete does not imply power to

sell stock subscriptions.—*Railroad v. Hinsdale*, 45 Oh. St. 556 (1888).

Purchase of stock.

A railroad company has no power to buy stock in a mining corporation.—*Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887).

Purchase roads.

Power to locate and construct branch roads does not confer by implication authority to purchase and operate the railroad of another company.—*Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168 (1872).

Side tracks.

Land may be condemned for side tracks whenever they become necessary in the proper management and operation of the road.—*Toledo, etc., Ry. Co. v. Daniels*, 16 Oh. St. 390 (1865).

Bridges.

Power to build a railroad between certain points implies power to bridge streams when necessary.—*Fall River Iron Works Co. v. Old Colony, etc., R. R. Co.*, 5 Allen (Mass.)

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221 (1862); *Hamilton v. Vicksburg, etc., R. R. Co.*, 34 La. Ann. 970 (1882); s. c., 119 U. S. 280; *Miller v. Prairie du Chien Ry. Co.*, 34 Wis. 533 (1874); *Works v. Junction R. R. Co.*, McLean (U. S.) 425 (1853); s. c., 3 O. F. D. 101.

Repair of bridges.

Power to build includes, of course, power to repair bridges.—*Hamilton v. Vicksburg, etc., R. R. Co.*, 119 U. S. 280; *Central Trust Co. v. Wabash, etc., Ry. Co.*, 32 Fed. 566.

Rebuilding bridges.

A railroad company will not be restrained from rebuilding a bridge across a stream when it will cause no greater obstruction than the old bridge.—*Board of Com'rs v. Pierce*, 90 Fed. 764 (1898).

Bridge, care in erection.

A company in the construction, repair, and maintenance of its bridges is bound to use reasonable care.—See *New York, etc., R. R. Co. v. Ellis*, 13 O. C. C. 704 (1895); s. c., 6 C. D. 304.

Power to operate.

Power to purchase implies authority to operate.—*Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168 (1872).

When company compelled to operate.

See *Port Clinton R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 Oh. St. 544 (1862); *Shapman v. Mad River, etc., R. R. Co.*, 6 Oh. St. 120 (1856).

Construction contracts.

A railroad company has the right to enter into a contract with another person for the construction of its road without retaining control over the mode and manner of doing the work, and may under proper circumstances be exempt from liability for the wrongful act of its contractors.—*Hughes v. Cincinnati, etc., Ry. Co.*, 39 Oh. St. 461 (1883); *Cincinnati, etc., R. R. Co. v. Sliff*, 13 Oh. St. 235, 247 (1862); *Carman v. Steubenville, etc., R. R. Co.*, 4 Oh. St. 399 (1854).

Interpretation of construction contract.

See *Cleveland, etc., R. R. Co. v. Kelley*, 5 Oh. St. 180 (1855); *Mansfield, etc., R. R. Co. v. Veeder*, 17 Oh. 385 (1848).

Telegraph lines.

A railroad company has implied power to engage in the telegraph business so far as necessary and convenient in the management of its business.—*Railroad Co. v. Telegraph Co.*, 38 Oh. St. 24 (1882).

Same subject.

It may grant any duly empowered company or person the right to use its telegraph line and equipment for general telegraph business;

but it may not in so doing reserve the right to do local telegraph business of a general nature.—*Railroad Co. v. Telegraph Co.*, 38 Oh. St. 24 (1882). See *Western, etc., Tel. Co. v. Atlantic, etc., Co.*, 1 W. L. B. 201, 309 (1876).

Sleeping-car contracts.

See *Stanley v. Cleveland, etc., R. R. Co.*, 15 Oh. St. 552 (1869).

May accept donations.

See *Elder v. Bellaire, etc., Ry. Co.*, 1 O. C. C. 256 (1885); s. c., 1 C. D. 140; *Sperry v. Johnson*, 11 Oh. 452 (1842).

Eminent domain.

See § 3281 and notes.

Power to run along and upon highways.

Only in cases of necessity has a railroad power to build its road along and upon a highway.—*Springfield v. Connecticut River R. R. Co.*, 4 Cush. (Mass.) 63 (1849); *Kenton County Bank v. Bank Lick Turnpike Co.*, 10 Bush (Ky.) 529 (1874).

Power to purchase land to get materials.

A railroad company may, if necessary and convenient, purchase land for the purpose of obtaining gravel, timber, etc., for construction purposes.—*Overmeyer v. Williams*, 15 Oh. 26.

Power to acquire report on mines.

A railroad company has no power to employ a person to make a report on mines of which its road is an outlet.—*George v. Nevada Central R. Co.*, 22 Nev. 228; 38 Pac. Rep. 441 (1894).

Power to aid entertainments.

A railroad company has no power to subscribe toward the expense of an entertainment which will probably bring passenger traffic to the road.—*Davis v. Old Colony R. R. Co.*, 131 Mass. 258. See *Wood on R. R.*, § 170, pp. 542-559.

Power to locate the road.

All charters must be taken to allow the exercise of a discretion in the location of the route as is incident to an ordinary practical survey of the same, made with reference to the nature of the country to be passed over and the obstacles to be encountered or avoided. The courts will interfere only in cases of abuse of such discretion.—*Walker v. Mad River R. R. Co.*, 8 Oh. 38 (1837); *Callender v. Painesville, etc., R. R. Co.*, 11 Oh. St. 524 (1860); *Southern, etc., R. R. Co. v. Stoddard*, 6 Minn. 150 (1861); *Fall River Co. v. Old Colony, etc., R. R. Co.*, 5 Allen (Mass.) 221 (1862); *Auspach v. Maganoy, etc., R. R. Co.*, 5 Phila. (Pa.) 491 (1864). See *Baldwin v. Hillsborough, etc., R. R. Co.*, 10 W. L. J. 337 (1853).

If the location is not in substantial compliance with the articles, the company may be

Location, Change of Route, etc., §§ 3271, 3272.

dissolved.—*State v. Railway*, 40 Oh. St. 504 (1884).

When a charter empowered a company to build a road from a town a location sixty rods outside the town is not in compliance with the charter, and the company may be compelled to extend the road.—*Comm. v. Erie, etc., R. R. Co.*, 27 Pa. St. 339-352 (1856).

Where a company is empowered to build to a certain city, it is not barred from reaching such point by the fact that it made a point outside such city a temporary terminus.—*Colorado, etc., Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. Rep. 293 (1890); *Childs v. Railroad Co.*, 33 N. J. L. 323 (1869).

There is nothing in this section which requires the terminus to be in towns or cities.—*Long Branch Com'rs v. West Line R. R. Co.*, 29 N. J. Eq. 566 (1878); *Attorney-General v. Delaware, etc., R. R. Co.*, 12 C. E. Green (N. J.) 645 (1876).

The whole road may be in one city or county.—*Long Branch Com'rs v. West Line R. R. Co.*, supra; *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755 (1880).

When is a road located?

A road is said to be located when a survey is completed and accepted. The supreme court of Pennsylvania, in *Williamsport R. Co. v. Railroad Co.*, 141 Pa. St. 407 (1891), said:

"The successive steps contemplated as necessary to vest a title to the railway in the corporation are these:

"1. A preliminary entry on the lands of private owners for the purpose of exploration. This is made by engineers or surveyors, who run or work one or more experimental lines, and who report their work, with such maps and profiles as may be necessary to represent it properly to the company that employs them. (See § 3281, Ohio Revised Statutes.)

"2. A selection and adoption of a line, or one of the lines so run, as and for the location of the proposed railroad. This is done by the corporation, and it requires the action in some form of the board of directors. This makes what was before experimental and open, a fixed and definite location. It fastens a servitude upon the property affected thereby, and

so takes from the owner and appropriates to the use of the corporation.

"3. Payment to the owner for what is taken and the consequences of the taking, or security that it shall be made when the amount due him is legally ascertained. The title of the owner is not divested until the last of these steps has been taken. As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation.

"As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title.

* * * * *

"In many states provision is made by law for recording the action of the company and the line adopted by it, so as to give notice to the public, and to settle questions of priority of location. We have no such statute, and the action of the company must be proved by other competent evidence, but when proved it has the same effect upon all interested as though it had been recorded. It settles the date of actual appropriation, and shows the exact location of the line of the road proposed."—*See Baldwin v. Hillsborough R. R. Co.*, 10 W. L. J. 356 (1853).

Agreement for location of road.

An agreement for the location of the route of a railroad at a particular intermediate place is not per se void as against public policy.—*Railroad Co. v. Ralston*, 41 Oh. St. 573 (1885). See *Pittsburg, etc., Ry. Co. v. Rose*, 24 Oh. St. 119 (1856).

Surveying and staking do not constitute a location.

A line of road is not so "located" by surveying and staking without condemnation or purchase as to give the company a right to the land exclusive of another railroad company that subsequently surveys and stakes the same line, and begins appropriation proceedings. Such first company cannot enjoin the second company from entering on such land. Its remedy is at law.—*Columbus Terminal, etc. v. Toledo Ry. Co.*, 32 W. L. B. 186 (1894).

§ 3271. **LOCATION OF TERMINUS.**—When a terminus named in the articles of incorporation is a county upon the line or boundary of the state, the president and directors of the company, upon the location of the road in that county, shall make and acknowledge a certificate definitely fixing the location in such county, and file the same with the secretary of state. (April 27, 1872, 69 v. 163, § 1.)

Note.—Attention is called to this section for the reason that it has been uniformly disregarded.

§ 3272. **CHANGE OF ROUTE.**—A company may, by a resolution adopted by a majority of its board of directors, at a meeting thereof duly called for the purpose, with the written consent of three-fourths in interest of its stockholders, change the line, or any part thereof, and either of the proposed termini, of its road; but no change shall be made which will involve the abandonment of any part of the road,

Change of Route, etc., § 3272.

either partly or completely constructed; and any subscription of stock made upon the faith of the location of such road, or a part thereof, upon any line abandoned by such change, shall be cancelled at the written request of the subscriber not having consented thereto, filed with the secretary or other chief officer of the company, within six months after such change. (April 7, 1876, 73 v. 115, § 1.)

Remedy of conditional subscribers.

This section adds a remedy for conditional subscribers to stock, but in no way affects the terms of their contracts. It is not necessary, therefore, for a conditional subscriber to request the cancellation of his subscription in writing. He may rely on the terms of his subscription.—*Railway Co. v. Fisher*, 39 Oh. St. 330 (1883).

Same subject.

A subscriber is not released unless he subscribed on the faith of the location of the road, and within six months after the change requested in writing the cancellation of his subscription.—*Armstrong v. Karshner*, 47 Oh. St. 276, 302 (1890).

Defenses of subscribers to stock.

See § 3253, notes; *Marietta, etc., R. R. Co. v. Elliott*, 10 Oh. St. 57 (1859); *Jewett v. Valley Ry. Co.*, 34 Oh. St. 601 (1878); *Milford, etc., Turnpike Co. v. Brush*, 10 Oh. 111 (1840); *Pa., etc., Canal Co. v. Webb*, 9 Oh. 136 (1839).

Resolution of directors.

The vote of the directors need not show the particular route to be occupied in the new counties or places selected. There is a new power to locate according to the statute when the directors have by proper vote so determined.—*In re New York, etc., Ry. Co.*, 88 N. Y. 279 (1882).

Extensions.

While in some states statutes are held to permit extension of completed roads, it seems clear that our statute permits only changes in the route and termini of incomplete roads.—See *Colorado, etc., Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. 293; *Louisville Trust Co. v. Cincinnati, etc., Ry. Co.*, 91 Fed. 699 (1897); s. c., 10 O. F. D. 646.

Change of location or route.

Prior to 1848 there was no general law providing for a change of location, route, or terminus of a railroad. In that year the first statute was passed, the latest form of which is § 3277, Revised Statutes.—See Acts of Feb. 11, 1848, 46 v. 44, § 10; Acts of May 1, 1852, 50 v. 276, § 11; Acts of April 5, 1866, 63 v. 141, § 11; Acts of March 8, 1865, 62 v. 36.

In 1871 an act was passed to facilitate location of good roads by minor changes, which act, with the changes, is found in Revised Statutes, § 3275.—See Acts of May 2, 1871, 68 v. 129; Acts of March 30, 1874, 71 v. 54.

The act to provide for change in route was

passed in 1876, and is found in § 3272, Revised Statutes.—See Act of April 7, 1876, 73 v. 115.

History of legislation.

The history of this legislation is given for the reason that considerable light is thus gained as to the exact meaning of our present acts.

Previous to 1848 roads without special provisions in their charters were unable to adopt any changes in route or location.—*Moorehead v. Little Miami R. R. Co.*, 17 Oh. 340 (1848); *Little Miami v. Naylor*, 2 Oh. St. 235 (1853); *Atkinson v. Marietta, etc., R. R. Co.*, 15 Oh. St. 21 (1864); *Works v. Junction R. R. Co.*, 5 McLean (U. S.) 425; s. c., 3 O. F. D. 101.

Exhaustion of power to locate.

In the absence of authority the completion of a location of a road exhausts the power of the company, and this principle applies whether it is attempted to relocate on private property or on a street or highway.—*Moorehead v. Little Miami R. R. Co.*, 17 Oh. 340 (1848); *Little Miami R. R. Co. v. Naylor*, 2 Oh. St. 235 (1853).

Construction of laws.

We have three sections 3272, 3275 and 3277, providing for changes in the route and location of railways in different forms and under different circumstances.

§ 3272 covers any change in the line, route or termini before the part affected is partially or completely constructed.

§ 3275 covers minor changes or divergences in the line before it is located, so as to avoid dangerous and expensive operation and construction, saving from such changes the main point, of the road, the general route and located parts.

§ 3277 covers changes in a located or completed road so as to avoid dangerous operation.

Laws of this nature, being in derogation of private right, must be strictly construed, but it should not be that narrow and niggardly strictness which utterly disregards the admitted policy of the law, and gives strained and secondary meaning to its language, in order to defeat that policy. In other words, these statutes are not to be viewed with the liberality extended to enactments purely remedial, but, on the other hand, the rules applicable to penal statutes are not to be applied to them.—*Jewett v. Railway*, 34 Oh. St. 601 (1878); *Toledo, etc., Ry. Co. v. Daniels*, 16 Oh. St. 390 (1865).

Change of Route, etc., §§ 3273-3275.

Cause of change.

Before a change can be made the cause set forth must be shown to be fairly within the terms of the statute.—In re New York, etc., R. R. Co., 88 N. Y. 279; Works v. Junction R. R. Co., 5 McLean (U. S.) 425; s. c., 3 O. F. D. 101.

Remedy for illegal change.

Where a railroad company has received from private parties donations of lands, subscriptions of stock, and payments of money in consideration that it should locate its road at a particular place, and allow private side track and warehouse privileges in connection therewith, the company will not be permitted to effectuate a change in fact (though not in name) of the line of its road away from such a place, by getting up a new corporation and constructing a new road parallel with its old one, under a different charter, permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid.—Chapman v. Mad River, etc., R. R. Co., 6 Oh. St. 119 (1856).

Indirect change of route.

Whether a railroad company may construct another road entirely parallel with its own, which if owned and managed by an interest

distinct from itself, must necessarily be a competing road, for the purpose and with the effect to bring about a change in its own line, rather than to create a feeder or an extension of its own line, is within the limits of such connections as are authorized by § 3300, Revised Statutes, *quere*.—Chapman v. Mad River, etc., R. R. Co., 6 Oh. St. 119 (1856). See Atlantic, etc., R. R. Co. v. St. Louis, 66 Mo. 228 (1890).

Injunction against change.

See Stewart v. Little Miami R. R. Co., 14 Oh. 353 (1846).

Extension of line.

Authority to extend a line of railroad will not authorize a company in departing from the named terminus. The extension must be made from the terminus, not from the middle, or any other point.—Works v. Junction R. R. Co., 5 McLean (U. S.), 425; s. c., 3 O. F. D. 101; s. c., 10 W. L. J. 370 (1853).

Abandonment of track.

A company may abandon a spur or switch track in the absence of express contract. This section does not cover such track.—Mercantile Trust Co. v. Columbus, etc., R. R. Co., 90 Fed. 148 (1898).

§ 3273. **CHANGE TO BE CERTIFIED TO SECRETARY OF STATE.**—When any such change is made, the same shall be described in such resolution, a duly authenticated copy of which, under the seal of the company, shall be filed with the secretary of state, and by him recorded, with proper reference, on the record of the articles of incorporation of the company, and when so filed, such change shall be considered as made, and shall be as valid and binding as if such changed line had been the line originally described in such articles. (April 7, 1876, 73 v. 115, § 2.)

§ 3274. **MORTGAGE COVERS LINE AS CHANGED.**—When any such company has issued its mortgage bonds for the construction of its road, the record of the mortgage securing the same, in each county through or into which the changed line of the road passes, shall be as effectual to create a lien upon the changed line of road, and upon the property of the company, as if such mortgage contained a complete description of such changed line and of such property. (April 7, 1876, 73 v. 115, § 3.)

In *Ewell v. Grand Street, etc., R. R. Co.*, 67 Barb. (N. Y.) 83 (1874), it is said:

"To hold that by deviating from the route laid down by the road could be pro tanto freed from the lien, would be to announce a very dangerous doctrine.

"Good faith forbids that a security should be invalidated after one party has received

the full benefit, and can no longer place the other party in as good position as it originally occupied. The bondholders therefore acquired a full right to have the road, as built, sold to pay their bonds."—*Meyer v. Johnston*, 53 Ala. 237 (1875); *Meyer v. Stewart*, 64 Ala. 603 (1879); *Jones on Corporate Bonds*, §§ 71, 101; *Short on Railway Bonds*, § 212.

§ 3275. **WHEN AND HOW ROUTE MAY BE CHANGED.**—When a company, the line of whose road has not been finally located in whole or in part, finds it necessary, in order to avoid dangerous or difficult curves or grades, or dangerous or unsubstantial grounds or foundations, or for other reasonable cause, to pass through a county not named in the articles of incorporation, or to avoid passing into or through a county named therein, other than a county in which a terminus of the road has been fixed by the articles of incorporation, or in which is located a town or place by or

Change of Route, etc.—Damages, etc., §§ 3276-3278.

through which the line of such road is to pass, the president and directors of the company, or a majority of them, may, under their hands and seals, make a certificate declaring such necessity, and the cause thereof, and name therein the county or counties through which it may be necessary to pass, or which it may be necessary to avoid, which certificate shall be acknowledged and certified as provided in chapter one of this title, and forwarded to the secretary of state; and a copy of such certificate, duly certified by the secretary of state, shall be evidence of the facts therein stated; but nothing herein shall be construed to authorize the abandonment of any part of such company's line that has been finally located, or a change of the general route of the line of such road, or the terminal points named in the articles of incorporation. (March 30, 1874, 71 v. 54, § 1.)

Change by directors.

See generally as to change of location by directors, *Baldwin v. Hillsborough, etc.*, R. R. Co., 10 W. L. J. 356 (1853).

Failure to contribute no cause for change.

A company cannot change its location because of the failure of a town to contribute to the road.—*Works v. Junction, etc.*, R. R. Co., 5 McLean (U. S.) 425; s. c., 3 O. F. D. 101; 10 W. L. J. 370 (1853).

§ 3276. **COMPANY LIABLE FOR DAMAGES AND CERTAIN SUBSCRIPTIONS CANCELLED.**—When the line of road of any company is, under the preceding section, diverted from a county named in the articles of incorporation, the company shall be liable in damages, if any be caused by such change or diversion, to any person owning land in such county, and all persons who subscribed to the capital stock of the company on the line of that part of the road so changed shall be released from all obligations to pay their subscriptions; but no action shall be commenced for such damages after six months from the filing of such certificate with the secretary of state, and the publication of notice thereof by the company, for four consecutive weeks, in some newspaper printed in such county, or, if no newspaper is printed therein, in some newspaper having general circulation therein, saving the rights of infants, lunatics, and persons imprisoned, for six months after their disability is removed. (March 30, 1874, 71 v. 54, § 2.)

Defenses of subscribers to stock.

A defense under this section to an action on a stock subscription must show that the road was diverted from a county named in the articles of incorporation, and that the subscriber was on the line diverted.—*Armstrong v. Karshner*, 47 Oh. St. 276, 301 (1890).

Damages to landowners.

The question of damages in such cases to landowners is ably discussed in *Leisse v. St. Louis, etc.*, R. R. Co., 2 Mo. App. 105 (1876); s. c., 72 Mo. 561.

§ 3277. **CHANGE OF LOCATION.**—For the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations, or when the road-bed has been injured or destroyed by the current of any river, water course, or other unavoidable cause, or for other reasonable cause, a company may change the location or grade of any portion of its road, whether heretofore made or hereafter to be made, but shall not depart from the general route prescribed in the articles of incorporation. (April 5, 1866, 63 v. 141, § 11; March 8, 1865, 62 v. 36, § 1.)

Validity of change.

A change under this section is good if the general route is not departed from, and if

sufficient cause exists.—*Piedmont, etc., Ry. Co. v. Speelman*, 67 Md. 260 (1887).

§ 3278. **DAMAGES.**—For the purpose of making any such change, the company shall have all the rights, powers, and privileges to enter upon and appropriate lands, and make surveys necessary to effect such change, upon the same terms, and subject to the same obligations, rules, and regulations as are prescribed by law, except that, when it is necessary to appropriate property for any such change, the appropriation may be had, if the probate court, in the proceedings instituted therefor, find that the

Powers in adjoining States — Branch Roads, §§ 3279, 3280.

proposed change will conduce to the interests of the company and the public, and that the property and rights of those owning real estate along the portion of the road to be affected by the change will not be unreasonably injured thereby; but when the location is changed after the road has been used for transportation of persons and property, the company shall be liable for all damages occasioned by such change to the owner of the land upon which the road was first constructed. (April 5, 1866, 63 v. 141, § 11; March 8, 1865, 62 v. 36, § 1.)

Damages to landowners.

The question of damages to landowners in such cases is ably discussed in *Leisse v. St.*

Louis, etc., R. R. Co., 2 Mo. App. 105 (1876); s. c., 72 Mo. 561. See *Chapman v. Mad River, etc., R. R. Co.*, 6 Oh. St. 119 (1856).

§ 3279. **POWERS IN ADJOINING STATES.**— Any company organized for the purpose of constructing a railroad to the boundary line of this state, may extend its road into and through any adjoining state, under the regulations which may be prescribed by such adjoining state; and the rights, powers, and privileges of such company over such extension, in the construction and use of such road, and in controlling the property and applying the money and assets thereon, shall be the same as if the road were built wholly within this state. (April 10, 1856, 53 v. 143, § 9.)

A railroad company, by extending its lines into another state, does not cease to be a citizen of the state of Ohio, and thereby entitled to remove cases brought against it in such other state to the federal courts.—

Baltimore, etc., R. R. Co. v. Cary, 28 Oh. St. 208 (1876); *Railway v. Stringer*, 32 Oh. St. 468 (1877); *Railway Assurance Co. v. Pierce*, 27 Oh. St. 155 (1875).

§ 3280. **BRANCH ROADS.**— A company may construct branches from the main line to towns or places within the limits of any county through or into which its road passes, or to a connection with any railroad which is or may be built within the state, or to any coal or other mine, stone quarry, plastic clay, pottery clay and fire clay pits or banks, ore or shale banks, if, at a meeting of the stockholders called for that purpose, the holders of a majority of the capital stock of the company, by a vote, in person or by proxy, so determine; and upon such determination the president and directors shall make and acknowledge a certificate setting forth the facts, and file the same with the secretary of state. (March 22, 1894, 91 v. 87; R. S. 1880; 69 v. 203, § 4.)

Branches to mines, factories, etc.

A great many courts have held that railroads have no power to condemn land for the purpose of reaching some manufacturing plant.

In *Pittsburgh, etc., R. R. Co. v. Benwood Iron Works*, 31 W. Va. 710 (1888), it is said:

"It seems to us, if the railroad corporations were permitted, ad libitum, to do what this defendant in error asks to be done, no 'deadlier blow could be dealt the private rights of the citizen.' If the doctrine claimed by the defendant in error should prevail, then corporations might go to any private place they choose, to rolling mills, ice houses, tanneries, sugar refineries, brick yards, grocery stores, and in the country to stone quarries, coal mines, stock farms, etc., and if any private citizen dared to stand in the way, violently wrest his property from him for their mere private gain. In such a state of affairs the so-called protection by constitution to the rights of private property by the arbitrary ruling of the courts, would be rendered nugatory and void. The mere declaration in a pe-

tition that the property is to be appropriated to a public use does not make it so; and evidence that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for condemnation was private gain, and it was apparent that the general public had no interest in it."

This view is supported by *Chicago, etc., R. R. Co. v. Wiltz*, 116 Ill. 449 (1886); *Denver Coal Co. v. Union Pac. R. R. Co.*, 34 Fed. 286 (1888); *Kyle v. Texas, etc., R. R. Co.*,—Tex. App.—, 4 L.R.A. 275 (1889); *Sholl v. German Coal Co.*, 118 Ill. 427 (1886); *Rensselaer, etc., Ry. Coal Co. v. Texas*, 43 N. Y. 137 (1870); *Chattanooga, etc., Ry. Co. v. Felton*, 69 Fed. 273 (1895). See *South Chicago, etc., Ry. Co. v. Dix*, 109 Ill. 237 (1883); *Salt Co. v. Brown*, 7 W. Va. 191 (1874).

The opposite position is held in *New Central Coal Co. v. Georges Creek Coal Co.*, 37 Md. 357 (1872); *Dietrich v. Murdock*, 42 Mo. 279 (1868); *Brown v. Corey*, 43 Pa. St. 495 (1862); *Railway Co. v. Petty*, 57 Ark. 359 (1893); *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755 (1880). See generally *Lewis*

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on Eminent Domain, § 171; Elliott on Railroads, § 661.

Our Ohio decisions tend toward the adoption of the West Virginia rule.—See *State v. Railroad Co.*, 40 Oh. St. 504 (1884); *State v. Railroad Co.*, 50 Oh. St. 239 (1893); *Reeves v. Treasurer of Wood County*, 8 Oh. St. 333 (1858).

Power to purchase branch roads.

Power to construct branches to a main road does not include authority to purchase a branch road.—*Campbell v. Marietta, etc.*, R. R. Co., 23 Oh. St. 168 (1872).

§ 3281. **POWER TO APPROPRIATE LAND.**—A company or municipal corporation which may own or operate a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as may be deemed necessary for its railroad including necessary side tracks, depots, work-shops, round-houses, and water stations, material for construction, except timber, a right of way over adjacent lands sufficient to enable it to construct and repair its road and the right to conduct water by aqueducts and to make proper drains; but no appropriation of private property to the use of a company or a municipal corporation which owns or operates a railroad shall be made until full compensation therefor is made in money or secured by a deposit of money to the owner irrespective of any benefit from any improvement proposed by the company or such municipal corporation as prescribed by law. (May 18, 1894, 91 v. 294; R. S. 1880; May 1, 1852, 50 v. 274, § 10.)

Statute strictly construed.

Statutes granting power to condemn land for railroad purposes must be strictly construed.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228, 244 (1885); *Currier v. Marietta, etc.*, R. R. Co., 11 Oh. St. 228 (1860); *Miami Coal Co. v. Wigton*, 19 Oh. St. 560, 566 (1860); *Youngstown v. Pittsburgh, etc.*, R. R. Co., 3 O. C. C. 214, 222 (1888); s. c., 2 C. D. 121; *Harmer v. Columbus, etc., Ry. Co.*, 29 W. L. B. 387 (1893); *Toledo Ry. Co. v. Daniels*, 16 Oh. St. 390, 396 (1865).

Appropriation under constitution of 1802.

Under the constitution of 1802, which was, unlike the present constitution in that respect, where lands were appropriated by a railroad company for its track, supposed benefits might be set off against the value of the land taken, and hence the land might be appropriated without the payment of any money whatever.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228 (1885).

Incorporation for private ends.

It is incompetent for a landowner to show in an appropriation proceeding that the incorporators procured the incorporation of the company, not for public use, but for private ends merely, and were exercising the corporate privileges in abuse of the law.—*Powers v. Hazelton, etc.*, R. R. Co., 33 Oh. St. 429 (1878).

Public necessity.

An appropriation proceeding cannot be defeated by showing that there is no public ne-

Location and length of branch roads.

Where a special charter of an Ohio railroad granted it power to locate and construct branched roads from the main line to other towns or places in the several counties through which said road may pass, it was held that the branches must proceed from the main line and terminate at towns or places in the same county.—*Works v. Junction R. R. Co.*, 5 McLean (U. S.) 425 (1853); s. c., 3 O. F. D. 101.

cessity for the road.—*Powers v. Hazelton, etc.*, R. R. Co., 33 Oh. St. 429 (1878). See § 6420.

Compensation.

Our laws guarantee a compensatory not speculative remuneration for the land taken, and for the damages occasioned thereby to the rest of the property. The difference in value of the property with the appropriation and that without it is the rule of compensation. The difference must be ascertained with reference to the value of the property in view of its present character, situation, and surroundings. It cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a roadway to the adjoining lands of other persons.—*Powers v. Hazelton, etc.*, R. R. Co., 33 Oh. St. 429 (1878).

Failure to make compensation—recovery of possession.

Where a company occupies land and builds a track and runs cars without first making compensation, the owner of the land, not having knowledge of or having acquiesced in such use, may recover possession of the land.—*Bothe v. Dayton, etc.*, R. R. Co., 37 Oh. St. 147 (1881).

Damage to turnpike companies.

Where a railroad company proceeds to construct its road in part along and upon land covered by the easement of a turnpike company, that latter is entitled to compensation to the extent of the damage accruing to it in the diminution of the productive value of its

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property, excepting, however, diminution caused by competition between the turnpike company and the railroad as means of transportation.—*Cincinnati, etc., R. R. Co. v. Zimm*, 18 Oh. St. 417 (1868).

Destruction of access to and from parcels of land.

Where the railway cuts asunder an entire tract of land, the owner is entitled to compensation for the inconvenience and danger of access between the two parts of the tract when the inconvenience and danger are peculiar to the owner in the use of his property, and not common to the public at large.—See *Hatch v. Cincinnati, etc., R. R. Co.*, 18 Oh. St. 92 (1868); *Platt v. Pennsylvania Co.*, 43 Oh. St. 244 (1885).

Danger from fire.

An owner is not entitled to recover on account of increased danger from fire to his building or other structures, by reason of the use of the property by a railway, unless the proximity of his buildings, etc., to the railway be such as to render the danger imminent and appreciable.—*Hatch v. Cincinnati, etc., R. R. Co.*, 18 Oh. St. 92 (1868).

Damage done in making appropriation.

Where a petition states only that a railroad company, in locating and constructing its road on and through the plaintiff's land, appropriated about two acres of the land to its own use, and located its road through the land in a diagonal manner so as to greatly injure the same and committed other acts and trespasses upon the land to the plaintiff's damage, fails to state a cause of action, there being no allegation that unnecessary damage was done or failure to make compensation.—*Cleveland, etc., R. R. Co. v. Stackhouse*, 10 Oh. St. 567 (1860).

Right to entry to survey.

The legislature may properly and constitutionally confer the right to enter upon the lands of an individual without compensation, in order to survey and make examinations for its line of road, and the company may exercise the right, doing no unnecessary damage. *Ward v. Toledo, etc., R. R. Co.*, 10 W. L. J. 365 (1853).

What interests and estates included in word "land."

The word "land" as used in this section includes all the rights and interests which may be had in lands which it may be necessary to take for railway purposes. It, therefore, includes the rights of an owner of abutting property in the street taken for the right of way, even if the fee is in the city.—*Valley Ry. Co. v. Pouchet*, 4 O. C. C. 187 (1889); s. c., 2 C. D. 492; s. c., 51 Oh. St. 571. See *Ohio Southern R. R. Co. v. Hinkle*, 1 N. P. 63 (1894); s. c., 1 Dec. 682. See § 6416.

Amount necessary.

The corporation is to determine how much is necessary, and unless there is a clear abuse in the attempted exercise of this power, the court upon the preliminary hearing will not interfere to determine the matter.—*Ohio Southern R. R. Co. v. Hinkle*, 1 N. P. 63 (1894); s. c., 1 Dec. 682.

Appropriation of more land than is necessary.

Where a company appropriates more land than is necessary for its use, it cannot by a sale to another company of the surplus land subject the landowner to the occupancy and burden of another carrier, and such sale is void as to the landowner.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228 (1885).

Rights of owner of remainder of fee.

Where a railway company, having obtained from the tenant for life a quitclaim deed of premises over which it proposes to construct and operate a permanent line of railway, is about to enter upon the lands for the purpose, against the objection of the owner of the remainder in fee, and without making compensation to him, such proposed action on the part of the railway company may be enjoined at the suit of such owner, until compensation is made. Such owner cannot be compelled to await the termination of the life estate before demanding compensation, nor can he stand by and make no objection to the construction of the road, and, after the death of the life tenant, evict the company and interrupt public business.—*Gorrill v. Toledo, etc., Ry.*, 4 O. C. C. 398, 406 (1890); s. c., 2 C. D. 617.

Interest acquired is permanent.

The estate to be acquired for right-of-way purposes by a railway must be a permanent, not a temporary, estate or interest.—See *Gorrill v. Toledo, etc., Ry. Co.*, 4 O. C. C. 398, 403 (1890); s. c., 2 C. D. 617.

Rights of owner of fee.

Where the interest acquired is only an easement, the owner of the fee retains every right in the land appropriated, not inconsistent with the paramount authority of the company freely and unobstructedly to build, repair, and operate its railroad, and use therefor materials fairly within the condemnation.—See *Platt v. Pennsylvania Co.*, 43 Oh. St. 228, 244 (1885).

Power of company to sell the easement.

In the absence of a statute a sale by a company of a part of the easement acquired for its right of way is not good as against the owner of the fee, as the use of the right of way by a second company was not a burden taken into consideration in the original appropriation, and the fee owner can recover damages.—*Platts v. Pennsylvania Co.*, 43 Oh. St. 228, 246 (1885). See *Pittsburgh, etc., Ry. Co. v. Garlick*, 20 O. C. C. 561 (1900).

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Abandonment of easement.

The question of abandonment or not is a question of intention, and the intention to abandon may doubtless be inferred from circumstances where they are strong enough to warrant such inference.—*Hatch v. Cincinnati, etc., R. R. Co.*, 18 Oh. St. 92, 121 (1868). See *Wagner v. Cleveland, etc., R. R. Co.*, 22 Oh. St. 563 (1872); *Pittsburgh, etc., Ry. Co. v. Garlick*, 20 O. C. C. 561 (1900).

What is abandonment?

An abandonment of the easement acquired is worked by nonuser for twenty-one years, or by a conveyance of the property.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228, 240 (1885); *Pennsylvania Co. v. Platt*, 47 Oh. St. 366 (1890). See *Wagner v. Cleveland, etc., R. R. Co.*, 22 Oh. St. 563 (1872).

Abandonment of easement.

Where there is an abandonment of the easement, the interest acquired reverts to the owner of the fee.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228 240 (1885).

Condemnation of crossing.

Land occupied by a railway may be condemned, if necessary, to furnish a crossing for another road.—*Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 30 Oh. St. 604 (1876).

Appropriation for wharves.

Under this act a railroad company is not authorized to condemn private property solely for wharf purposes.—*Iron R. R. Co. v. City of Ironton*, 19 Oh. St. 299 (1869).

Appropriation for embankments, etc.

Railroads, from the nature of the locomotion thereon, require an evenness of grade, and this necessitates the cutting of hills, and the filling of valleys. In making these cuts or excavations earth and material must be removed, and where not proper to be used in a fill, the place to put such removed material is as much of a necessity as any other matter in construction. So land may be appropriated of sufficient width to form a basis for embankments.—*Ohio Southern R. R. Co. v. Hinkle*, 1 N. P. 63 (1894); s. c., 1 Dec. 682.

Land for depots.

The legislature has constitutional power to confer upon a corporation authorized to construct a railroad, the right to appropriate grounds necessary for its use as a depot.—*Giesy v. Cincinnati, etc., R. R. Co.*, 4 Oh. St. 308 (1854).

Temporary right of way cannot be appropriated.

A company has no power to appropriate a temporary right of way, say for three years, to be used until its main line is ready.—*Cur-*

rier v. Marietta, etc., R. R. Co., 11 Oh. St. 228 (1860).

Appropriation by company which has built its road.

A company has power to condemn land notwithstanding it has built its road on the land sought to be appropriated.—*Ohio Southern R. R. v. Hinkle*, 1 N. P. 63 (1894); s. c., 1 Dec. 682.

Side tracks.

A company has power to condemn lands for new side tracks, leading from the main road to its depot buildings, whenever they become necessary in the proper management of the road.—*Toledo, etc., Ry. Co. v. Daniels*, 16 Oh. St. 390 (1865); *Cincinnati, etc., R. R. Co. v. Spring Grove Ave. Co.*, 15 W. L. B. 384 (1886).

Injunction against occupation.

Where a railroad company is about to enter on lands for the purpose of constructing a road, the owner of the land may have an injunction to restrain the company until compensation is made.—*Gorrill v. Toledo Ry. Co.*, 4 O. C. C. 398 (1890); s. c., 2 C. D. 617.

Judgment lien.

A judgment lien may attach to property acquired under this section, as it does to that of any individual.—*Stewart v. Railway Co.*, 53 Oh. St. 151, 172 (1895).

Power of eminent domain.

See generally *Giesy v. Cincinnati, etc., R. R. Co.*, 4 Oh. St. 308 (1854).

See as to appropriation of land, § 6414 et seq., and notes.

Appropriation of canal lands—rights of owner of fee.

Where a railroad company appropriates the lands of a canal company, the owner of the fee is entitled to recover the full value of the lands, if any, taken by the railroad company, and not covered by the former appropriation by the canal company, and, also, a full and fair compensation for such additional burdens and inconveniences, not common to the general public, as accrue to him and his entire tract on which the easement is imposed, by reason of the change of uses to which the lands appropriated have been subjected.—*Hatch v. Cincinnati, etc., R. R. Co.*, 18 Oh. St. 92 (1868); *Vought v. Columbus, etc., R. R. Co.*, 58 Oh. St. 123 (1898).

Sale of canal lands to railways.

See *Hatch v. Cincinnati, etc., Ry. Co.*, 18 Oh. St. 92 (1868); *Goodin v. Cincinnati, etc., Canal Co.*, 18 Oh. St. 180 (1868); *Cincinnati, etc., R. R. Co. v. Zinn*, 18 Oh. St. 417 (1868); *Vought v. Columbus, etc., R. R. Co.*, 58 Oh. St. 123 (1898).

Power to Hold Lands, etc., § 3282.

No dower in land appropriated.

A widow can have no dower right in property condemned by statute, where her husband received full compensation for the land taken.—*Little Miami R. R. Co. v. Jones*, 5 W. L. G. 5 (1860).

City cannot appropriate for use of company.

Morehouse v. Norwalk, 6 W. L. B. 267 (1881).

§ 3282. **POWER TO HOLD LAND.**—Such company may acquire, by purchase or gift, any lands in the vicinity of the line of its road, or through which the same passes, so far as may be deemed convenient or necessary by the company to secure the right of way, or such as may be granted to aid in the construction of the road, and hold or convey the same in such manner as the directors may prescribe, but all such conveyances acquired by gift, to said companies, shall be null and void, unless said company complete said road on the right of way so conveyed within five years from the time of said conveyance; and all deeds and conveyances made by the company shall be signed by the president, under the seal of the company. (May 1, 1852, 50 v. 274, § 15.)

Purpose of section.

The object of this section is to clothe the railway corporation with capacity to acquire by purchase or gift lands that are convenient or necessary to secure the right of way, or any lands granted to and in the construction of the road.—*State ex rel. v. Cincinnati, etc., Ry. Co.*, 37 Oh. St. 157 (1881).

Power to acquire land.

A railroad company has power to acquire real estate only when such power is granted to it by statute or by its charter.—*Walsh v. Barton*, 24 Oh. St. 28, 42 (1873).

Property held subject to police regulations.

Every railroad company maintains and operates its property subject to the inherent power in the state to adopt such regulations as the safety and welfare of the community may require.—*Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 30 Oh. St. 604 (1876).

Right to hold land limited.

The right of a railroad corporation to hold land is not an unqualified right, but it is limited to the uses and purposes of the corporation, and is to be held for the purposes of the grant for the public uses. The title which it has in its right of way is a qualified title, subject to the equal right of another railroad corporation to cross the same with its track, provided compensation be made as required in the case of individuals for the property appropriated, or the interest therein which is so appropriated.—*Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 30 Oh. St. 604 (1876).

Power to purchase for right of way.

A company has ample power to buy land for its right of way when convenient or necessary.—*Walsh v. Barton*, 24 Oh. St. 28, 42 (1873).

Purchase to obtain timber.

A company has power to purchase land to obtain timber or materials.—*Lessee of Overmeyer v. Williams*, 15 Oh. 26 (1846).

Purchase for unauthorized purpose.

Even if a company abuses its discretion and power in the purchase, and does in fact buy for a valuable consideration lands not convenient and necessary to its right of way, a title derived from such company is good and indefeasible. The property would not escheat, and estoppel against all concerned would cut off all attack. The state might proceed against the corporation, but could not affect the title to the land.—*Walsh v. Barton*, 24 Oh. St. 28, 42 (1873).

Fixtures — stone piers are not.

Stone piers built by a railroad company as a part of its railroad, on lands over which it has acquired the right of way for its road, do not, though firmly imbedded in the earth, become the property of the owner of the lands as a part of the realty. And, on the purpose of the completing of the railroad being abandoned, the company may remove such structures as personal property.—*Wagner v. Cleveland, etc., R. R. Co.*, 22 Oh. St. 563 (1872).

Right of way includes land necessary.

Where a railway company was entitled by contract to a deed for a definite strip of ground for a right of way, completed its track along said strip near its center, and was in actual possession, such possession included so much ground upon either side of said tract as was reasonably necessary for the convenient use and maintenance of the railroad, in the customary mode, and was constructive notice to a subsequent purchaser of the actual equitable title of the company.—*Day v. Railroad Co.*, 41 Oh. St. 392 (1884).

Grants of right of way without limit of time are perpetual.

Where a landowner granted a right of way to a railroad company organized under a charter in perpetuity, and the grant contains no limit as to time, the easement will be perpetual, unless terminated by release or abandonment.—*Junction R. R. Co. v. Ruggles*, 7 Oh. St. 1 (1857). See *Bosworth v. Pittsburg, etc., Ry. Co.*, 1 C. C. 69, 70 (1885); s. c., 1 C. D. 42.

Right of way contract—ambiguity.

An owner of land who sells to a company a right of way for its road by a written contract, in which the description of the land is indefinite, and after the road is constructed accepts, with full knowledge of the facts and without objection, the compensation agreed to be paid, and acquiesces for a period of years in the occupancy by the company, is estopped to deny that such location is the location originally agreed upon and to demand additional compensation.—*Railway Co. v. Williams*, 53 Oh. St. 268 (1895). See *Cleveland, etc., Ry. Co. v. Reid*, 4 N. P. 127 (1896).

Same subject.

Where the terms of a right of way grant are general and indefinite, its location and use by the grantee, acquiesced in by the grantor, will have the same legal effect as if it had been fully described by the terms of the grant.—*Warner v. Railroad Co.*, 39 Oh. St. 70 (1883).

Agreement to arbitrate as to price for right of way.

Where property-owners agree with a railroad company to convey land for its track, and to submit to arbitration the question of compensation to be paid them by the company for the land and damages, such arbitration does not involve the question of possession and title to real estate within the meaning of § 5601.—*C. P. & V. R. R. Co. v. Duckwall* (Sup. Ct.), 46 W. L. B. 92 (1901).

Selection of right of way under contract.

Where the owner of land granted to a company the right to select a strip thereof for its right of way, and from the terms of the grant and the circumstances it is clear that both parties understood that the right granted was to be exercised at the time of the final location and construction of the railroad, and not afterward, a court of equity will, by injunction, restrain such railroad company from taking possession of any additional part of said land after its railroad has been located.—*Warner v. Railroad Co.*, 39 Oh. St. 70 (1883).

Donations conditioned on location—change of location.

Where a railroad company has received from private parties donations of land in con-

sideration that it should locate its road at a particular place, the company will not be permitted to effectuate a change in fact (though not in name) of the line of its road away from such place, by getting up a new corporation and constructing a new road parallel with the old one, under a different charter, and permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid.—*Chapman v. Mad River R. R. Co.*, 6 Oh. St. 119 (1856).

Gift of land conditioned on location of depot—performance.

Where land is given to a railroad company on condition that it should be occupied for depot grounds a substantial compliance with the terms of the deed will prevent a recovery of the land for failure to perform the conditional agreement.—*Pittsburg, etc., Ry. Co. v. Rose*, 24 Oh. St. 219 (1873).

Rights of vendor on breach of condition subsequent.

A condition subsequent does not operate of itself, and the right to insist upon a forfeiture may be waived or lost by estoppel.—See *Field v. Lake Shore, etc., Ry. Co.*, 23 O. C. C. 1 (1897); s. c., 62 Oh. St. 633.

Land contracts—notice to subsequent purchasers.

Where the vendor retains the legal title pending the payment of the purchase money subsequent purchasers are charged with notice.—*Seasongood v. Miami Valley Ry. Co.*, 9 W. L. B. 256 (1883); *Dayton, etc., R. R. Co. v. Lawton*, 20 Oh. St. 401 (1870). See *Compton v. Wabash, etc., Ry. Co.*, 7 W. L. B. 118, 122 (1882).

Dedication, what is not.

Dedication is not one of the railroad company's means of acquiring property, and there is no dedication from the fact of landowners putting a town plat on record with a lot reserved thereon for a depot.—See *Todd v. Pittsburg, etc., R. R. Co.*, 19 Oh. St. 514 (1869).

Execution of deed.

A deed executed by the president of a railroad company in due form, under the seal of the corporation, and delivered, will be presumed to have been authorized by the directors; and the mere fact that such authority is not found on their minutes will not rebut the presumption.—*Cincinnati, etc., R. R. Co. v. Harter*, 26 Oh. St. 426 (1875).

Deed—proof of execution.

A deed purporting to have been executed by the president of a railroad corporation, under the seal of the corporation, as authorized in this section, if objected to, cannot be given in

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evidence without proof of its execution.—*Walsn v. Barton*, 24 Oh. St. 28 (1873).

License to take gravel from right of way need not be signed by president.
See *Greene v. Trustees of York Township*, 8 N. P. 491 (1899).

Subscriptions to stock payable in real estate.
See *Goodin v. Evans*, 18 Oh. St. 150 (1868).

Deed of right of way.
May be held in escrow by the agent of the company.—See *Cincinnati, etc., R. R. Co. v. Hill*, 13 Oh. St. 235 (1862).

Land subject to street assessments.

Northern, etc., R. R. Co. v. Connelly, 10 Oh. St. 159 (1859); *Baltimore, etc., R. R. Co. v. Com'rs*, 19 Oh. St. 589 (1869).

Construction of deed for right of way.

See *Belmer v. Cincinnati, etc., R. R. Co.*, 10 W. L. B. 232 (1883).

Enforcement of land contracts.

See § 6449 and notes.

Construction of covenants as to title in deed.

See *Pittsburg, etc., Ry. Co. v. Garlick*, 20 O. C. C. 561 (1900).

§ 3283. **USE OF STREETS—HOW OBTAINED.**—If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals, but every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track. (April 15, 1857, 54 v. 133, § 12.)

Authority conferred by section.

The extent of the authority conferred by this section on municipal corporations is to agree with railroad companies upon the manner, terms and conditions upon which a street, etc., may be used and occupied by a railroad, "if it be necessary in the location" of the railroad for any part of it to occupy such street, etc.; and then they may agree for the use of so much of the street only as is necessary for the purposes of the railroads. This limitation is manifest from the provision that if the parties are unable to agree, the company may appropriate so much of the street as is necessary for the purposes of its road. The object of the appropriation is to acquire such use of the street, etc., as could have been granted by agreement, and no greater use can be obtained in the one mode than in the other; the right acquired in either is limited to the use of so much of the street as may be necessary for the purposes "of the railroad." The statute does not contemplate the destruction of the street, or the cessation of its use by the public, or its withdrawal from the control and supervision of the proper municipal offi-

cers, nor is authority found in it for any agreement having such result. Therefore, when a city gives a railroad company the right to cross a street below grade, and build a bridge over the railroad, it is not prevented by such agreement from thereafter lowering the street so as to cross the railroad at grade.—*Railroad Co. v. Defiance*, 52 Oh. St. 262, 308 (1895).

Effect of section on liability of municipality.

The liability of the municipality is not affected, nor the remedy against it taken away, by this section, but in the action against the municipal corporation the plaintiff is not entitled to recover damages which are in the nature of compensation for the additional burden in the street arising from the location and construction of the tracks therein; for damages of that character the municipal corporation is not liable.—*Zanesville v. Fannan*, 53 Oh. St. 605 (1895). See *Steubenville v. McGill*, 41 Oh. St. 235 (1884); *Dillenbach v. Zenia*, 41 Oh. St. 207 (1884); *Zanesville v. Spoerl*, 54 Oh. St. 634 (1896).

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What agreements not within this section.

Agreements with existing and operating railroads as to the repair or alteration of crossings, bridges, etc., are not within this section. — See *Railroad Co. v. Defiance*, 52 Oh. St. 262, 313 (1895).

Control over streets — effect of section.

The powers conferred on municipal corporations with respect to the opening, improving and repairing of streets are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interests may require; and they cannot be granted away or relinquished, or their exercise suspended or abridged, except when and to the extent legislative authority is expressly given to do so; such authority is not given by this section. — *Railroad Co. v. Defiance*, 52 Oh. St. 262 (1895). See *Wabash R. R. Co. v. Defiance*, 167 U. S. 88 (1897).

Abandonment of streets.

It was not the intention of the legislature by this section to permit municipal authorities to abandon and surrender to railroads any streets and highways and to deprive the public of the use of the same farther than was necessary. The contracts authorized by this section contemplate the use of the streets by the railways in common with the public. — *Lake Shore, etc., Ry. Co. v. Elyria*, 14 O. C. C. 48 (1897); s. c., 7 C. D. 312. See *Railroad v. Defiance*, 52 Oh. St. 262 (1895); *Cleveland, etc., R. R. Co. v. Cincinnati*, 1 Gooble, 269 (1890).

Exclusive rights cannot be acquired by railroad.

A railroad does not acquire an exclusive right to the use of a street by the fact that the street was unimproved and little used at the time of the grant, that the company made a cut through the street and fenced both sides to prevent people from falling into the cut, and prevented the public from using the crossing, and failed to restore the street for over twenty-one years. — *Lake Shore, etc., Ry. Co. v. Elyria*, 14 O. C. C. 48 (1897); s. c., 7 C. D. 312.

Exclusive rights as to other companies cannot be acquired.

See *Kinsman, etc., R. R. Co. v. Broadway, etc., R. R. Co.*, 36 Oh. St. 239 (1880).

Unauthorized use — ejectment.

Ejectment will lie by a city to recover possession of streets in which the public has an easement. — *Cleveland v. Cleveland, etc., Ry. Co.*, 93 Fed. 113 (1899).

Persons on tracks in streets are not trespassers.

Where a railroad occupies a street with its tracks, the ordinary presumption is that of a joint use by the public and the railroad company, and a person injured upon the track in the street cannot be regarded as a trespasser.

— *Smith v. Pittsburg, etc., Ry. Co.*, 90 Fed. 783 (1898); *Baltimore, etc., R. R. Co. v. Anderson*, 85 Fed. 413 (1898).

Unauthorized use — liability for injuries.

The unauthorized occupation and use of highways by a railway company makes such company a trespasser, and liable for such damages as proximately result to persons or property in the absence of contributory negligence. — *Pittsburg, etc., Ry. Co. v. Hood*, 94 Fed. 618 (1899).

Unauthorized use of streets is a nuisance.

In the absence of authority, the construction and use by a railroad company of its road longitudinally on a public highway is a public nuisance. — See *Pittsburg, etc., Ry. Co. v. Hood*, 94 Fed. 618 (1899).

Injunction against railroad in a street as a nuisance.

See *Sargent v. Ohio, etc., R. R. Co.*, 1 Handy, 52 (1854).

Canal banks may not be used under this section.

The board of public works of the state is not authorized by law to grant to a railroad company the right to lay its track, and to maintain and operate a railroad, on and along the berme bank of a navigable canal belonging to the state. — *State ex rel. v. Cincinnati, etc., Ry. Co.*, 37 Oh. St. 157 (1881).

"Way" — "public ground" — interpretation.

The word "way" or "public ground" does not include the public navigable canals of the state in express terms, nor by necessary implication. A way, in the connection in which it stands in this section, must be regarded as something of the same nature and kind as a road or street. — *State ex rel. v. Cincinnati, etc., Ry. Co.*, 37 Oh. St. 157 (1881).

Effect of § 3284 on this section.

A railroad cannot cross a street or highway in a city under § 3284, but must obtain the right to do so under this section. — *Youngstown v. Pittsburg, etc., R. R. Co.*, 3 O. C. C. 214 (1888); s. c., 2 C. D. 121; *Cincinnati, etc., R. R. Co. v. Cincinnati*, 8 W. L. B. 334 (1882).

Consent of city not revocable.

A city's grant of consent to use a street does not create a mere revocable license, but the railroad has the same rights as if the use of the street had been condemned. — *Pittsburg, etc., R. R. Co. v. Cincinnati*, 16 W. L. B. 367 (1886); *Cincinnati v. Pittsburg, etc., R. R. Co.*, 30 W. L. B. 137 (1893). See *Cincinnati, etc., Ry. Co. v. Carthage*, 36 Oh. St. 631 (1881).

Power to divert highway.

A contract may be made with a railway company with respect to the manner, terms

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and conditions upon which such company may occupy, cross or divert a public highway in the construction of its railroad: and such contract, when fairly made, is valid, and will be enforced the same as other valid contracts. — *Megrue v. Commissioners*, 15 O. C. C. 242 (1897); s. c., 8 C. D. 262.

Construction of contract.

The grant of the use of a street by a city to a railroad "as such railroad should deem it necessary and expedient" means such use as is reasonably necessary and expedient for the railroad, with due regard for the convenience of the public. — *Lake Shore, etc., Ry. Co. v. Elyria*, 14 O. C. C. 49 (1897); s. c., 7 C. D. 312.

Conditions to consent to use.

Reasonable conditions essential for the protection of the public interests may be imposed in a grant to a railway company of the right to use a street, and if accepted by the company are binding upon the parties. A restriction limiting the use of the tracks to the night hours is a valid and reasonable condition. — *Pittsburg, etc., Ry. Co. v. Hood*, 94 Fed. 618 (1899); *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296 (1896); s. c., 10 O. F. D. 112.

Right of city to extend streets across track—construction of grant.

Where a railroad company is permitted to cross streets in a city on condition that if the city thereafter desires to extend any streets or alleys across the railroad tracks, it shall be granted right of way free of damage and expense, and without condemnation proceedings, the company is estopped from claiming the city has no right to extend streets. — *Chicago, etc., R. R. Co. v. Hamilton*, 3 O. C. C. 455 (1888); s. c., 2 C. D. 259.

Appropriation of city of land for street across a railroad.

See § 2232 et seq.

Duty of company to repair—construction of grant.

Where a grant of right to use a street under this section bound the company to grade and gravel the streets, the company is not released from the duty of grading and graveling by reason of an inoperative ordinance rescinding the original consent of the city. On the failure of the company within a reasonable time to grade and gravel the streets, a right of action accrues to the city without special notice or demand on the company. — *Cincinnati, etc., Ry. Co. v. Carthage*, 36 Oh. St. 631 (1881).

Contract, when made by county commissioners, should be entered on minutes.

Although it is essential to the validity of a contract entered into by county commissioners that it be entered on the minutes of their proceedings by the auditor, where the contract has been fully performed on the part of the

county, the other party to the contract cannot resist performance on his part on the ground that it was not so entered. — *Commissioners v. Baltimore, etc., R. R. Co.*, 37 Oh. St. 205 (1881).

Highways occupied without consent—action by authorities for damages.

See *Lawrence R. R. Co. v. Commissioners*, 35 Oh. St. 1 (1878).

Cleveland lake front cases.

Hohmes v. Cleveland, etc., R. R. Co., 93 Fed. 100 (1861); *Cleveland v. Cleveland, etc., R. R. Co.*, 93 Fed. 113 (1899).

Section 6448 does not affect this section.

This section and § 6448 are quite consistent and may both stand as furnishing to the private proprietor an election of remedies. He cannot have both, either concurrently or in succession; and a recovery under this section for all injuries done to his property by the occupancy complained of would estop him from claiming under § 6448 that such occupancy was without his consent, and that full compensation had not been made. — *Grafton v. Baltimore, etc., R. R. Co.*, 12 W. L. B. 214 (1884); s. c., 31 Fed. 309. See *Baltimore, etc., R. R. Co. v. Lersch*, 58 Oh. St. 652 (1898); *Railroad Co. v. Campbell*, 51 Oh. St. 328 (1894).

Effect of agreement of city and railroad on land owner.

The agreement between the authorities in charge of the street or road and the railroad company can in no way affect the right of the landowner to claim compensation. — *Railroad Co. v. O'Harra*, 48 Oh. St. 343 (1891).

Right of action prior to the enactment of this section.

See *Parrot v. Cincinnati, etc., R. R. Co.*, 3 Oh. St. 330 (1854); s. c., 10 Oh. St. 624 (1858); *Little Miami R. R. Co. v. Naylor*, 2 Oh. St. 235 (1853).

Common-law remedy—limitations.

Although a remedy existed at common law, this section now governs, and the limitation is two years. — *Columbus, etc., R. R. Co. v. Mowatt*, 35 Oh. St. 284 (1880).

Action to compel condemnation, limitation.

The limitation in this section does not affect the right to compel condemnation within twenty-one years after the taking of the land. — *Railroad Co. v. O'Harra*, 48 Oh. St. 343 (1891).

Proceedings to compel appropriation.

The owner of lands abutting on a highway occupied by a railroad company, without his consent and without having made compensation to him, may commence an action to compel the railroad to appropriate the right of way for its road. — *Lawrence R. R. Co. v.*

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Williams, 35 Oh. St. 168 (1878). See *Kramer v. Toledo*, etc., R. R. Co., 53 Oh. St. 436 (1895).

Injunction by property owner.

Where a city has granted to a railway company the right to lay its tracks over a street, the construction of such tracks will be enjoined at the suit of an abutting property owner, whose consent has not been obtained, where it appears that the construction and operation of such railroad would substantially interfere with his rights and easements in the streets, and damage his property, until such railroad shall have fully compensated such owner, and in such case it is immaterial whether the fee is vested in the city or in the abutting owners, so long as it is held upon the same defined uses. — *Railway Co. v. Lawrence*, 38 Oh. St. 41 (1882); *Toledo Bending Co. v. Manufacturers Ry. Co.*, 2 N. P. 317 (1895); s. c., 3 Dec. 430. See *Taphorn v. Marietta*, etc., R. R. Co., 4 W. L. B. 988 (1879); s. c., 11 W. L. B. 92; *Dyer v. Cincinnati*, etc., Ry. Co., 7 O. C. C. 255 (1893); s. c., 4 C. D. 584.

Same subject — not necessary that property should abut.

See *Madden v. Pennsylvania Ry. Co.*, 11 C. D. 571 (1900).

Mandatory injunction to restore.

Where a railroad company, under an ordinance of the city granting the right to lay its tracks in a certain street, proceeds without having first obtained the consent of abutting property owners to tear up the street to construct its road, a mandatory injunction will be granted on the suit of an abutting property owner whose property will be damaged by such construction, ordering the company to restore the street to its former condition. — *Toledo Bending Co. v. Manufacturers Ry. Co.*, 2 N. P. 317 (1895); s. c., 3 Dec. 430. See *Varvig v. Cleveland*, etc., R. R. Co., 54 Oh. St. 455 (1896); *Cincinnati*, etc., R. R. Co. v. *Cincinnati*, 8 W. L. B. 334 (1882).

Extent of liability.

A railroad company cannot avoid liability for damages to abutting property upon the theory that the city would not be liable, and thus acting under the authority of the city, be relieved from liability except to the extent the city would be liable. By no arrangement with the municipal authorities can a railway in any manner impair the value of abutting property on a street on the strength of the proposition that the city itself, for its uses, might take the property, and not be liable for such compensation as would be required at the hands of a private company. — *Lake Shore*, etc., Ry. Co. v. *Brown*, 16 O. C. C. 269 (1896); s. c., 9 C. D. 37.

Joint liability of lessor and lessee of railroad.

Where one company raised the grade and laid an additional track, and the other took possession and continued the permanent use

of the same, they are jointly liable for permanent injury to the property of the plaintiff resulting therefrom, and also for temporary injury occurring after the lease from causes created without right by the lessor and continued by the lessee. — *Railroad Co. v. Hambleton*, 40 Oh. St. 496 (1884).

What property is "near to."

Property is "near to" a street, so as to entitle the owner to avail himself of the remedy given by the statute, if the injury to it is the direct and necessary result of the occupancy of the street by the track or other structures of a railroad company. And an injury arises when the diminution of the value of the property can be fairly attributed to such use and occupancy of the street. — *Shepherd v. Baltimore*, etc., R. R. Co., 130 U. S. 426, 432 (1888); s. c., 6 O. F. D. 322; *Wheeling*, etc., R. R. Co. v. *McLaughlin*, 15 O. C. C. 1 (1897); s. c., 7 C. D. 647; *Columbus*, etc., R. R. Co. v. *Mowatt*, 35 Oh. St. 284 (1880).

Statute of limitations.

The limitation of two years fixed by this section does not run in favor of a railroad company which occupies a street without consent or condemnation. — *Lawrence R. R. Co. v. Cobb*, 35 Oh. St. 94 (1878).

Statute of limitations.

The provision of this section by which an action brought under this section is required to be commenced within two years after the completion of the track, is a statute of limitation, and a delay beyond that period does not extinguish the right of recovery. If the railroad company does not, either by demurrer or answer, interpose an objection on account of the lapse of time, but proceeds to trial on the merits, it will be deemed to have waived the benefit of the provision. — *Baltimore*, etc., R. R. Co. v. *Lersch*, 58 Oh. St. 639 (1898).

When is track completed.

The track is completed whenever it is put in condition fit for permanent use in running trains. — See *Railway Co. v. Gardner*, 45 Oh. St. 309, 325 (1887).

Action by administrator.

An action by an administrator to recover of a railroad company compensation and damages for wrongfully taking and appropriating lands of the decedent during his lifetime, cannot be maintained, for the reason that such wrongful taking did not divest the decedent of his title to the land; and the land, therefore, descended at his death to his heirs. — *Railway Co. v. O'Harra*, 50 Oh. St. 667 (1893).

Same subject.

An action may be maintained by an administrator to recover for damages which accrued in the lifetime of the decedent from the wrongful use made of the lands, the interruption of his easement, and the consequential injuries to other lands, for which he could have maintained a personal action. — *Railway Co. v. O'Harra*, 50 Oh. St. 667 (1893).

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Action by mortgagee for injury to mortgage security.

See *Cameron v. Cincinnati*, 17 W. L. B. 153 (1886).

Title of property owner — proof.

In an action under this section, the plaintiff's title may be established by proof of adverse possession. — *Lawrence R. R. Co. v. Cobb*, 35 Oh. St. 94 (1878). See *Shepherd v. Baltimore, etc., R. R. Co.*, 130 U. S. 426, 434 (1888) : s. e., 6 O. F. D. 322.

Unrecorded consent of original owner — notice to purchasers.

Where a railroad company has, with the consent of the owner of abutting land, laid in front of the premises a single track of its road and is operating cars thereon, such condition is notice to a purchaser of such property of a right to maintain such track, and his easement in the street, as owner of abutting land, is, to the extent of such possession and user, affected thereby. But such right will not be affected by an unrecorded deed from his grantor, executed more than six months prior, giving to the company permission to lay additional tracks, if at the time of his purchase the purchaser acts in good faith, and has no knowledge of the existence of such conveyance. — *Varwig v. Cleveland, etc., R. R. Co.*, 54 Oh. St. 455 (1896) : s. e., 6 O. C. C. 439; s. e., 3 C. D. 528.

What amounts to an obstruction to access.

It is not sufficient to bar recovery that the abutting lot owner has left direct access to the street immediately in front of his property; if the public travel has been excluded therefrom by the act of the defendant in constructing or suffering an obstruction to be constructed thereon. He is entitled to direct unimpaired access from his lot to the portion of the street in front in use by the general public. If, in order to reach that portion of the street in use by the general public, he is compelled to go to a point beyond the lines of his lot, either to cross over or under such obstruction, he suffers thereby an inconvenience and injury not common to the public, for which he is entitled to compensation. — *English v. Trustees of R. R.*, 8 W. L. B. 15 (1882).

Extent of recovery.

Under this section abutting owners are entitled to recover full compensation for the depreciation in the value of their property. In estimating the damages the same standard is to be applied as in direct proceedings by the railroad company to condemn for its use the private right of such owner in the street. — *Grafton v. Baltimore, etc., R. R. Co.*, 12 W. L. B. 214 (1884) : s. e., 21 Fed. 309; s. e., 5 O. F. D. 318.

Damages for temporary injury by obstruction of street.

Damages caused by the temporary obstruction of a street during the construction of the

railroad are not recoverable under this section unless such obstructions are unnecessarily and unreasonably interposed and prolonged. — *Shepherd v. Baltimore, etc., R. R. Co.*, 130 U. S. 426, 433 (1888) : s. e., 6 O. F. D. 322.

Damages arising from additional tracks.

Where a railroad company, whose main track has been established for thirty years, lays a new track from such main track through a side street, the owner of property near to such track is entitled to all damages caused by reason of the construction and operation of the new track in the street only, while the engine is on the same making noise, smoke and sparks, and obstructing the street. But when the cars and engine get off this track in the street, and are on the main or other tracks, the property owner is not entitled to damages arising from such operation of the railroad, unless the engine and cars are at the instant attached to cars or engine which are at that time on the track in the street. — *See Railroad Co. v. Hambleton*, 40 Oh. St. 496 (1884) : *Cleveland, etc., Ry. Co. v. Reeder*, 6 O. C. C. 354 (1892) : s. e., 3 C. D. 489.

Recovery limited to damages pleaded.

Where the plaintiff in an action under this section specifically alleges that the injuries of which he complains were caused by noises, smoke, dust and sparks of fire, but does not set up any easement, fee or other interest in the street, or aver any injury thereto, he should not be permitted on the trial of the action, over the objection of the railroad company, to establish as the measure of his recovery the difference between the value of the property before and after the track was laid, and the court should instruct the jury that the recovery should be limited to the claims made in the petition. — *Baltimore, etc., R. R. Co. v. Lersch*, 58 Oh. St. 639 (1898).

Damages caused by running trains.

An adjacent landowner cannot maintain an action at law for consequential damages from the operation of its cars unless he can show a negligent exercise by the railway company of its legal rights. Any annoyance incident to the running of the cars on the road with reasonable care is *damnum absque injuria*. — *Flieman v. Cleveland, etc., Ry. Co.*, 27 W. L. B. 302 (1892).

Obstruction of street — inconvenience common to public.

The owner of property near to a railroad occupying a street cannot recover damages on account of any obstruction to the street caused by the tracks or the operation of the railroad which does not cause him injury different in character from that suffered by the general public, although his injury may be greater in degree, the common-law rule as to such injuries not being abrogated by this section. — *Wheeling, etc., R. R. Co. v. McLaughlin*, 15 O. C. C. 1 (1897) : s. e., 7 C. D. 647; *Flieman v. Cleveland, etc., Ry. Co.*, 27 W. L. B. 302 (1892).

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Damages personal in nature do not follow the land.

Damages, excepting for the wrongful taking of land, are personal in character, and do not pass to a grantee on a conveyance. — *Railroad Co. v. Campbell*, 51 Oh. St. 328 (1894).

Damages from smoke, noises, fire, etc.

In an action by an owner of property abutting on or near to the street occupied, it is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noises and sparks of fire, occasioned by running of locomotives and cars along the track in front of the property. — *Railway Co. v. Gardner*, 45 Oh. St. 309 (1887); *Wheeling, etc., R. R. Co. v. McLaughlin*, 15 O. C. C. 1 (1897); s. c., 7 C. D. 647. See *Parrot v. Cincinnati, etc., R. R. Co.*, 10 Oh. St. 624 (1858); *Hatch v. Cincinnati, etc., R. R. Co.*, 18 Oh. St. 92 (1868).

Evidence as to damages.

The true rule of damages in these cases is the difference in the value of the property

affected before and the value after the location of the railroad, and this is to be determined by the jury in the light of the facts established by the evidence, and not upon the mere opinions of witnesses, except so far as opinions may be received upon questions of value, it is error to permit witnesses to testify how much less per year was received as rent for the property affected since, than before the track was laid in front of it; to give opinions concerning the amount of damages sustained and also opinions as to the difference in value of the property with the track in the street and if it was some place else. — *Railway Co. v. Gardner*, 45 Oh. St. 309 (1887).

Damages — interest.

In awarding damages in an action under this section, an allowance may be made in the nature of interest on account of delay. — *Lawrence R. R. Co. v. Cobb*, 35 Oh. St. 94 (1878).

Powers of council as to crossings.

See Mun. Code, §§ 7, 10.

§ 3284. **RIGHT TO CROSS COUNTRY ROADS.** — A company may, whenever it is necessary in the construction of its road to cross a road or a stream of water, divert the same from its location or bed; but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness, and any or all railroads hereafter constructed, which shall cross any avenue or public highway leading from a city of the first or second class to a public cemetery of such city, situate within or without the limits of any such city, shall be constructed so as either to pass under or over such avenue or public highway, at such elevation or depression as the case may be, as will allow the unobstructed passage of all wagons, carriages, or other vehicles which it may be necessary for any person to use upon such avenue or public highway. (May 1, 1852, 50 v. 274, § 16.)

Common-law rule.

This section is substantially the common-law rule on the subject. — *Railroad Co. v. Defiance*, 52 Oh. St. 262, 314 (1895).

When duty arises.

The duty comes to a railroad company when it constructs its road across a highway, not when it appropriates its right of way. — *Toledo v. Lake Shore, etc., Ry. Co.*, 17 O. C. C. 265, 281 (1893); s. c., 9 C. D. 135.

Extent of power to divert.

Subject to the performance of the duty to restore, the power or right to divert a road or stream is co-extensive with the public necessity which calls for its exercise, and the diversion may be temporary or permanent, as the public needs or necessities require. — *Valley Ry. Co. v. Bohm*, 34 Oh. St. 114, 119 (1877).

Nature of duty of company.

The obligation of the company to place the highway in such condition as not to impair its former usefulness to the public, is a condition inseparable from the right or franchise granted to the company to cross the highway with its railroad, or to divert it from its lo-

cation for the accommodation of the railroad. — *Zanesville v. Fannan*, 53 Oh. St. 615 (1895); *State ex rel. v. Dayton, etc., R. R. Co.*, 36 Oh. St. 434 (1881).

Duty to make safe crossings.

§ 3324 and notes; § 3337-2 and notes.

Duty to keep in repair.

There is no duty imposed by this section upon the company to keep the highway in repair, after it has been placed in such condition as not to impair its usefulness. — *Pittsburg, etc., Ry. Co. v. Maurer*, 21 Oh. St. 421 (1871).

Duty to guard pending construction.

Until such time as the highway is fully restored to its former condition of safety and usefulness, the railroad company must, by the erection of proper barriers, prevent and guard travelers from using the highway if it is in a dangerous condition. — *Potter v. Bunnell*, 20 Oh. St. 150 (1870).

Duty to restore is personal — cannot be shifted to contractor.

The duty imposed by this section is personal, and a railroad company cannot, by employing contractors to do the work, shield it-

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self from responsibility for injuries done to persons rightfully using the road.—*Cincinnati, etc., R. R. Co. v. Van Dorn*, 1 O. C. C. 292 (1885); s. c., 1 C. D. 160.

Duty to restore to former condition.

The requirements of this section is not to restore to its former place or condition, but to such condition as not to affect materially its utility. It is to be left in such condition how much so ever it may be diverted from its former course, that the right to the public or private enjoyment, where such right exists, shall not be materially disturbed or interfered with. The right to divert is not limited to a temporary use.—*Valley Ry. Co. v. Bohm*, 34 Oh. St. 114 (1877); *Little Miami R. R. Co. v. Commissioners*, 31 Oh. St. 338 (1877). See *Toledo v. Lake Shore, etc., Ry. Co.*, 17 O. C. C. 265 (1893); s. c., 9 C. D. 135.

Liability for failure to restore.

Under this section a railroad company is liable for damages arising out of its failure to restore roads to their former condition of usefulness.—*Pittsburg, etc., Ry. Co. v. Maurer*, 21 Oh. St. 421 (1871); *Cincinnati, etc., R. R. Co. v. Van Dorn*, 1 O. C. C. 292 (1885); s. c., 1 C. D. 160; *Potter v. Bunnell*, 20 Oh. St. 150 (1870).

Remedy of § 863 is cumulative.

The remedy given to county commissioners by § 863 for the obstruction of a state or county road, is cumulative, and does not affect the right of the state to maintain proceedings to compel the restoration of the road.—*State ex rel. v. Dayton, etc., R. R. Co.*, 36 Oh. St. 434 (1881).

Damages cannot be recovered in proceedings to condemn.

In proceedings by a railroad company to appropriate land adjoining a highway, where it appears that the company in taking the land described in the petition, would necessarily have to make an alteration in the course or grade or occupation of the highway, such facts cannot be taken into consideration by the jury in estimating the damages for the land sought to be appropriated. If any such alteration in the highway should be made so as to destroy or lessen the value of the defendant's property, he can recover damages therefor in a proper proceeding brought for that purpose, and the appropriation proceedings instituted by the railroad company would not be a bar to such suit.—*Schaible v. Lake Shore, etc., Ry. Co.*, 10 O. C. C. 334 (1895); s. c., 6 C. D. 505.

Damages to property abutting on the highway.

Where the tracks are laid in a cut across the highway, the company is obliged to build a bridge across its tracks with suitable approaches, and if in so doing it makes embankments to such heights as to injure the access to abutting property, it will be liable for the injuries done, although the construction as

made was authorized by the authorities in charge of the road.—*McNulta v. Ralston*, 5 O. C. C. 330 (1891); s. c., 3 C. D. 163.

Joint liability of city and company.

When a railroad company assumes the repair and maintenance of a street bridge over its railway, it becomes liable for injuries occasioned by the falling of the bridge, and it is jointly liable with the city having control of the bridge, and a street-car company using it.—*Toledo, etc., R. R. Co. v. Sweeney*, 8 O. C. C. 298 (1894); s. c., 4 C. D. 11; s. c., 52 Oh. St. 616.

Remedy by injunction.

In enjoining a railway company from using a highway, where it has been diverted from its location, but left in such close proximity to the railway as to make it dangerous for public travel, it is proper for the court to prescribe what change in the location shall operate to supersede the injunction, and on allowing an injunction against the company from any further work on or obstruction of the highway, the court may, on final hearing, require the removal of the obstructions already placed thereon, in case the company refuses to restore such highway to its former usefulness.—*State ex rel. v. Dayton, etc., R. R. Co.*, 36 Oh. St. 434 (1881).

Enforcement of duty by state through attorney-general.

While a company continues in the exercise of its franchise, the state has the right to compel it to perform the condition upon which the franchise was granted, by petition invoking the equity powers of the court, prosecuted by the attorney-general in the name of the state.—*State ex rel. v. Dayton, etc., R. R. Co.*, 36 Oh. St. 434 (1881).

Crossings in cities.

This section applies only to country roads, and not to city or town streets, and a railroad company may not therefore cross a city street except under the provisions of § 3283.—*Youngstown v. Pittsburg, etc., R. R. Co.*, 3 O. C. C. 214 (1888); s. c., 2 C. D. 121; *Cincinnati, etc., R. R. Co. v. Cincinnati*, 8 W. L. B. 334 (1882).

Effect of section on liability of city.

This section in no way affects the duty of a city to keep its streets free from nuisance, nor is its liability in any way changed.—*Zanesville v. Fannan*, 53 Oh. St. 605 (1895).

Control of streets cannot be surrendered.

An ordinance which authorizes a railroad company to erect new bridges over its track where it crosses a highway, the bridges to be kept in repair by the railroad, does not divest the municipal authorities of their control over the streets, nor impair their power to improve the same, nor entitle the railroad company to perpetually maintain the bridges as constructed, but the ordinance and privilege

Right to Cross Roads, § 3284.

granted by it are subject to a proper exercise by the municipal body, of its power to improve the streets and make such changes in the grades as may be necessary to subserve the public interest.—*Railroad Co. v. Defiance*, 52 Oh. St. 262 (1895); *Elyria v. Railroad Co.*, 13 O. C. C. 484 (1902).

By restoration of street no additional rights are acquired.

Where a company crosses a street by a bridge and builds the piers so as to narrow the street, it acquires no right to maintain such structures against the objection of the city.—*Elyria v. Lake Shore, etc., Ry. Co.*, 13 O. C. C. 482 (1902).

Power to appropriate lands to restore highway or stream.

The right to divert a stream or road under the obligation of restoring it to its former state of usefulness, carries the right to appropriate necessary lands to make such diversion and build the road; compensation being made for riparian rights and other interests affected.—*Valley Ry. Co. v. Bohm*, 34 Oh. St. 114 (1877).

Statute of limitations.

An obstruction to a public highway is a nuisance against which the statute of limitations does not run.—*Little Miami R. R. Co. v. Commissioners*, 31 Oh. St. 338 (1877).

Obstructions to road made by the company.

If, after a highway has been fully restored, the railroad company wrongfully encroaches upon the highway, or impairs its usefulness, it will be held liable for damages resulting from such wrongful encroachment or impairment.—*Pittsburg, etc., Ry. Co. v. Maurer*, 21 Oh. St. 421 (1871).

Rights of railroad at highway crossing.

The right of a railroad company to enjoy the use of its road at the crossing of a common highway, and the right of the public to use the highway are co-ordinate and equal. Reasonable care and prudence must be exercised by each, in the use of the crossing so as not to interfere unnecessarily with the other.—*Pittsburg, etc., Ry. Co. v. Maurer*, 21 Oh. St. 421 (1871).

Diverting stream on its own land—statute of limitations.

A railway company, like an individual, may, on its own land, and for its own benefit, lawfully cut a new channel for a stream of water, and turn such stream into such new channel, if thereby no damage is caused to another; but when it so controls and directs the course of the stream that, as the stream leaves the company's premises and control, the water is thus thrown across the old channel and against and upon the land of another, and thereby causes damage to such other, the company is liable for such damage; and while

the company, after thus causing great damage, and promising to repair the damage done and stop future damage, continues so to control and direct the stream, and the stream continues to cause additional damage, the company becomes liable for the additional damage, and will continue so to become liable until the company acquires a right to cause such damage, and until such right is acquired by the company, the four years' statute of limitations will not bar a proper recovery for damages.—*Valley Ry. Co. v. Franz*, 43 Oh. St. 623 (1885).

Diversion of streams.

See generally *Railroad Co. v. Carr*, 38 Oh. St. 448 (1882); *Crawford v. Rambo*, 44 Oh. St. 279 (1886); *C. & H. C. & I. Co. v. Tucker*, 48 Oh. St. 41 (1891).

Power to close bridge for repairs.

Where it is the duty of a railroad company to erect and maintain a bridge in a street under which its road is passing, and such bridge becomes dangerous and out of repair, the company has the same right as the city to close the bridge, although it constitutes part of the public street.—*Toledo, etc., Ry. Co. v. Mammet*, 13 O. C. C. 591 (1895); *s. c.*, 6 C. D. 244.

Duty to maintain bridge.

Although there may be some doubt as to the original liability of a company to build a bridge across its road, if it in fact builds a bridge and maintains it for forty years, it will be held liable to maintain.—*Toledo v. Lake Shore, etc., Ry. Co.*, 17 O. C. C. 265 (1893); *s. c.*, 9 C. D. 135.

Bridges over right of way—removal by municipal authorities.

Where a railroad is constructed in a cut across a highway, and the highway is restored by bridging across, such bridge constitutes a part of the highway and may be removed, when the council deem it necessary for the public convenience to make the crossing at grade.—*Railroad Co. v. Defiance*, 52 Oh. St. 262 (1895).

Low bridge over highway—remedy.

Where an injunction is asked to restrain a railroad from building a bridge over a turnpike which would leave only a space between the surface of the road and the bridge not sufficient for the purposes of the public using such road, and it appears that much work has been done in building such bridge before objection was made, and that the cost of raising such bridge would involve a heavy expense, and that the difficulty could be remedied at much less expense and trouble by lowering the surface of the road at the point in question, the court will order that the latter be done at the expense of the railroad company.—*Wooster Turnpike Co. v. Railroad Co.*, 15 O. C. C. 268 (1897); *s. c.*, 8 C. D. 269.

Toll Bridge Business — Bonds, §§ 3285, 3286.

What cemeteries not protected.

The cemetery of a private association does not come within the terms of this section. It covers and protects only cemeteries owned by

cities of the first or second class.— *Youngstown v. Pittsburg, etc.*, R. R. Co., 3 O. C. C. 214 (1888); s. c., 2 C. D. 121.

§ 3285. **MAY DO TOLL BRIDGE BUSINESS.**— It may so construct its bridges as to answer the ordinary purposes of travel and business, as well as for railroad purposes, and may demand and receive such rates of toll for the passage of individuals, vehicles of all kinds, or animals, as it may fix, subject to the approval of the commissioners of the county or counties in which such bridge is erected; but the rates of toll must be uniform, shall be printed or painted, and kept conspicuously posted in or near the tollhouse of the bridge, and may be revised and changed in the first week in each year; and the company may compound and bargain with any person or party for the use of such bridge, by the month, quarter, or year; but no company, shall receive toll upon any such bridge if erected within one mile of any toll-bridge previously constructed over the same stream. (March 11, 1853, 51 v. 415, § 1.)

§ 3286. **POWER TO ISSUE BONDS.**— A company may issue bonds, convertible or otherwise, bearing a rate of interest not exceeding seven per centum per annum, to an amount not exceeding two-thirds of its capital stock, actually subscribed, for one or more of the following purposes: Completing or extending its road, constructing branch roads, laying double or additional track, increasing its machinery or rolling-stock, building depots or shops, making improvements, paying its unfunded debts, or redeeming its bonds; and it may secure the bonds issued for such purposes by mortgage on its property, or otherwise, if authorized by the vote, in person or by proxy, of holders of a majority of the stock upon which all the installments called for by the board of directors have been paid; but such vote shall be taken at a meeting of stockholders, of which thirty days' notice shall be given. (March 14, 1876, 73 v. 25, § 5.)

Vote of stockholders.

This section does not in terms require a vote of the stockholders to give the directors authority to issue bonds. Such authority is only required for the execution of a mortgage over the corporate property.— *Shoemaker v. Dayton, etc.*, R. R. Co., 19 W. L. B. 322 (1888).

earnings of the demised road should not be sufficient to protect the interest on the bonds. In a suit to foreclose the mortgage, held, that the lease was not after-acquired property within the meaning of the mortgage.— *Moran v. Pittsburg, etc.*, Ry. Co., 32 Fed. 878 (1887); s. c., 5 O. F. D. 712.

Future acquisitions of property.

Where railroad mortgages contain apt language to that effect, they attach to and cover future acquisitions of property for the use of the road.— *Coopers v. Wolf*, 15 Oh. St. 523 (1864). See *Feike v. Cincinnati, etc.*, Ry. Co., 14 O. C. C. 186 (1897); s. c., 7 C. D. 652; *Coe v. Columbus, etc.*, R. R. Co., 10 Oh. St. 372 (1859); *Coe v. Peacock*, 14 Oh. St. 187 (1863); *Ludlow v. Hurd*, 1 Dis. 552 (1857); *Hatry v. Painesville, etc.*, Ry. Co., 1 O. C. C. 426 (1886); s. c., 1 C. D. 238; *Louisville Trust Co. v. Cincinnati, etc.*, Ry. Co., 91 Fed. 699 (1897); s. c., 10 O. F. D. 646; *Compton v. Jesup*, 68 Fed. 263 (1895); s. c., 8 O. F. D. 452.

What is after-acquired property.

A railway company gave a mortgage to secure its coupon bonds, conveying all the property which it then possessed or should thereafter acquire, and subsequently executed a lease, to which the mortgagee was not a party, whereby the lessee agreed to pay the coupons at maturity, in the event the net

Franchise to be a corporation cannot be mortgaged.

A railroad company has no power to mortgage or sell its corporate franchise to be a corporation, and a judicial sale upon mortgages executed by it would not invest the purchaser with any corporate capacity whatever.— *Atkinson v. Marietta, etc.*, R. R. Co., 15 Oh. St. 21 (1864); *Coe v. Columbus, etc.*, R. R. Co., 10 Oh. St. 372 (1859).

What property mortgage does not cover.

A mortgage executed by a railroad company on "the road" of the company, "whether made or to be made, acquired or to be acquired," and all property, real or personal, "of the company, whether now owned or hereafter to be acquired, used or appropriated for the operating or maintaining the said road," is not a lien upon the real estate of the company then owned or afterward acquired which has not been used or appropriated for operating or maintaining the road.— *Walsh v. Barton*, 24 Oh. St. 28 (1873); *Hatry v. Painesville, etc.*, Ry. Co., 1 O. C. C. 426 (1886); s. c., 1 C. D. 238.

Scrap — cast-off articles.

The cast-off articles, fragments, and old materials, once forming part of the road, or used in its operation, still continue under the mortgage, if a proper and judicious management of the road requires that they should be recast or exchanged for new articles, for the uses of the road.—*Coopers v. Wolf*, 15 Oh. St. 523 (1864).

Extra-territorial force of mortgage on rolling stock.

A mortgage covers rolling stock, though temporarily out of the state, and a receiver may, under comity between states by an action brought in the foreign state in his own name, assert his right to the possession thereof where such right is not in conflict with the rights of citizens of such foreign state nor against the policy of its laws.—*Bank v. McLeod*, 38 Oh. St. 174 (1882); *Winslow v. Troy Iron, etc., Co.*, 1 Dis. 229 (1856).

Fraud in issue — action by trustee.

A trustee, holding bonds for the benefit of others, cannot maintain an action of deceit to recover damages suffered by his cestuis que trustent by reason of a deception practiced upon them in connection with their purchase of the bonds, nor can he maintain an equitable action on the ground of fraud in such case.—*Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889).

Lease subsequent to mortgage — rights of mortgagee.

Where a lease is executed by a mortgagor subsequent to the mortgage, and there is no privity of estate or contract thereby created between the mortgagee and lessee, and there is no attornment by lessee to mortgagee, the mortgagee cannot, either before or after the mortgagor's default, demand the benefits of the lease without the consent of the lessee.—*Moran v. Pittsburg, etc., Ry. Co.*, 32 Fed. 878 (1887); s. c., 5 O. F. D. 712.

Notice to mortgagees of rights of vendors.

Where a party contracts to sell land to a railway company, but retains the legal title pending payment, it is sufficient to put subsequent mortgagees of the road upon inquiry as to his rights.—*Dayton, etc., R. R. Co. v. Lewton*, 20 Oh. St. 401 (1870).

Action to compel the issuance of bonds — mandamus.

A writ of mandamus will not be allowed to compel a corporation to issue its bonds to one of its creditors in order to obtain the benefit of a mortgage security, where the right of the creditor to such security is doubtful, and the property sought to be affected has passed into the hands of third parties as purchasers. The remedy in such case should be by a suit brought in equity against the parties whose interest it is sought to affect.—*Ham v. Toledo, etc., Ry. Co.*, 29 Oh. St. 174 (1876).

Proceeds of bond are trust fund.

Where money is held by a corporation or its directors, arising from a sale of its mortgage bonds, and the purposes for which the bonds or their proceeds are to be used by the corporation are set forth in the mortgage, and are such as are authorized by statute it is a trust fund to be used in good faith by the corporation for the purposes stated in the mortgage.—*Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887); *Central Trust Co. v. Burke*, 1 N. P. 169 (1895); s. c., 2 Dec. 96.

Same subject — injunction against misuse.

Upon a proper showing the bondholders of a company are entitled to an injunction to restrain a misuse of the funds arising from the sale of bonds.—*Columbus, etc., Ry. Co. v. Burke*, 19 W. L. B. 27 (1887).

Clause exempting stockholders from individual liability.

Where a mortgage to secure certain bonds contains a clause limiting the effect of the contract contained in the bond, as to matters not pertinent to the mortgage, a holder of such bonds will not be presumed to have notice of such clause merely by reason of a general reference to the "terms and conditions" of the mortgage contained in the bonds.—*Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889).

Same subject — does not cover liability on subscriptions.

See *Raymond v. Spring Grove, etc., Ry. Co.*, 21 W. L. B. 103 (1889).

Money advanced to pay interest not entitled to equitable lien.

A claim against a railroad company for money advanced to pay interest and taxes is entitled to no equitable claim upon the property of the company as against mortgagees.—*Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 372 (1859).

Interest coupons — negotiability.

An interest coupon, not having a payee designated therein, is not a promissory note, nor negotiable in law.—*Wright v. Ohio, etc., R. R. Co.*, 1 Dis. 465 (1857).

Interest — semi-annual payment.

Where bonds are issued bearing interest at seven per cent. per annum, payable semi-annually, and it was claimed that the corporation had no power to contract for the payment of interest either semi-annually or at any other time before the money fell due, it was held that the payment of the interest could be regulated according to the usual course of dealing in borrowing money and paying the price or compensation for its use.—*Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 372, 376 (1859).

Interest.

See *Hillsborough, etc., R. R. Co. v. Cincinnati*, 2 A. L. R. 724 (1873).

Estoppel to deny validity of issue.

Where a company pays interest and principal on bonds for several years, it may be estopped to deny the validity of the issue of the bonds.—*Shoemaker v. Dayton, etc., R. R. Co.*, 19 W. L. B. 322 (1888).

Interpretation and construction.

A mortgage given by a railroad company, to secure the payment of dividends to the holders of certificates of preferred stock, is an incident to the principal obligation, and the terms and purport of the certificates will be held to express the real intent of the parties, even though some of the stipulations of the mortgage may be apparently inconsistent with the intent as expressed by the certificates.—*Miller v. Ratterman*, 47 Oh. St. 141 (1890).

Same subject.

Where the words or terms of a bond are equivocal or not entirely clear, the court may consider the deed of trust in connection with the bond in order to ascertain the real contract between the corporation and the bondholder.—*Shoemaker v. Dayton, etc., R. R. Co.*, 18 W. L. B. 43 (1887).

Convertible bonds, dividends.

Where convertible bonds are issued, and the holders thereof have regularly been paid interest, they are entitled to convert their bonds into stock, but only to receive an amount of stock equal to the amount of the principal sum of the bonds, but no extra allowance of stock or money for dividends on the stock, not being entitled to both interest and dividends.—*Sutcliffe v. Cleveland, etc., R. R. Co.*, 24 Oh. St. 147 (1873).

Convertible bonds, action for refusal to convert—pleading.

A petition is fatally defective in not averring that the plaintiffs were, and at the commencement of their action continued to be, the holders of the bonds, for the nonconversion of which they bring suit.—*Denney v. Cleveland, etc., R. R. Co.*, 28 Oh. St. 108 (1875).

Convertible bonds—right of action for refusal to convert cannot be assigned.

The holder of a convertible bond cannot assign to another the right of action for a breach of the stipulation for conversion, and yet retain the bond for the benefit of himself and his future assignees.—*Denney v. Cleveland, etc., R. R. Co.*, 28 Oh. St. 108 (1875).

Convertible bonds, stipulation available only to holder.

A stipulation making bonds convertible into stock is inseparably connected with the bond on which it is indorsed, and is only available to the holder of the bond, and so long only as he continues to be such holder.—*Denney v. Cleveland, etc., R. R. Co.*, 28 Oh. St. 108 (1875).

Convertible bonds—fraud.

Where a company has power to issue bonds for the purpose of raising money, it may allow the holders of the bonds to convert them into stock. But if this should be done, not in good faith, but for the purpose of keeping the control of the company in the hands of a board of directors, a court of equity would interfere on the ground of its being a fraud.—*Baldwin v. Hillsborough R. R. Co.*, 10 W. L. J. 356 (1853).

Effect of state judgment prior to federal foreclosure—what such judgment lien includes.

A judgment recovered in a state court against the railroad company prior to the commencement of the foreclosure suit by a creditor who was not made a party, remains unaffected by the decree and sale, such judgment becomes a lien on the real property owned by the company at the time of its recovery, in the county where rendered, including lands acquired for the roadway, right of way, depots and other purposes of the company, and continues to be so against the property in the hands of the purchaser at the foreclosure sale.—*Stewart v. Railway Co.*, 53 Oh. St. 151 (1895).

Enforcement of lien by such judgment creditor—subrogation of purchaser to rights of mortgagee—application of proceeds.

See *Stewart v. Railway*, 53 Oh. St. 151 (1895).

Foreclosure in federal court—notice.

A suit brought in a federal court to foreclose a mortgage on the property of a railroad corporation, operates as constructive notice throughout the district, and all persons acquiring an interest in or lien on any part of the property during the pendency of the suit will be bound by the decree and sale made thereunder; the purchaser will take the property discharged from all such liens and interests; though the persons obtaining them be not parties to the suit, they must seek satisfaction from the proceeds of the sale, to reach which they should become parties, and bring their claims to the attention of the court by appropriate pleadings.—*Stewart v. Railway Co.*, 53 Oh. St. 151 (1895).

Sale of part of road to pay interest.

Where the mortgage so stipulates, the trustees may cause to be sold so much of the road as is necessary to pay arrearages of interest, though no part of the principal has become due.—*Goodman v. Cincinnati, etc., R. R. Co.*, 2 Dis. 176 (1858).

Action by one bondholder on behalf of all.

An action brought by one bondholder to enforce an equitable lien based on railroad equipment bonds, alleging that the suit is filed "in his own behalf as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the

Narrow Gauge Roads, Powers of, § 3286-1.

prosecution of the suit, is binding only on those who are made or become parties to the suit; the parties who are not named are not parties to the suit, and are not bound by the proceedings therein unless they elect to come in and claim as such and bear their proportion of the expenses; or unless, after having had notice and an opportunity to come in, they refuse or neglect to do so.—*Adelbert College v. Toledo, etc., Ry. Co.*, 3 N. P. 15 (1896); s. c., 5 Dec. 14; *Carpenter v. Canal Co.*, 35 Oh. St. 307 (1880).

Foreclosure.

The holder of a bond may enforce his lien on behalf of his own interest or on behalf of any person to whom he has transferred certain of his interest coupons, but the holder of non-negotiable coupons cannot maintain an action in his own name to compel the trustees to foreclose.—See *Wright v. Ohio, etc., R. R. Co.*, 1 Dis. 465 (1857).

Power of mortgagee to take possession.

A power inserted in a mortgage authorizing the mortgagee, upon default of payment, to take possession of the railroad and other property connected therewith, and to use or sell the same, must be exerted upon all the property mortgaged; and does not authorize the mortgagee to detach portions thereof, either from the possession of the company or an officer succeeding to its rights by a valid levy.—*Coe v. Peacock*, 14 Oh. St. 187 (1863).

Undelivered bonds not subject to execution.

Railroad mortgage bonds held by the company or its agents, for the use of the company before delivery, are not subject to execution as property of the company, nor can they be subjected to sale by proceedings in aid of execution.—*Means v. Cincinnati, etc., R. R. Co.*, 2 Dis. 465 (1859).

Exemption from execution.

The execution of a mortgage by a railroad company can give no exemption to its per-

sonal property from liability for its debts that the execution of a like mortgage by an individual would not create.—*Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 372 (1859); *Coe v. Knox County Bank*, 10 Oh. St. 412 (1859). See *Carey v. Pittsburg, etc., R. R. Co.*, 1 W. L. M. 338 (1859).

Injunction against sale on execution.

An injunction may be allowed restraining the removal and sale on execution of portions of the mortgaged property of a railroad company on the application of the mortgagees, when the whole of the property is admitted to be inadequate security for the payment of the mortgage debts.—*Lane v. Baughman*, 17 Oh. St. 642 (1867); *Ludlow v. Hurd*, 1 Dis. 552 (1857).

Refusal of sheriff to levy—damages.

Where the amount of mortgages exceeds the entire value of the mortgaged property, only nominal damages can be recovered against the sheriff for refusing to levy upon and sell the property on executions against the company.—*Coopers v. Wolf*, 15 Oh. St. 523 (1864). See *Coe v. Peacock*, 14 Oh. St. 187 (1863).

Remedy of judgment creditor in equity.

When the property is inadequate security for the payment of mortgage debts, a judgment creditor's remedy is in equity, to subject the interest of the mortgagor to the payment of his judgment, or where the nature of his claim is such as to entitle him to have it paid out of the earnings of the company, by proceedings to appropriate so much thereof as may be necessary to the payment of the judgment.—*Lane v. Baughman*, 17 Oh. St. 642 (1867). See *Carey v. Pittsburg, etc., R. R. Co.*, 1 W. L. M. 338 (1859).

Execution against property in use.

See *State v. Brinson*, 46 W. L. B. 275 (1901).

Other sections.

See § 3309a.

§ 3286-1. **POWER OF NARROW GAUGE ROADS.**—Any railroad company having a gauge not exceeding three feet, known as a narrow gauge road, heretofore or that may be hereafter incorporated under the laws of this state, and having at least fifty miles of completed road, and not exceeding six thousand dollars per mile of first mortgage bonds issued for each mile of completed road, for the purpose of funding its floating debt, or for the completion of its unfinished proposed line of road, or for the purchase of rolling stock, or for the erection of repair-shops, or for the purchase of supplies necessary for the operation of said road, or for any or all of said purposes, shall be and the same is hereby authorized to issue its second mortgage bonds, bearing a rate of interest not exceeding seven per cent. per annum, secured by a second mortgage upon its entire property, real and personal, and its franchise, for any amount not exceeding two-thirds of the amount of its authorized capital stock, and sell the same at such time and places, within or without the state, and at such rate as the directors of said railway company may deem for its best interest: provided, said issue of bonds and mortgage shall be authorized by a vote, either in person or by proxy, of the majority of the holders of paid up stock; and provided, that previous to taking said vote thirty days' notice shall be given to the stockholders of said railway company, by publication in a newspaper of general circulation in each and every county through which the line of road is operated. (April 10, 1880. 77 v. 164.)

Power to Borrow Money — Mortgage for, etc., §§ 3287-3289.

§ 3287. **INTEREST, SECURITY, EXTENT OF POWER.**—A company may borrow money at a rate not exceeding seven per centum per annum, for any purpose that the same may be needed in its business, and execute bonds or promissory notes therefor in sums of not less than one hundred dollars, and it may secure the payment of such bonds and notes by a pledge of its property and income; but the aggregate indebtedness authorized by this and the preceding section shall not exceed the amount of the capital stock of the company. (May 1, 1852, 50 v. 274, § 14.)

What income can be pledged.

The income which railway corporations are authorized to pledge is their net income, not their gross earnings. It is therefore the right and duty of these companies to apply their earnings, first, to pay for all services rendered by laborers, agents and officers; for taxes, machinery, fuel, expenses of maintaining and operating their roads, and for liabilities growing thereout. Second, to pay interest on mortgages. Third, to pay liens in the order of priority. — *Carey v. Pittsburg, etc., R. R. Co., 1 W. L. M. 338 (1859).* See *McCormack v. Central Ohio R.R. Co., 3 W. L. G. 218 (1859)*; *Darst v. Pittsburg, etc., R. R. Co., 4 W. L. G. 377 (1859).*

Injunction to restrain diversion of funds for payment of interest.

A court of equity, upon application of an income bondholder for himself and others, should take cognizance of the trust, and restrain the corporation from diverting the funds, to which alone he and his associates may look for the payment of their interest. — *Shoemaker v. Dayton, etc., R. R. Co., 18 W. L. B. 43 (1887)*; s. c., 3 O. C. C. 473; *Carey v. Pittsburg, etc., R. R. Co., 1 W. L. M. 338 (1859).* See *Darst v. Pittsburg, etc., R. R. Co., 4 W. L. G. 377 (1859).*

When is interest cumulative.

See *Shoemaker v. Dayton, etc., R. R. Co., 18 W. L. B. 43 (1887)*; s. c., 3 O. C. C. 473 (1888); s. c., 2 C. D. 270.

§ 3288. **NATURE OF MORTGAGE.**—Such mortgage or pledge may be made by the company executing a deed of mortgage, or other instrument in writing, for the purpose of securing the payment of the loan of money made, or the notes, bonds, or other evidences of indebtedness issued by the company, which mortgage may include the personal as well as the real property of the company. (February 9, 1853, 51 v. 332, § 1.)

§ 3289. **RECORD OF MORTGAGE.**—It shall be held to be a sufficient record of any such mortgage, heretofore or hereafter made, if the same is recorded in the office of the recorder of deeds in each of the counties in which the real or personal property is situate or employed, and the mortgage so recorded shall be held to be a good and substantial lien, from the date of the record of the same in each county where it is recorded, as well upon the personal as the real property of the company. (February 9, 1853, 51 v. 332, § 2.)

Priority of mortgage.

A recorded mortgage given by a railroad company on its road bed and other property, creates a lien whose priority cannot be displaced thereafter either directly by a mortgage given by the company, or indirectly by

Amount of loans authorized.

One lien may be put on the property after another until bonds are executed to the amount authorized and the power exhausted. — See *Coe v. Columbus, etc., R. R. Co., 10 Oh. St. 372, 400 (1859).*

Amount of issue — recovery from stockholders.

Railway companies have general power to issue bonds secured by mortgage, and where such bonds are issued in excess of the amount allowed by law, there can be no recovery on the bonds against the individual stockholders and directors who caused the issue. — *Raymond v. Spring Grove, etc., Ry. Co., 21 W. L. B. 103 (1889).*

Estoppel to deny validity of issue.

Where the stock of a railway company is irregularly increased, and bonds are issued based upon such increase in stock, both the corporation and the stockholders are estopped to deny the validity of the issue after they have acquiesced in the same for three years. — *Farmers Trust Co. v. Toledo, etc., Ry. Co., 67 Fed. 49 (1895)*; s. c., 9 O. F. D. 230.

Street railroads.

This section, together with §§ 3288, 3289, are applicable to street railroad companies. — See § 3309a.

a contract between the company and a third party for the erection of buildings or other works of original construction. — *Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296 (1890)*; s. c., 6 O. F. D. 537.

Bonds, Power to Sell, § 3290.

Defective mortgages — rights of general creditors.

A creditor having been permitted to levy an execution upon a part of the personal property, including a portion acquired subsequently to the date of both second and third mortgages, but this levy having been made after the action to foreclose was brought, and while the property was in the hands of a receiver appointed in the case, he is not entitled

to a preference over the equitable second mortgage. — *Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 372 (1859).

Defective mortgage — rights as against subsequent mortgages.

Where a mortgage is defective in its execution, and therefore void under our laws, it is good as against a subsequent mortgage which is made subject to it. — *Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 372 (1859).

§ 3290. **POWER OF DIRECTORS TO SELL BONDS.** — The directors of the company may sell, negotiate, mortgage, or pledge such bonds or notes, as well as any notes, bonds, scrip, or certificates for the payment of money or property which the company may have theretofore received, or shall hereafter receive, as donations, or in payment of subscriptions to the capital stock, or for other dues of the company, at such times and in such places, either within or without the state, and at such rates and for such prices at not less than seventy-five cents on the dollar, as in the opinion of the directors will best advance the interests of the company; and if such notes or bonds are thus sold at a discount, without fraud, the sale shall be as valid in every respect, and the securities as binding for the respective amounts thereof, as if they were sold at their par value. (December 15, 1852, 51 v. 286, § 1; March 14, 1876, 73 v. 25, § 5.)

Character of issue — sale or loan.

The giving of a guaranty of bonds is to be looked to in determining whether the real transaction is a bona fide sale or a disguised loan. If a sale, the guaranty passes as an incident, and is, in equity, assignable to subsequent purchasers of the bonds. — *Bank of Ashland v. Jones*, 16 Oh. St. 145 (1865). See *Junction R. R. Co. v. Bank*, 12 Wallace (U. S.) 226 (1870).

Sale of bonds not made a loan by a personal guaranty.

When a transaction would otherwise be a sale by a railroad corporation of its own bonds, the fact that their payment is guaranteed by the directors in their individual capacities does not necessarily make the transaction a loan. — *Bank of Ashland v. Jones*, 16 Oh. St. 145 (1865).

Sale of bonds — usury.

Before a sale of bonds can be declared invalid, as in contravention of the settled policy of the state where made, the repugnancy must be plain and substantial. The fact that bonds sold here bear a higher rate of interest than may be prescribed for similar bonds issued under the authority of this state, but which are authorized to be sold at any price, creates no repugnancy. — *Bank of Ashland v. Jones*, 16 Oh. St. 145 (1865).

Power to sell bonds at less than par.

A company having power to sell its bonds at less than par may exchange them for iron rails. — *Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 372 (1859).

Sale of bonds in foreign state.

A corporation of a state, authorized to raise money by the sale of its bonds, may itself sell the bonds directly, either within or with-

out the state, and such transaction will not be regarded as a loan. — *Bank of Ashland v. Jones*, 16 Oh. St. 145 (1865).

Application to foreign corporations.

This section applies only to domestic corporations, and a sale of bonds by a foreign corporation at less than par is usurious. — *McGregor v. Covington, etc., R. R. Co.*, 1 Dis. 509 (1857).

Applies to foreign corporations.

The law of Ohio authorizing railroad companies to sell their own bonds and notes at such prices as they may deem expedient, is extended by comity to the companies of other states authorized to transact business in Ohio. — *Junction R. R. Co. v. Bank*, 12 Wallace (U. S.) 226 (1870).

Repeal of usury laws.

In so far as sections 3290 and 3287 permit railroad companies to borrow money at a rate of interest exceeding 8 per cent., their effect is to repeal the usury laws as to such companies, and that notes or lease warrants executed by a railroad company for deferred payments on equipment purchased conditionally, and which were payable monthly as rental, the title to the equipment to vest in the company on their full payment are not usurious, though their amount is greater than the stated value of the equipment with 8 per cent. interest until maturity, but not greater than would have been required if they had borne 7 per cent. interest, and had been discounted at 75 per cent of par. — *Metropolitan Trust Co. v. Columbus, etc., R. R. Co.*, 93 Fed. 702 (1899).

When sale is for seventy-five per cent.

Where one K. contracted to perform certain services in the reorganization of a railway

Officers, Classification of Directors, etc., §§ 3291-3296.

company, for which he was to receive certain amounts of bonds and stock in the reorganized company, it being claimed that the bonds were issued for less than 75 per cent. of their par value, and were therefore void under this section, held, that the stock should be taken at its actual, and not at its par, value, in computing the amount received by the company for the bonds. — *Continental Trust Co. v. Toledo, etc., R. R. Co.*, 86 Fed. 929 (1898); s. c., 95 Fed. 497 (1899); s. c., 82 Fed. 642 (1897).

§ 3291. **TRANSFER BOOKS IN FOREIGN STATES.** — The directors of any company, when they deem it expedient for the interest or convenience of the company, may open transfer books in any of the states of the United States, for the purpose of transferring stock which may be purchased or held by persons out of this state; and they may employ suitable agents to keep such transfer books, whose acts, done under the authority of this section, shall be binding on the company. (March 21, 1850, 48 v. 51, § 1.)

§ 3292. **VICE-PRESIDENT.** — The directors may elect from their number a vice-president, whenever, in their opinion, the interests or convenience of the company requires it; and in case of the absence, death, resignation, or other disability of the president, the vice-president so elected shall exercise the same powers and discharge the same duties as properly and legally belong to the office of president, until such vacancy is filled by a new election, or such disability removed. (March 29, 1856, 53 v. 36, § 1.)

Duties.

The office of vice-president may be made active and independent. — *Colman v. West Virginia, etc., Co.*, 25 W. Va. 148 (1884); *Chicago, etc., Co. v. James*, 22 Wis. 194 (1867); s. c., 24 Wis. 388 (1869); *Richards' v. Osceola*, 79 Ia. 707 (1890). See § 3247 and notes.

§ 3293. **TREASURER.** — The directors may, whenever, in their opinion, the interests or convenience of the company will be promoted thereby, elect any suitable person as treasurer of the company, to be subject to such rules and regulations as they or the company may prescribe. (April 7, 1857, 54 v. 103, § 1.)

§ 3294. **CHANGE OF NUMBER OF DIRECTORS.** — A company may, by a vote of a majority of its stock at any regular annual meeting of the company, increase the number of directors to any number not greater than fifteen, or decrease the number before or after such increase to any number not below seven. (January 14, 1875, 72 v. 17, § 3.)

May be done by majority.

A decrease or increase in the number of directors is not such a fundamental change but that it may be done by the majority. — *Mower v. Staples*, 32 Minn. 284 (1884).

§ 3295. **CLASSIFICATION OF DIRECTORS.** — The stockholders of a company, whether organized under general or special laws, whose railroad is wholly or partly within this state, may, at any regular meeting of its stockholders, or a special meeting of which at least thirty days notice has been given by publication, by an affirmative vote of the stockholders owning a majority of the stock of the company, direct its board of directors to so classify the members thereof, by lot or otherwise, that one-third thereof shall terminate their official term at the first annual election thereafter, one-third at the next annual election thereafter, and the remainder at the next succeeding annual election thereafter; at the first regular election succeeding such classification, when the term of the directors of the first class expires, and at each succeeding annual election thereafter, the stockholders shall elect directors for three years, to take the place of those retiring, and no more; and all vacancies which otherwise occur in the board shall be filled in the manner prescribed by law. (April 30, 1869, 66 v. 77, § 1.)

§ 3296. **CLASSIFICATION OF DIRECTORS — VOTING.** — The stockholders of a company whose road is wholly or partly within this state, may, at any regular

Conditional Subscriptions — Exemption from Execution, etc., §§ 3296, 3299.

annual election of directors thereof, so classify and elect such directors that one-third thereof shall serve for one year, one-third for two years, and the remainder for three years; at each succeeding annual election thereafter the stockholders shall elect directors to take the place of those whose terms so expire; no person shall be allowed to vote for directors as aforesaid unless he has been a registered stockholder of such company at least thirty days prior to such election; and the registry of such stock shall be made in the books kept at the principal office of the company. (April 30, 1869, 66 v. 77, § 2.)

§ 3297. **CLASSIFICATION OF DIRECTORS — RIGHTS OF CREDITORS.** — The provisions of the two preceding sections shall also apply to companies whose bondholders or other creditors share with the stockholders in the election of directors; and in such case the vote necessary to direct the classification provided for in said sections shall be the same as is required to elect directors of such company. (April 30, 1869, 66 v. 77, § 3.)

§ 3298. **SUBSCRIPTIONS CONDITIONED ON COMPLETION OF ROAD.** — The directors of a company which has expended in the construction of its road ten per centum of its authorized capital, and has obtained actual bona fide subscriptions to its capital stock to the amount of at least twenty per centum thereof, may receive subscriptions to its capital stock, payable in such installments, dependent upon the completion of the whole or any part of its road so that cars may pass over the same, as its directors may deem expedient, and upon full payment thereof may issue certificates of stock therefor; but no subscriber to the stock hereby authorized shall be entitled to any of the privileges of a stockholder until his subscription is fully paid, nor shall he, for any purpose, be deemed a stockholder until the happening of the contingency upon which the installments on his subscription are made dependent. (April 15, 1857, 54 v. 133, § 3.)

Conditional subscriptions taken before twenty per cent. is subscribed.

If at the time a subscription is made it is unauthorized by this section, it may be a continuing offer to subscribe and become absolute when its conditions have been complied with, though it may be withdrawn at any time before such performance. — *Armstrong v. Karshner*, 47 Oh. St. 276 (1890).

Condition of partial completion.

Where a subscription is conditioned upon the completion and operation of the road between specified points, it is not necessary that the whole road should be completed before the subscription can be enforced. — *Leshner v. Karshner*, 47 Oh. St. 302 (1890).

Effect of words "paid as donation."

The addition of the words "paid as donation" do not convert a conditional subscription to an agreement for a gift. — *Leshner v. Karshner*, 47 Oh. St. 302 (1890).

Right of conditional subscriber to vote.

A subscriber to stock is entitled to no privileges until his subscription is fully paid, for instance, he cannot vote if action is to be taken under § 3300. — *Railroad Co. v. Hinsdale*, 45 Oh. St. 556 (1888).

Conditional subscriptions generally.

See § 3242, notes.

§ 3299. **WHEN PROPERTY EXEMPT FROM EXECUTION.** — A company which has begun and partly built its road, but is unable to finish and operate the same for want of means, may take subscriptions conditioned that the proceeds thereof shall not be used or applied upon the debts of the company; and all money or material collected upon such subscriptions, and all material or implements purchased with such money for the construction of the track, houses, depots, and rolling stock of the company, shall be exempt from execution, or other process or proceedings for the payment of the debts of the company so long as such money, material, or implements are used or designed for the construction of such track, houses, depots, and rolling stock. (April 16, 1867, 64 v. 192, § 1.)

Executions against railroad property.

See § 3286, notes.

Purchase, Lease, etc., of Other Roads, § 3300.

§ 3300. **AID, LEASE OR PURCHASE OF OTHER ROADS.**—Any company may aid another in the construction of its road, by means of subscription to the capital stock of such company, or otherwise, for the purpose of forming a connection of the roads of the companies, when the road of the company so aided does not and will not, when constructed, form a competing line; any company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of road of such companies are continuous or connected, and not competing, upon such terms as may be agreed upon between the companies; and after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, and of branches thereto of the company from which it purchased said railroad, including the power to acquire and appropriate property therefor, and shall be subject to all the duties, obligations and restrictions of said company; and any two or more companies whose lines are connected and not competing, may enter into any arrangement for their common benefit consistent with, and calculated to promote the objects for which they were created. (March 14, 1882, 79 v. 35; R. S. 1880, § 3300; April 15, 1873, 70 v. 129, § 24.)

Power of foreign corporations to lease.

A foreign corporation having no charter from the state of Ohio, authorizing it to construct and operate a railroad in this state, cannot, by a transfer of a portion of a railroad already constructed in the state by legal authority, acquire a right to use and operate such railroad within this state.—Ohio, etc., R. R. Co. v. Indianapolis, etc., R. R. Co., 5 A. L. Reg. (N. S.) 733 (1866).

What roads are competing.

The lines of two railroad companies which are in their general features parallel and competing, cannot be connected under this section.—State v. Vanderbilt, 37 Oh. St. 590 (1882). See Chapman v. Mad River, etc., R. R. Co., 6 Oh. St. 119 (1856).

What roads not competing.

Roads running at right angles from point of connection cannot be said to be competing "in their general features or from a geographical standpoint;" although there may be incidental competition on through or seaboard business.—See Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11 (1889).

Roads may be competing though they reach competing points by trackage arrangements with other lines.

Hafer v. Cincinnati, etc., R. R. Co., 29 W. L. B. 68 (1893).

Roads may be competing though not actually cutting rates.

Hafer v. Cincinnati, etc., R. R. Co., 29 W. L. B. 68 (1893).

What roads are connected.

Two railroad companies owning lines of railroad connected only by other railroads, which such railroads hold by lease, are not connected.—See State v. Vanderbilt, 37 Oh. St. 590 (1882).

Roads joined by tracks of union company are connected.

Where roads are connected by the tracks of a union depot and terminal company, in which

each has a proprietary interest, they are connecting lines within the statute.—See Burke v. Cleveland, etc., Ry. Co., 22 W. L. B. 11 (1889).

Aid by traffic guaranty and purchase of bonds.

Aid may be extended by a traffic guaranty and purchase of bonds.—O. & M. R. R. Co. v. Short, 3 W. L. B. 1143 (1879).

Purchase of stock from stockholders of another company.

A purchase of stock in a completed railroad company by another company from the stockholders of such company is not authorized by this section.—Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (1887).

Purchase of stock in other companies.

A purchase of all the stock of a mining company by a railroad company can by no construction be brought within this section; for this section covers only subscriptions to stock of railroads in aid of construction.—Columbus, etc., Ry. Co. v. Burke, 19 W. L. B. 27 (1887).

Statute of frauds.

A lease extending over three years must be acknowledged according to the statute of frauds.—Ohio, etc., R. R. Co. v. Indianapolis, etc., R. R. Co., 5 A. L. Reg. (N. S.) 733 (1866).

Covenant to pay interest.

Where the lessee agreed to advance the money necessary to pay the coupons on the bonds of the lessor, such advance to be paid out of subsequent earnings and not otherwise, the agreement will not be held to be harsh, oppressive or inequitable, and not to be an agreement to loan money to an insolvent corporation, which the court will not enforce.—Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118 (1895); s. e., 5 Dec. 41.

Rescission of lease.

A lease can only be rescinded by the same consent of stockholders required to authorize a lease.—Henry v. Pittsburg, etc., Ry. Co., 2 N. P. 118 (1895); s. e., 5 Dec. 41.

Leases, etc., of Other Roads, § 3300.

Right of receiver to abrogate lease or contract.

See *New York, etc., R. R. Co. v. Railway Co.*, 58 Fed. 268 (1893); *Investment Co. v. Railway Co.*, 41 Fed. 378 (1889).

Specific performance.

The specific performance of a lease will not be compelled by a court.—*Henry v. Pittsburg, etc., Ry. Co.*, 2 N. P. 118 (1895); s. c., 5 Dec. 41. See *Port Clinton, etc., R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 Oh. St. 544 (1862).

Effect of lease or purchase on rights of original companies.

Where the railroad of one company is purchased by another railroad company in pursuance of this section, in the absence of any provision of law to the contrary, the road passes to the purchasing company subject to the same restrictions and limitations as to rates chargeable for transportation as attached to it in the hands of the vendor.—*Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168 (1872); *Railway Co. v. Moore*, 33 Oh. St. 384 (1878).

Damages to landowners.

Where a railroad company has received from private parties, donations of lands, subscriptions of stock, and payments in money, in consideration that it should locate its road at a particular place, and allow private side track and warehouse privileges in connection therewith, the company will not be permitted to effectuate a change in fact (though not in name) of the line of its road away from such place, by getting up a new corporation and constructing a new road parallel with its old one, under a different charter, and permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid.—*Chapman v. Mad River, etc., R. R. Co.*, 6 Oh. St. 119 (1856).

Sale of stock subscriptions.

This section does not confer authority to sell stock subscriptions.—See *Railroad Co. v. Hinsdale*, 45 Oh. St. 556 (1888).

Release of stock subscriptions.

When this section is in force at the time a subscription is made to the capital stock of a company, it becomes a part of the contract, and a sale thereafter made by the company of a part of its road under this section, does not release the subscriber, except when and as provided for by statute, unless by the sale the company has made the performance of the conditions of the subscription impossible.—*Armstrong v. Karshner*, 47 Oh. St. 276 (1890).

Liability for personal injury.

Where the defendant made an arrangement with the D. company whereby it gave to the latter company the right to construct a track on the side of defendant's roadbed for the purpose of connecting the road of the D. com-

pany with defendant's road, the connecting track passing over a bridge previously constructed by defendant for its track and which foot-passengers had been permitted to use for the purpose of transit. The plaintiff, in passing on foot, fell through the same, between the rails of the connecting track, and was injured by reason of the defective covering; *held*, the defendant having no interest in or control over the track, cannot be held liable.—*Gwathney v. Little Miami R. R. Co.*, 12 Oh. St. 92 (1861).

Liability of lessor to rebuild.

At common law, in the absence of express covenant in a lease, the lessor is not bound to make repairs, additions, or improvements to the leased property, or to rebuild structures thereon which have become unfit for use, nor is there any implied covenant that the property is fit for the purpose for which it is leased. The fact that the demised property is a railroad does not affect the application of those principles.—*Felton v. City of Cincinnati*, 95 Fed. 336 (1899).

Voting pool of stockholders to effect arrangement under this section.

An agreement of stockholders for putting their stock into the hands of a depository to vote it as directed by a committee appointed by themselves, the purpose being to pass the control of the road to another company, is not illegal under this act.—*State v. Ohio, etc., R. R. Co.*, 6 O. C. C. 415; s. c., 3 C. D. 518; s. c., 49 Oh. St. 668 (1892).

Void conditions subsequent.

Where the lease contains a condition prohibiting the lessee from receiving for transportation property from certain connecting roads, it is a condition subsequent which is void as against public policy.—*Metropolitan Trust Co. v. Columbus, etc., Ry. Co.*, 95 Fed. 18 (1899).

Corporations created prior to 1851.

Railroad companies incorporated prior to the adoption of the constitution of 1851, and which avail themselves of this section either by taking or making leases, are to be regarded as thereby relinquishing all rights inconsistent with title 2 according to the provisions of § 3233.—*Cincinnati, etc., R. R. Co. v. Col.*, 29 Oh. St. 126 (1876).

What roads could be leased under old act.

Prior to the act of March 14, 1882, only constructed roads could be leased or purchased under this act.—See *Railroad Co. v. Hinsdale*, 45 Oh. St. 556 (1888).

Traffic agreement not an "appurtenance" of the road so as to be included in sale by receiver.

See *Cincinnati, etc., R. R. Co. v. Cincinnati, etc., Ry. Co.*, 6 N. P. 427 (1899); s. c., 9 Dec. 493.

Leases, etc., of Other Roads, §§ 3301-3303.

When injunction granted to enforce traffic agreement.

See *Railroad Co. v. Railroad Co.*, 1 O. C. C. 100 (1885).

Traffic arrangement charges.

A company can only charge a reasonable price for use of tracks. — See *Toledo, etc., R. Co. v. Railway Co.*, 7 N. P. 376 (1894).

§ 3301. **ASSENT OF STOCKHOLDERS — RENT.** — No such aid shall be furnished, nor any purchase or lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, assent thereto; and in case of the lease of any railroad situate in whole or in part within this state, the rental reserved and secured for the leased road shall be equal, at least, to the net earnings of the same for the fiscal year next preceding the one in which the lease is made. (April 17, 1892, 79 v. 111; Rev. Stat. 1880; April 15, 1873, 70 v. 129, § 24 [§ 1].)

Waiver of assent.

Where a lease is made without the stockholders' assent, their acquiescence in the lease for a long period will be held to be a waiver of the requirement of the statute. — See *St. Louis, etc., R. R. Co. v. Terre Haute, etc., R. R. Co.*, 33 Fed. 440 (1888); s. c., 145 U. S. 393; *Zabriskie v. Cleveland, etc., R. R. Co.*, 64 U. S. 381 (1859).

Validity of assent obtained outside of meeting.

In construing a Nebraska statute similar to this section the court said: "The stockhold-

ers' meeting, and the vote in such meeting on the question of assenting to the proposed lease, are matters of essence, of substance, and not of mere form, and their assent individually obtained outside of such meeting, and in the absence of deliberation, would bind no one. — *Peters v. Lincoln, etc., R. R. Co.*, 12 Fed. 513 (1881).

Form of assent.

The statute does not require the assent to be in any particular form, and the circumstances will be looked to for light on that question. — See *Humphreys v. St. Louis, etc., Ry. Co.*, 37 Fed. 307 (1889).

§ 3302. **RIGHTS OF NON-ASSENTING STOCKHOLDERS.** — A stockholder who refuses his assent to such sale, lease, or aid by subscription, and signifies the same by notice, in writing, to the purchaser or lessee, within sixty days thereafter, shall be entitled to demand and receive from such purchaser or lessee, previous to the consummation of such sale or lease, the average market value of his stock for six months next preceding the day of the meeting of the companies at which the sale or lease is approved, on the surrender of his stock; and if the stockholder and the purchaser or lessee cannot agree as to the value of the stock, the parties may submit the question to arbitration, which shall be conducted in accordance with the provisions of law regulating arbitrations, so far as the same may be applicable, by three disinterested persons, to be appointed upon the motion of either of the parties, by the judge of the court of common pleas of the county in which the owner of the stock resides, or, in case he is a non-resident of the state, or of any county through or into which the road passes, then in the county in which the principal office of the company is kept. (April 15, 1873, 70 v. 129, § 24 [§ 2].)

Arbitration.

See as to arbitration under a similar section. *Railway Co. v. Garrett*, 50 Oh. St. 405 (1893).

Application to street railroad companies.

See §§ 2505a and 2505z.

§ 3303. **ARBITRATION.** — If any such stockholder refuse to submit the question to arbitration, the proper judge shall, upon the application of a director of either of the companies parties to the contract, appoint the arbitrators, who shall proceed to ascertain the value of the stock in the same manner as if the question had been submitted by consent of both parties; and if the party owning the stock refuse to receive the amount awarded in any case, the company may deposit the same with the clerk of the court of common pleas of the county in which the arbitration is held, which

Leases, etc., of Other Roads, §§ 3304-3305.

deposit shall operate the same as if payment were made to the owner of the stock. (April 15, 1873, 70 v. 129, § 24 [§ 2].)

Railway Co. v. Garrett, 50 Oh. St. 405 (1893).

Application to street railroad companies.

See §§ 2505a and 2505c.

§ 3304. **NOTICE OF ARBITRATION.** — In all cases of arbitration under the two preceding sections, the party desiring such arbitration shall give the opposite party at least ten days' notice of his intention to apply to the judge for the appointment of arbitrators, which notice shall be served in the same manner as is provided for the service of a summons, and shall specify the time and place of the hearing of the application; but in cases of non-residents the notice shall be by publication for four consecutive weeks, in some newspaper printed in the county. (April 15, 1873, 70 v. 129, § 24 [§ 3].)

Application to street railroad companies.

See §§ 2505a and 2505c.

§ 3305. **SECURITY FOR RENT — LIABILITIES.** — No company shall lease its road, or any part thereof, to any other company, whether of this or any other state, as hereinbefore provided, unless the lessor receive full and adequate security for the payment of the rental and for the preservation of the property of the lessor, in as good condition as on entering into possession, and if the lessee fail to pay such rental promptly when due, such lease shall be void, at the option of the lessor; and the company to whom any railroad is leased, if a corporation of any other state, shall be subject to all the restrictions, disabilities, and duties of a railroad company incorporated within this state; and notwithstanding such lease the corporation of this state lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith, and may be jointly sued in any of the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability; and provided that service may be had upon said companies, or either of them, by the service of process upon any officer or agent of either of said companies. (April 13, 1883, 80 v. 116; Rev. Stat. 1880; April 15, 1873, 70 v. 129, § 24 [§ 4].)

Order cancelling lease — appeal by stockholder.

A judgment ordering the cancellation of a railroad lease may be appealed from by a stockholder of the lessor under § 5226 as a person directly affected thereby when there is reason to believe that the officers of the lessor are acting in the interest of the plaintiff. — *Henry v. Jeanes*, 47 Oh. St. 116 (1890); s. c., 48 Oh. St. 443.

Liability of lessor for acts of employees of receiver of lessee.

This section does not operate to give a right of action against a lessor company for negligent acts of the employees of a receiver who is operating the road as receiver of the lessee. — *Chamberlain v. New York, etc., R. R. Co.*, 36 W. L. B. 81 (1896), 71 Fed. 636. See *Caldwell v. Pittsburg, etc., R. R. Co.*, 33 W. L. B. 134 (1894).

Liability of lessor under old law.

See *Cincinnati, etc., Ry. Co. v. Sleeper*, 3 A. L. R. 464 (1874).

Liability of lessor at common law.

See *Fisher v. Baltimore, etc., R. R. Co.*, 3 N. P. 283 (1896); s. c., 6 Dec. 67.

Gwathney v. Little Miami R. R. Co., 12 Oh. St. 92 (1861).

Lessor liable for fires.

Where damage is caused by a fire originating from the negligence of the lessee, both lessor and lessee are liable. — *Fisher v. Baltimore, etc., R. R. Co.*, 3 N. P. 283 (1896); s. c., 6 Dec. 67.

Service of process.

See *Collins v. Baltimore, etc., R. R. Co.*, 7 N. P. 279 (1898); s. c., 7 Dec. 445.

Liability is joint and severable.

This section does not require both companies to be sued, as they are jointly and severally liable. — *Stoltz v. Baltimore, etc., R. R. Co.*, 7 N. P. 129 (1897). See as to removal to court, *Spangler v. R. R. Co.*, 42 Fed. 305 (1890).

Statute of limitations.

Commencing suit against one company will not save the running of the statute against the other. — *Stoltz v. Baltimore, etc., R. R. Co.*, 7 N. P. 129 (1897).

Extension of Line, Increase of Stock, §§ 3306-3308.

§ 3306. **EXTENSION OF LINE.**—When a company desires to extend the line of its road beyond either of its previously designated termini, the president and directors of the company may submit the question of such extension and change of termini to a meeting of its stockholders, to be called for that purpose, by notice published for four consecutive weeks in some newspaper in general circulation in each county through or into which it passes; and if the holders of the majority of the stock, in person or by proxy, so determine, the president and directors, or a majority of them, shall make a certificate of the fact, naming the places of the new terminus or termini of the road, and the county or counties through or into which the extended line will pass, and file it in the office of the secretary of state, and such certificate and extension shall be considered and held to be a part of the original line of the road. (March 20, 1875, 72 v. 70, § 2.)

Extension — effect of mortgage.

There is nothing in the statute of Ohio relating to the extension of lines of railroad which has the effect of extending a railroad mortgage, by operation of law, to cover after-

acquired property which would not be included by the terms of the mortgage, construed by the rules of the common law.—*Louisville Trust Co. v. Cincinnati, etc., Ry. Co.*, 91 Fed. 699 (1897); s. e., 10 O. F. D. 646.

§ 3307. **INCREASE OF STOCK.**—A company may increase its capital stock, as hereinafter provided, whenever in the opinion of the directors the same is insufficient for the construction of its road, or it becomes necessary for the speedy and convenient transaction of its business to construct a second additional track, extend its line or construct branches thereof, increase its machinery, rolling stock, depots, or other fixtures, or for the purpose of paying any bonds issued or guaranteed by it, or for the purchase of any railroad within this state which has been or may hereafter be sold by a judicial order or decree, or for completing its line of road, or liquidating or paying off any unfunded or floating debt, or other liabilities incurred in the construction or equipment of its road, or for the purpose of extending the same or constructing branches as authorized, or for either or all the purposes aforesaid. (May 5, 1873, 70 v. 289, § 1; March 29, 1875, 72 v. 91, § 1.)

Stock dividends.

Where a railroad, having power to increase its stock, paid a stock dividend, a holder of bonds convertible into stock, who has been paid interest on the bonds, cannot on converting his bonds into stock claim the stock dividend.—*Sutliff v. Cleveland, etc., R. R. Co.*, 24 Oh. St. 147 (1873).

What is not an increase.

Where the authorized stock of a company has not been subscribed, though the company has been in existence for some time, an issue of such stock by the directors is not an increase of the stock so as to require the directors to offer the stock to the stockholders.

—*Sims v. Street R. R. Co.*, 37 Oh. St. 556 (1882).

Irregularities in increase.

Irregularities in the proceedings to increase the stock, e. g., that no notice of the meeting of stockholders was given, will not defeat an action to recover on a subscription for such increased stock for the purpose of paying debts, where such subscriber having knowledge of the facts, acquiesced until the company became insolvent.—*Clarke v. Thomas*, 34 Oh. St. 46 (1877); *Turnbull v. Pomeroy Salt Co.*, 24 W. L. B. 133 (1890). See *Farmers' Loan, etc., Co. v. Toledo, etc., Ry. Co.*, 67 Fed. 49 (1895); s. e., 9 O. F. D. 242.

See generally § 3262 and notes.

§ 3308. **STOCKHOLDERS' MEETING, NOTICE, VOTE.**—Before any stock shall be issued under the last section a majority of the directors shall call a meeting of the stockholders, designating distinctly the time, place, and purpose of the meeting, and the amount of stock required, which meeting shall be held at the principal business office of the company in this state, and notice of which shall be given for at least thirty days previous, by continued publication in at least two newspapers published and of general circulation in the state, and by a like notice, mailed thirty days previous to the time named for the meeting, to each stockholder whose residence is known; and if at such meeting the consent of the holders of a majority of the stock upon which they would be entitled to vote at an election of directors of the company

Common or Preferred Stock — Bond Issues, §§ 3309-3309a.

be given, the stock of the company may be increased to such amount as may be decided necessary or requisite for the purposes named in the preceding section. (March 14, 1876, 73 v. 25, § 2.)

Who may vote.

See § 3296.

§ 3309. COMMON OR PREFERRED STOCK; CONDITIONS. — The increased stock may be "common" or "preferred," as shall be designated in the call for the meeting of the stockholders; if preferred stock be issued, the company may guarantee to the holders thereof semi-annual or quarterly dividends, to an amount not exceeding six per centum per annum, payable at its office, or at such other place as the directors may designate; the stock may be sold at such time and place, either within or without the state, as may be deemed advisable and the proceeds thereof applied to the purposes for which it is issued; the unpreferred stock of the company shall be entitled to dividends only out of the surplus of the profits, after setting apart a sum sufficient to pay the dividends upon the preferred stock, and the company which issues such preferred stock shall reserve the privilege of redeeming and cancelling the same at par, at any time after three years from the date of its issue; and the preferred stock herein provided for may be convertible into bonds of the company at the option of the parties. (May 5, 1873, 70 v. 289, § 3.)

See generally §§ 3235, 3263, and notes.

§ 3309a. BOND ISSUES BY CONSOLIDATED AND OTHER COMPANIES. — Any railroad company now or hereafter organized under the laws of this state, and any such company which now is or shall hereafter be consolidated with other companies, as provided in sections thirty-three hundred and seventy-nine, thirty-three hundred and eighty, thirty-three hundred and eighty-one and thirty-three hundred and eighty-two of the Revised Statutes, may, at a meeting of its stockholders, called as provided in section thirty-three hundred and eight, in lieu of issuing preferred stock as provided in section thirty-three hundred and nine, provide for borrowing money to locate, construct and equip its proposed line of railway, or for the purpose of leasing or purchasing and equipping branch or connecting roads constructed or in process of construction, not exceeding ten miles in length, or for redeeming or exchanging any part or all of its previously issued bonds, or for funding its floating debt, or for any or all of said purposes, in such an amount as it may deem necessary, not exceeding its authorized capital stock, but companies formed by consolidation of one or more companies of this state or of this state with one or more companies of other states as provided in sections 3379 and 3380, may issue bonds in excess of such capital stock and at such rates of interest as may be agreed upon between the respective parties, not exceeding seven per cent. per annum, payable semi-annually or quarterly, as they may direct, and may execute and issue securities therefor, and to secure the payment thereof may pledge the entire property and net income of such company by mortgage or otherwise, and any railroad company formed by the consolidation of two or more railroad companies existing under the laws of this state or any railroad company formed by the consolidation of one or more companies created by or existing under the laws of this state and any other state or states, with a railroad company or companies of this state or any other state, may, from time to time, if authorized by the vote in person or proxy of holders of two-thirds (2-3) of the full paid-up stock of such consolidated railroad company present and voting at meetings of stockholders, called as aforesaid, issue its bonds, convertible or otherwise, into stock, bearing a rate of interest not exceeding six per centum per annum, for one or more of the following purposes: Paying, redeeming or funding debts or obligations assumed, incurred or created by it or either of its predecessors or constituent companies, compromising claims made against it or either of its predecessors or constituent companies, purchasing the whole or any part of any railroad held by it under lease to, or operating con-

 Classification of Stock — Electricity, §§ 3309b-3310-1.

tract with it or either of its predecessors or constituent companies acquiring the whole or any part of the stock or bonds of any railroad company owning a railroad held by such consolidated railroad company under lease or operating contract, acquiring the whole or any part of the bonds, notes or other obligations of any other railroad company of this or any other state, the whole or a majority of whose capital stock shall be held by such consolidated railroad company, completing, extending, improving, maintaining or operating its road, branches or lines, held under lease or contract, laying double or additional track, purchasing rolling stock, building depots, elevators or shops, and generally for any purpose needed in its business, and may, if the directors shall so determine, secure such issue or issues of bonds by mortgage or pledge of any or all of its real or personal estate or franchise or income. Said securities may be expressed in dollars or in the currency of the country where disposed of and may be disposed of upon such terms and at such prices as may be agreed upon between the respective parties not inconsistent with the laws of this state. The proceeds of sale of such securities shall be applied only as now required by law; provided, that nothing in this section or in the sections of the Revised Statutes relating to railroad companies, prior to section thirty-four hundred and thirty-seven, other than in sections thirty-two hundred and eighty-seven, thirty-two hundred and eighty-eight, and thirty-two hundred and eighty-nine shall be construed as affecting street railroads. (April 14, 1880, 77 v. 206; April 19, 1881, 78 v. 230; March 13, 1883, 80 v. 55; March 20, 1884, 81 v. 57; April 11, 1890, 87 v. 181; March 10, 1892, 89 v. 82; April 27, 1896, 92 v. 415.)

Street railroads — application of statutes.

By this section §§ 3207 and 3211 and § 3231-1 have no application to street rail-

roads, but see §§ 2505a, 2505b, 2505z. — *Mason Bridge Co. v. Cambria Iron Co.*, 59 Oh. St. 179 (1898).

§ 3309b. **CLASSIFICATION OF STOCK.**—Any railroad company hereafter formed may, in its article of incorporation, provide for the division of its capital stock into common stock and classes of preferred stock by stating therein the amount of each kind and class of stock, the par value of the respective shares thereof, and the vote which shares of each class shall have. And it may further provide in such articles, terms and conditions of such preferred stock in addition to and not inconsistent with the provisions of section 3309. (April 2, 1891, 88 v. 267.)

See generally § 3235 and notes.

§ 3310. **FACTS TO BE CERTIFIED TO SECRETARY OF STATE.**—Within ten days after such meeting the president and secretary of the company shall make an abstract, stating the whole amount of pre-existing capital stock, the amount authorized, the number of shares of stock upon which all the installments called for by the board of directors have been paid, and the vote at the meeting, and add a certificate that the provisions of the two preceding sections have been fully complied with; and they shall make affidavit to such abstract and statement, and file the same in the office of the secretary of state, who shall cause the same to be recorded. (March 14, 1876, 73 v. 25, § 4.)

§ 3310-1. **ELECTRICITY AS MOTIVE POWER.**—Upon any railroad heretofore or hereafter constructed in this state, electricity may be used as a motive power in the propulsion of cars; provided, however, that before any line of poles and wires shall be constructed through or along the streets, alleys or public grounds of any municipal corporation, plans of such construction shall be submitted to and approved by the council of such municipal corporation. (May 21, 1894, 91 v. 397.)

Hamlet trustees included.

Trustees of a hamlet are included in the word "council."—*In re Newburgh*, 15 O. C. C. 78 (1897); s. c., 8 C. D. 24.

Principal Office — Liability of Directors, etc., §§ 3311 3314.

§ 3311. **PRINCIPAL OFFICE, WHERE ESTABLISHED.**— Each company shall, as soon as convenient after its organization, establish a principal or (general) office at some point on the line of its road (or on the line of any road within this state with which it connects or has running arrangements), and may change the same at pleasure, and shall give public notice of such establishment or change in some newspaper published on its line within this state; and the office of the president, secretary and treasurer of the company shall be kept at such principal or general office, or at some other point on the line of the road of the company within this state, and a record kept there of all the proceedings of the company, to be open at reasonable hours to the inspection of any stockholders of the company. (April 9, 1880, 77 v. 153; R. S. 1880; May 1, 1852, 50 v. 274, § 17.)

Forfeiture of franchise for failure to maintain office.

See *Simmons v. Norfolk, etc., Co.*, 113 N. C. 147 (1893); *State v. Milwaukee, etc., R. R. Co.*, 45 Wis. 579 (1878); *People v. Kingston Co.*, 23 Wend. (N. Y.) 193 (1840); *State v. South Pac. Co.*, 24 Tex. 80 (1859).

Inspection of books.

See § 3254 and notes.

§ 3313. **SECURITIES SOLD TO DIRECTORS UNDER PAR, VOID.**— All capital stock, bonds, notes, or other securities of a company, purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void. (April 27, 1872, 69 v. 173, § 2.)

Purchase from third persons.

The purchase by a director of a corporation of bonds already sold in good faith to a third party, although such purchase be at less than par, does not fall within this section.—*Continental Trust Co. v. Toledo, etc., R. R. Co.*, 86 Fed. 929 (1898); *Toledo, etc., R. R. Co. v. Continental Trust Co.*, 95 Fed. 497 (1899).

Return of amount paid.

Where bonds have been purchased by a director for less than par, and the company has paid interest regularly for a long time, it cannot repudiate the transaction without returning to the director the consideration paid.—*Shoemaker v. Dayton, etc., R. R. Co.*, 19 W. L. B. 322 (1888).

Mortgage is void.

The issue and delivery by a railroad corporation of fifty millions of dollars of paid-up stock and fifteen millions of dollars of bonds secured by a mortgage on the railroad, in consideration of eighteen millions of dollars cash

Application of section to mining companies.

Where a mining company has built a railroad under § 3866, it can only change the principal office of its railroad under this section, and its principal place of business can only be changed under § 3238a.—*State v. Coal Co.*, 4 N. P. 115 (1897); s. c., 6 Dec. 178; *Snow Fork, etc., Co. v. Hocking, etc., R. R. Co.*, 7 N. P. 191 (1897); s. c., 6 Dec. 178.

paid to the corporation by a syndicate, of which the directors are members, is unlawful, contrary to public policy and to this section, and such stocks and bonds are void, although the bonds may be enforceable by bona fide holders of the same, yet the mortgage is not negotiable, and it is void, although owned by a bona fide holder.—*Union Trust Co. v. New York, etc., R. R. Co.*, 17 W. L. B. 176 (1887).

Duty of directors with reference to stock.

It is the duty of directors to use their best efforts to advance the value of the stock of their company, to restore, if lost, confidence therein, and to advise holders of the stock of its real value; and not by combinations and arrangements place themselves in a position of using their superior knowledge of its value to depress such value and purchase large quantities of stock at prices far below its real value.—See *Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618.

§ 3314. **LIABILITY OF DIRECTORS FOR MISMANAGEMENT.**— The directors shall be liable in their individual capacity to the stockholders for any damage sustained by the stockholders by reason of the negligence, mismanagement, or unfaithfulness in the discharge of their duties; but a director may exonerate himself by entering his protest upon the record against any act done without his concurrence from which injury is feared, and forthwith publishing the same for three weeks in some newspaper printed and of general circulation in the county in which is the principal office of the company. (May 1, 1854, 52 v. 91, § 3.)

See § 3248 and notes, and notice the liability imposed by this section is not to the corporation, but to the stockholders.

Eligibility to Office — Bridging Navigable Waters, etc., §§ 3315-3317.

§ 3315. **CERTAIN PERSONS INELIGIBLE TO OFFICE.**—No person who is a stockholder, owner, or part owner of any express, despatch, fast freight, or transportation company, whether incorporated or not, which has for its object, or one of its objects, the shipment of freight or the transportation of persons over any railroad in the United States, or who is in any way pecuniarily interested in any company or partnership formed for any such or like purpose, shall perform the duties of, or be elected or appointed to, any office of profit or trust in any railroad company, or employed as freight or ticket agent thereof; and all such persons shall be ineligible to any such office or appointment. (April 6, 1866, 63 v. 156, § 1.)

Similar acts in other states.

See laws of Pennsylvania, Wisconsin, and Missouri.

§ 3316. **ACTS OF SUCH DIRECTORS VOID, PENALTIES.**—If any person be elected to an office, or appointed to a position, or perform duties, in violation of the preceding section, all his official acts shall be null and void; and for every day that he exercises or attempts to exercise the functions of such office or appointment, he shall forfeit and pay the sum of fifty dollars, to be recovered at the suit of any stockholder of the company, in the name of the company, one-half of which shall go into the treasury of the company, and the other to the stockholder prosecuting. (April 6, 1866, 63 v. 156, § 2.)

§ 3317. **HOW AUTHORITY OBTAINED TO BRIDGE CANALS OR NAVIGABLE WATERS.**—When the line of the road of a company crosses a canal or any navigable water, the company shall file with the board of public works, or with the acting commissioner thereof having charge of the public works where such crossing is proposed, the plan of the bridge, and other fixtures for crossing such canal or navigable water, which shall designate the place of crossing; if the board or acting commissioner approve such plan, he shall notify the company, in writing, of such approval; but if the board or acting commissioner disapprove such plan, or fail to approve the same within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation, and upon reasonable notice being given to the members of the board of public works, or said acting commissioner, the court or judge shall, upon good cause shown, appoint a competent, disinterested engineer, not a resident of any county through which the road passes, to examine such crossing, and prescribe the plan and condition thereof, so as not to impede navigation; such engineer shall, within twenty days from his appointment, make his return to the court of common pleas of the county wherein such crossing is to be made, subject to exception by either party; thereupon the court shall, at the next term after the filing of the return, proceed to examine the return, and approve and confirm the same, unless good cause be shown against such approval; and such order of confirmation shall be sufficient authority for the erection, use, and occupancy of such bridge, in accordance with such plan; but no company shall construct over any canal any permanent bridge less than ten feet in the clear above the top water-line of the canal; and the piers and abutments of such bridge shall be placed so as not in any manner to contract the width of the canal, or interfere with free passage on the tow-path; but this section shall not be construed to prevent the construction or continuance of draw-bridges which do not interrupt navigation. (May 1, 1852, 50 v. 274, § 20; 50 v. 205, §§ 4, 5.)

What plans cannot be approved.

The court has no power to approve the plan for the construction of a bridge where the bridge is to be less than ten feet above the top water-line of the canal, or where the piers or abutments interfere with navigation. — *State ex rel. v. Railway Co.*, 37 Oh. St. 157, 173 (1881).

Powers of acting commissioner.

This section gives the same power to the acting commissioner as to the whole board, consequently they act independently of each other. The board cannot control, modify or reverse a decision of the acting commissioner. — *Works v. Junction R. R. Co.*, 5 McLain (U. S.) 425 (1853); s. c., 3 O. F. D. 101.

Bridges, etc.—When Passenger Trains Must Stop, §§ 3318-3320.

Charter must give right to cross.

The right to cross a navigable water by a railroad bridge must be given by the sovereign power, by special or general act. Where this is not done, neither the board of public works nor an acting commissioner can approve the plan of a proposed bridge. The board has no power to grant leave to cross the navigable water.—*Works v. Junction R. R. Co.*, 5 McLain (U. S.) 425 (1853); s. c., 3 O. F. D. 101.

Jurisdiction of commissioner.

"Having charge of the public works, where such crossing is proposed," means that such place shall be within the territorial jurisdiction of the commissioner.—*Works v. Junction R. R. Co.*, 5 McLain (U. S.) 425 (1853); s. c., 3 O. F. D. 101.

What are navigable waters.

The words "navigable waters" are used in no restricted sense; they embrace all waters within the state, which are navigable by the

works of art or nature.—*Works v. Junction R. R. Co.*, 5 McLain (U. S.) 425 (1853); s. c., 3 O. F. D. 101.

Power of congress.

Under the power to regulate commerce, congress has power to prevent the obstruction of any navigable river, which is a means of commerce between any two or more states. The exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of a navigable water connecting two or more states. The local right is to cross such water. The general commercial right is paramount to all state authority.—See *Lake Shore, etc., Ry. Co. v. Ohio*, 165 U. S. 365 (1897); *Works v. Junction R. R. Co.*, 5 McLain (U. S.) 425 (1853); s. c., 3 O. F. D. 101.

Remedy.

See as to quo warranto in circuit court.—*Lake Shore, etc., Ry. Co. v. State*, (Sup. Ct.) 33 W. L. B. 169 (1894).

§ 3318. **ESTABLISHED BRIDGES.**—All railroad bridges erected prior to May 1, 1852, over any navigable canal, feeder, slack-water improvement, river, stream, lake, or reservoir, not less than ten feet in the clear above the top water line, shall remain undisturbed by the board of public works. (May 1, 1852, 50 v. 205, § 4.)

§ 3319. **ENFORCEMENT BY ATTORNEY-GENERAL.**—If a company refuse to comply with any of the provisions of section thirty-three hundred and seventeen the attorney-general, on being notified thereof, shall immediately institute proper legal proceedings, in the name of the state, against such company, for the purpose of enforcing the provisions thereof. (May 1, 1852, 50 v. 205, § 5.)

§ 3320. **PASSENGER TRAINS MUST STOP AT CERTAIN STATIONS.**—Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers; if a company, or any agent or employe thereof, violate, or cause or permit to be violated, this provision, such company, agent, or employe shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the state, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provisions of this section, the company whose agent or employe caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation. (April 13, 1889, 86 v. 291; April 13, 1867, 64 v. 142, § 26.)

Power of company to make regulations.

In the absence of statutory provision to the contrary, a railroad company may adopt a regulation that a certain train or trains of passenger cars running regularly on its road shall not stop at designated stations or places; and one traveling as a passenger on such road is bound to inquire whether the train upon which he takes passage stops at the station or place to which he is going. A passenger who is on a train not stopping at the station he desires may be put off if he is unwilling to pay the regular fare to a station at which the

train does stop.—*Pennsylvania Co. v. Wentz*, 37 Oh. St. 333 (1881).

Regulations subject to statutes.

The power of a railway company to adopt and enforce regulations that certain trains shall not stop at all places is subject to legislative control, and by this section is taken away as to cities of three thousand inhabitants.—*Pennsylvania Co. v. Wentz*, 37 Oh. St. 333 (1881).

Where the laws make provision for the stopping of trains at certain places, all tickets

Taxes, Time of Trains, Waiting Rooms, §§ 3321-3321-3.

and contracts must be construed with reference to such laws, and a contract recognizing the validity of a regulation disregarding such laws is invalid. — *Pennsylvania Co. v. Wentz*, 37 Oh. St. 333 (1881).

Constitutionality.

This section is a valid exercise of the police power of the state, and does not violate the interstate commerce clause of the constitution of the United States, and is valid until congress passes an act inconsistent with it. —

Lake Shore, etc., Ry. Co. v. State ex rel. Lawrence, 8 O. C. C. Rep. 220 (1894); s. c., 4 C. D. 406; s. c., 37 W. L. B. 196; Lake Shore, etc., Ry. Co. v. State ex rel. Lawrence, 173 U. S. 285 (1899).

Not conflicting with federal statutes.

This section is not inconsistent with § 5258, Rev. Stat. U. S. — Lake Shore, etc., Ry. Co. v. State ex rel. Lawrence, 8 O. C. C. 220 (1894); s. c., 4 C. D. 406.

§ 3321. **TAXES ON LAND OCCUPIED AS RIGHT OF WAY.** — Each company owning and occupying any right of way or easement in lands, either by agreement with the owners, or by virtue of any appropriation proceeding, shall present to the auditor of the county in which such land is situate a statement of the quantity of land embraced within such right of way or easement, and such quantity shall be deducted by the auditor from the land on the tax duplicate, so that the owners thereof shall not be required to pay taxes thereon; a company hereafter becoming the owner and occupant of any such right of way or easement shall, within six months thereafter, present such statement to the auditor; and upon the failure of the company to make such statement, the owner of the land may make the same. (March 23, 1875, 72 v. 71, § 8.)

§ 3321-1. § 1. **POSTING TIME OF ARRIVAL OF TRAINS.** — Every company or person operating a railroad within this state, shall immediately after the taking effect of this act, cause to be placed in a conspicuous place in each passenger depot of such company, located at any station in this state at which there is a telegraph office, a blackboard, at least four feet in length and two feet in width, upon which board such company or person shall cause to be written, at least ten minutes before the schedule time for the arrival of each passenger train stopping regularly upon such road at such station, the fact whether such train is on schedule time or not, and if late, how much. (May 8, 1886, 83 v. 118.)

Constitutionality.

The discrimination in this section between stations having telegraph offices and those

without such offices does not render the section unconstitutional. — *Pennsylvania Co. v. State*, 142 Ind. 428 (1895).

§ 3321-2. § 2. **PENALTIES FOR VIOLATION.** — That for each violation of the provisions of this act, such company or person so neglecting or refusing to comply with the provisions of this act, shall forfeit and pay the sum of ten dollars (\$10.00) to be recovered in a civil action in the name of the state of Ohio, one-half of which shall go to the party commencing proceedings, and the remainder shall be paid over to the treasurer of the township, village or city in which such proceedings are had. (May 8, 1886, 83 v. 118.)

No penalty for each failure to post.

This section does not provide a penalty for the refusal or neglect to comply with any of its provisions, as, for instance, the refusal to schedule the train, etc., but for the refusal or neglect to comply with the entire provisions of the act, or each violation of the entire provisions of the section. A failure to erect a blackboard at a proper station is a violation of the section. A penalty of ten dollars only can be recovered for failure to provide a blackboard, or to register the arrival of trains at a

station, within the terms of the section, without any reference to the violation of each or any of the separate provisions of the section. — *State ex rel. McClurg v. Railroad Co.*, 8 O. C. C. 604 (1894); s. c., 4 C. D. 372.

Jurisdiction.

The action to recover a penalty under this section can only be brought before a justice of the peace or a mayor. — *State ex rel. McClurg v. Railroad Co.*, 8 O. C. C. 604 (1894); s. c., 4 C. D. 372.

§ 3321-3. § 1. **WAITING ROOMS AT RAILROAD STATIONS.** — That every person, firm or corporation operating a steam railroad wholly, or in part, within the state of Ohio, be required to provide a suitable waiting room at each station where

Waiting Rooms; Right of Way; Road Crossings, §§ 3321-4-3323.

passenger trains or any of them, of such road, are regularly scheduled to stop, for the use of the traveling public. Said waiting rooms to be maintained and kept as to be conducive to the health and comfort of the patrons of such railroad. (April 16, 1900, 94 v. 231.)

§ 3321-4. § 2. DUTY OF COMMISSIONER OF RAILROADS.— Upon the written complaint of ten or more citizens of the state of Ohio being filed with the said commissioner that any of the provisions of this act are being violated, at such station, the said commissioner shall forthwith make investigation of the same; and if upon such investigation it be found that such violation exists, he shall issue an order to the person, firm or corporation guilty of such violation, setting forth the nature of the improvement required and directing that the same be completed within a time to be specified therein. (April 16, 1900, 94 v. 231.)

§ 3321-5. § 3. PENALTY AND ENFORCEMENT.— Any person, firm or corporation failing to comply with an order of said commissioner, or any of the provisions of this act, shall, upon conviction therefor before a court of common pleas of the county in which such violation shall occur, forfeit and pay any sum not less than one hundred dollars. Such forfeiture or penalty to be recovered in a civil action in the name of the state of Ohio, for the benefit of the county in which such failure or violation shall occur; such action to be brought by the prosecuting attorney of the county in which the violation of this act occurs, at the instance of the commissioner of railroads and telegraphs, as provided in other cases for the recovery of penalties and forfeitures against railroad companies. Said prosecuting attorney shall receive, for his services ten per cent. of all fines and costs recovered under the provisions of this act. (April 16, 1900, 94 v. 231.)

§ 3322. RIGHT OF WAY PAPERS TO BE RECORDED.— When the grant of such right of way or easement is not in the form of a lawfully executed deed or lease, the recorder of the county where the land is situate shall, upon the request of the company owning such right of way or easement, record such grant in the record book of leases, and index the same; and such record, or a copy thereof duly certified by the recorder, shall be received in evidence in all courts and places, in the same manner and to the same effect as the original; but the correctness of such record or copy may be impeached by any interested party, by competent proof; and the recorder shall be entitled to the usual fee for recording such grants, and certifying copies thereof. (March 23, 1875, 72 v. 71, § 8.)

§ 3322a. TAXATION OF RIGHT OF WAY.— Any company using or occupying any land as a right of way, without paper title or contract of record therefor, shall within six months after the passage of this act present a correct survey and plat of such land, exhibiting the quantity in such right of way taken from the lands of an owner abutting on such right of way, as it then stands on the tax duplicate of such county, to the auditor of the county in which such land is situate, who shall charge such land on his duplicate to such company, so used or occupied by any such company and such relative quantity shall be deducted by the auditor from the land on the tax duplicate, so that the abutting owners thereof shall not be required to pay the taxes thereon; and all costs of such survey, plat and transfer shall be paid by the company. Upon the failure of any company to have made such survey plat and transfer the owner or owners of such abutting land may have the same made and recover the costs thereof in an action against such company before any court having jurisdiction thereof. (April 1, 1902, 95 v. 73.)

§ 3323. MUST ERECT SIGN-BOARDS AT ROAD CROSSINGS.— Each company shall erect, at all points where its road crosses a public road, at a sufficient eleva-

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tion from such public road to admit of the free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railroad, and warn persons to be on the look-out for the locomotive; and a company which neglects or refuses to comply with this provision shall be liable in damages for all injuries which occur to persons or property from such neglect or refusal. (May 1, 1852, 50 v. 274, § 18.)

When evidence as to sign-board admissible.

In an action by a traveler on a public highway against a railroad company, to recover for injuries by collision with a passing train at a public crossing, alleged to have been caused by negligence in the management of the train, where the evidence tends to show that he did not exercise proper care and caution to avoid the injury, it is competent for him to show that there was no sign-board up, as required by law, as reflecting upon the question of his want of care, although the want of such sign-board is not alleged as a ground of recovery.—*Baltimore, etc., R. R. Co. v. Whitacre*, 35 Oh. St. 627 (1880).

Same subject.

Unless it is averred as a ground of negligence that a sign was omitted, he cannot insist upon it as a substantive cause of action.

If a party is acquainted with the crossing the absence of the warning post is not available as a proof of negligence.—*New York, etc., R. R. Co. v. Kistler*, 16 O. C. C. 316 (1894); s. c., 9 C. D. 277; *C. C. & I. Ry. Co. v. Reiss*, 13 O. C. C. 405 (1889); s. c., 7 C. D. 450. See *Baltimore, etc., R. R. Co. v. Whitacre*, 35 Oh. St. 627 (1880); *Lang v. Holiday, etc., Mining Co.*, 49 Ia. 469 (1878).

Liability imposed.

A violation of this section does not render the company absolutely liable for injuries to persons or property while attempting to cross the track. Evidence of such omission merely establishes the negligence of the company, and if it appear that the plaintiff's negligence contributed to the injury, he cannot recover. *Dodge v. Burlington, etc., R. R. Co.*, 34 Ia. 276 (1872).

§ 3324. FENCES ALONG TRACKS, CROSSINGS, CATTLE-GUARDS, CONSTRUCTION BY LANDOWNERS AT EXPENSE OF COMPANY.—A company or person having control or management of a railroad shall construct, or cause to be constructed, and maintain in good repair on each side of such road, along the line of the lands of the company owning or operating the same, a fence sufficient to turn stock; and when such fence is constructed out of barbed wire, or separate lateral strands not connected by interwoven wire, or cross perpendicular wire not more than fifteen inches apart, there shall be securely fastened to the posts, at the top of the same, at right angles thereto, at least one board, not less than one and one-eighth inches thick and five inches wide, and extending the entire length thereof; and before operating such road shall cause to be maintained at every point where any public road, street, lane or highway used by the public, crosses such railroad, safe and sufficient crossings, and on each side of such crossings cattle-guards sufficient to prevent domestic animals from going upon such railroad; and such company or person shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such fence, crossing or cattle-guard, or any neglect or carelessness in the construction thereof, or in keeping the same in repair. That provided, where any road now in process of construction, or any proposed road, passes through any inclosed land, that the company or person having control of any such road shall, during the construction of the same, provide suitable crossings for the owner or occupant of each farm, and make and keep in repair fences along the line of such road through such inclosed fields, and protect any crops growing thereon; and further provided, that where the company or person agrees, with the owner of the lands through which any railroad passes, that said owner shall build and keep in repair any portion of the fencing, and should said fencing be destroyed or damaged by fire from passing trains, said company or person owning or operating such road shall rebuild or repair said fence, provided the property-holder should demand it; and provided, that if any railroad company shall fail or refuse to construct any fence in the manner hereinbefore provided, within six months after the passage of this act, and after having received written notice so to do from the owner or occupant of any lands through which the road may pass, (that) then said owner or occupant may,

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after thirty days from the time of serving such notice upon the agent of such company nearest said lands, proceed to construct the same, and the company shall be liable to such person for the cost thereof. This act shall apply to all fences now built, as well as those hereafter constructed. (April 18, 1874, 71 v. 85, § 1; R. S. 1880; April 20, 1887, 78 v. 199; April 8, 1891, 88 v. 295; May 18, 1894, 91 v. 297.)

Construction of section.

This section is to be reasonably construed, and where damage results from defects (occurring without the fault or neglect of such companies) in an otherwise sufficient fence, there is no liability.—*Railroad Co. v. Schultz*, 43 Oh. St. 270 (1885).

Constitutionality.

This section is constitutional, founded in a sound public policy, and equally obligatory on railroad companies whether organized under charters granted prior or laws enacted since the constitution of 1851 went into effect.—*Railroad Co. v. Infirmary*, 32 Oh. St. 566, 570 (1877).

No duty to fence at common law.

See *Seymour v. Railway Co.*, 44 Oh. St. 12, 19 (1886); *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Oh. St. 172 (1854).

Duty to public.

The obligation to construct and maintain fences upon both sides of railroads, imposed by this act, is not limited to owners and occupiers of adjoining lands, but extends to the public generally.—*Marietta, etc., R. R. Co. v. Stephenson*, 24 Oh. St. 48 (1873); *Railway Co. v. Allen*, 40 Oh. St. 206 (1883); *Gill v. Atlantic, etc., Ry. Co.*, 27 Oh. St. 240 (1875); *Railroad Co. v. Scudder*, 40 Oh. St. 173, 175 (1883).

Company cannot relieve itself of its duty and shift duty to contractor.

The duty of a railroad company is not discharged by contracting with another party to perform it, when the performance itself is insufficient.—*Gill v. Atlantic, etc., Ry. Co.*, 27 Oh. St. 240 (1875); *Railway Co. v. Allen*, 40 Oh. St. 206 (1883).

Duty to fence as to persons.

If a track is not inclosed by a fence and proper guard, a higher degree of care is imposed upon the company for the protection of children than otherwise would be required.—*Devereaux v. Thornton*, 4 W. L. B. 355 (1879); s. c., 2 Cleve. L. Rep. 477; 10 W. L. B. 266.

Fence across private roads.

Where a private road extends across the track and right of way of a railroad company and connects with a public highway, the company is required to maintain across such private road suitable fences, or provide other protection against injuries which may result from animals passing from such highway through the private road on or along the

railroad track.—*Railroad Co. v. Cunningham*, 39 Oh. St. 327 (1883).

Effect of repairs by company when it is landowner's duty to repair.

Occasional repairs by a company to fences, which by contract it was the duty of the landowner to repair, does not release the landowner from his duty to maintain and repair.—*Railway Co. v. Heiskell*, 38 Oh. St. 666 (1883).

Railroads must have separate inclosures.

Inclosures of railroads under this act must be separate and distinct from the inclosures of adjoining proprietors.—*Marietta, etc., R. Co. v. Stephenson*, 24 Oh. St. 48 (1873).

Fences in towns.

This section requires the construction and maintenance of fences within the limits of cities and villages where they do not obstruct streets, highways or other public grounds.—*Cleveland, etc., R. R. Co. v. McConnell*, 26 Oh. St. 57 (1875).

Joint liability of roads running over same track.

See *Berchold v. Lake Shore, etc., R. R. Co.*, 1 Cleve. L. Rep. 314 (1878).

Statute of limitations.

An action against a railroad company to recover damages for killing or injuring a domestic animal which had strayed upon its tracks, and was killed or injured without fault or negligence of the railroad company in operating its train, but solely by the neglect to fence the road as required by law, is founded upon "a liability created by statute, other than a forfeiture or penalty," and is barred in six years.—*Seymour v. Railway Co.*, 44 Oh. St. 12 (1886).

Pleading.

The facts upon which the company's liability depends must be stated in the petition, and, if not admitted, must be established by proof. An allegation that the defendant was, by law, bound to fence and inclose its railroad, tenders an immaterial issue, and is not to be taken as true because not denied.—*Baltimore, etc., R. R. Co. v. Wilson*, 31 Oh. St. 555 (1877).

Negligence must be proved.

In an action against a railroad company to recover damages for killing live stock, the plaintiff must prove affirmatively that want of ordinary care on the part of the company

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or its employees caused the injury. Such reference does not arise from the mere fact that the animal was killed.—*Railroad Co. v. McMillan*, 37 Oh. St. 554 (1882); *Railway Co. v. Heiskell*, 38 Oh. St. 666 (1883); *Bellefontaine, etc., R. R. Co. v. Bailey*, 11 Oh. St. 333 (1860).

Facts justifying verdict.

The fact that an insufficient fence has for several weeks been maintained by a railroad company along its right of way is sufficient to justify a jury in finding it guilty of negligence: and the fact that the plaintiff's stock had, during all such time, been kept in a field adjoining the right of way, without escaping through such fence and passing upon the railroad track, is not sufficient to exonerate the company from such neglect. Where the immediate means or cause of such stock passing over such fence and upon the railroad track is that, recently prior thereto, a board or rail had become detached and fallen from the fence, without the knowledge of the company, such company is not excused from liability where there is evidence to justify the jury in finding that such special defect was attributable to the generally defective condition of the fence.—*Railroad Co. v. Schultz*, 43 Oh. St. 270 (1885).

Expert testimony.

Where one of the issues in an action is whether a fence is sufficient to turn stock, it is error to permit witnesses, who show no other qualifications than that they had seen the fence, to give to the jury their opinions as to the sufficiency of the fence to turn stock.—*Railroad Co. v. Schultz*, 43 Oh. St. 270 (1885).

Expert testimony.

An expert may testify whether, in view of the distance between the cattle and the engine, it was possible to avoid injury.—*Bellefontaine, etc., R. R. Co. v. Bailey*, 11 Oh. St. 333 (1860).

Cattle running at large on track—duty of company.

If the owners of cattle permit them to run at large in the vicinity of an uninclosed railroad track, and do not choose to avoid danger to their cattle by keeping them within their own inclosures, they can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, running its trains with a speed regulated by the grade of its road, the capacity of its locomotive power, and the safety of persons and property carried, shall, with due regard to the safety of persons and property in their charge, being the paramount consideration, exercise, what, "in that peculiar business," would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed railroad. The company is not bound to take into consideration the possibility of cattle being on the track.—*Central*

Ohio R. R. Co. v. Lawrence, 13 Oh. St. 66 (1861); *Cleveland, etc., R. R. Co. v. Elliott*, 4 Oh. St. 474 (1855); *Kerwhacker v. Cleveland, etc., R. R. Co.*, 3 Oh. St. 172 (1854); *Bellefontaine, etc., R. R. Co. v. Schruyhart*, 10 Oh. St. 116 (1859); *Bellefontaine, etc., Co. v. Bailey*, 11 Oh. St. 333 (1860); *Didman v. Michigan, etc., R. R. Co.*, 31 W. L. B. 240 (1894); *Cranston v. Cincinnati, etc., R. R. Co.*, 1 Handy, 193 (1854).

Cattle running at large—contributory negligence.

Suffering domestic animals to run at large, by means whereof they stray upon an uninclosed railway track, where they are killed by a train, is not, in general, a proximate cause of the loss, and hence, although there may have been some negligence in the owner's permitting the animals to go at large, such negligence being only a remote cause of the loss, it will not prevent his recovering from the company, if the immediate cause of their death was negligence of the company's servants in conducting the train.—*Cleveland, etc., R. R. Co. v. Elliott*, 4 Oh. St. 474 (1855).

Cattle at large on track—presumption.

The mere fact that cattle have strayed, without right, on the track of a railroad, neither establishes that character of negligence which precludes a claim for injury done by running the locomotive against them, nor justifies a want of proper care to save and preserve them from destruction.—*Cranston v. Cincinnati, etc., R. R. Co.*, 1 Handy, 193 (1854).

Cattle running at large.

In an action under this section, it is a sufficient answer to allege that the plaintiff did not live along the line of the railway, nor were his cattle grazing in any inclosed field adjacent thereto. That said plaintiff knowingly, willfully and unlawfully permitted his cattle to run at large on the highways and uninclosed lands adjacent to defendant's said railroad, whereby said cattle went upon said road and were accidentally killed.—*Pittsburg, etc., Ry. Co. v. Methaven*, 21 Oh. St. 586 (1871). See *Railway Co. v. Wood*, 47 Oh. St. 431, 436 (1890).

Cattle running at large.

Where cattle are running at large without the fault of the owner, he is not guilty of contributory negligence in case they are injured.—*Marietta, etc., R. R. Co. v. Stephenson*, 24 Oh. St. 748 (1873).

Duty of company—animals on track.

Where domestic animals are injured by a railroad train while trespassing upon the track of the company, and the owner of the animals is free from negligence contributing to their injury, the company will be liable for a failure on the part of those operating the train to exercise ordinary care to avoid injury.—*Lake Erie, etc., R. R. Co. v. Weisel*, 55

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Oh. St. 155 (1896); Cincinnati, etc., R. R. Co. v. Smith, 22 Oh. St. 227 (1871); Lake Shore, etc., Ry. Co. v. Slater, 24 W. L. B. 2 (1890).

Same subject — road unfenced.

If the road is properly fenced the company is held to the exercise of ordinary care only in the running of trains to prevent the killing of animals. Where the road is not properly fenced, a higher degree of care is required.—Gill v. Atlantic, etc., Ry. Co., 27 Oh. St. 240 (1875).

Same subject — plaintiff negligent in failing to build fences.

Where the owner of land through which a railroad runs agrees with the railroad company, for a valuable consideration, to build and keep up good and sufficient fences, and fails to do so, and on account of the insufficiency of such fences his animals stray upon the track and are injured, he is not entitled to recover for such injury, although the insufficiency of the fences was caused by casualty and without negligence on his part, unless such injury is shown to have been intentional, or the result of gross carelessness on the part of the agents and servants of the company.—Lake Erie, etc., R. R. Co. v. Weisel, 55 Oh. St. 155 (1896); Pittsburg, etc., Ry. Co. v. Smith, 26 Oh. St. 124 (1875); Cincinnati, etc., R. R. Co. v. Waterson, 4 Oh. St. 424 (1854); Railway Co. v. Heiskell, 38 Oh. St. 666 (1883). See Easter v. Little Miami R. R. Co., 14 Oh. St. 48 (1862).

Contributory negligence of landowner.

It is not contributory negligence for a landowner to turn his stock into a field insufficiently fenced where it is the duty of the company to fence.—Railway Co. v. Smith, 38 Oh. St. 410 (1882); Railroad Co. v. Seudder, 40 Oh. St. 173 (1883). See Pittsburg, etc., Ry. Co. v. Methven, 21 Oh. St. 586 (1871).

See under old partition fence act, Railroad Co. v. Infirmary, 32 Oh. St. 566 (1877); Sandusky, etc., R. R. Co. v. Sloan, 27 Oh. St. 341 (1875).

Want of notice of condition of fence.

It has never been decided that it was no defense for a company to show that it had no notice of the condition of a fence.—See Railway Co. v. Smith, 38 Oh. St. 410 (1882); Railroad Co. v. Shultz, 43 Oh. St. 270, 273 (1885); Baltimore, etc., R. R. Co. v. Reamer, 24 W. L. B. 222 (1890).

Breachy and unruly animals.

An owner of breachy and unruly animals may recover for their injury or loss provided the animals were at large without his fault, and he has used that reasonable care and precaution in restraining them which a prudent and cautious man would use under like circumstances.—Railway Co. v. Howard, 40 Oh. St. 6 (1883).

Covenant to build or repair, when runs with land.

Where a railroad company makes a deed poll of land in fee along which its right of way is located, "subject to the condition that said grantee, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the railroad as now located and built, . . . which condition and obligation shall be perpetually binding on the owners of the land," the grantee, by accepting the deed, will be deemed to have entered into an express undertaking to perform the condition contained in the deed, and such undertaking will run with the land and become obligatory upon a subsequent owner by purchase from the grantee of the company.—Hickey v. Railway Co., 51 Oh. St. 40 (1894).

Same subject — purchaser without notice.

A written agreement by the grantor of the right of way to a railway company to fence it on each side through his lands will not affect the right of a subsequent purchaser to require the company to fence its road, where the purchase was made without actual or constructive notice of the existence of such agreement. Such agreement not being recorded, the mere use and occupation of the right of way by the company and its successors for the purpose of a railroad will not constitute constructive notice of the existence of such agreement.—Railway v. Bosworth, 46 Oh. St. 81 (1888).

Same subject — when does not run with land.

Where it is stipulated in a deed poll that the grantee, his heirs and assigns, shall build and perpetually maintain a fence on the line between the land granted and other lands owned by the grantor, and the parties to such deed, at the time of its execution, contemplate the subdivision of the granted premises into building or town lots, and their subsequent sale, the burden of maintaining such fence will not attach to or run with lots which do not abut on the line of the proposed fence.—Walsh v. Barton, 24 Oh. St. 28 (1873).

Same subject.

Where the covenant runs with the land the grantee of the original owner, whose duty it was to fence, cannot recover the cost of fencing.—Warner v. Baltimore, etc., R. R. Co., 31 Oh. St. 265 (1877).

Same subject.

Where in proceedings to condemn land the parties enter into an agreement of record whereby the company bound itself to build and maintain fences, the agreement is valid and binding, and runs with the land so as to be binding on the assignees or grantees of both parties.—Huston v. Cincinnati, etc., R. R. Co., 21 Oh. St. 235 (1871).

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SAME subject.

Where a landowner by duly recorded deed conveyed a right of way and covenanted for himself, his heirs and assigns, to erect and maintain a fence on each side of such way, a lessee of his grantee would be so far bound by the covenant that he could not claim from the railroad company a higher degree of care to avoid injury to a horse than if the covenant had been kept.—*Easter v. Little Miami R. R. Co.*, 14 Oh. St. 48 (1862).

Same subject—grantee not liable.

When the deed is drawn as stated in the preceding note, the company will not have a right of action against the grantee for failure to repair, after he has ceased to be the owner of the land by conveying it to another.—*Hickey v. Railway Co.*, 51 Oh. St. 40 (1894).

Failure to construct fence—remedy.

If a railway company fails to construct a fence as required by this section, an abutting landowner may construct such fence and recover of the company the reasonable cost and expense thereof, together with the value of the use and occupation of his premises during the time such fence is being constructed or repaired, but he must do all he can to confine his loss to the minimum, and he cannot recover for damages he might have avoided.—*Millhouse v. Railway Co.*, 7 O. C. C. 466 (1893); s. c., 4 C. D. 682; s. c., 36 W. L. B. 258.

Remedy for failure of company to fence or build crossings according to contract.

Where the owner of land, by his written contract, agreed to give to a railroad company the perpetual right of way through the same, at a stipulated price, which was paid to him, with a provision in the contract that when the road should be completed the company should fence the same, *held*, that after the road is completed, the owner of the land cannot, upon failure to put up the fence, eject the company from the land.—*Hornback v. Cincinnati, etc., R. R. Co.*, 20 Oh. St. 81 (1870).

Same subject.

Where a landowner agreed to release a right of way in consideration of a certain sum of money and the construction of road crossings and cattle-guards, and the company took possession before receiving a deed or constructing the crossings or guards, the landowner has an equitable lien upon the property sold, as well for damages for not constructing the crossings and guards as for the unpaid purchase money, and the landowner may have a remedy by compelling specific performance or by enforcing his lien.—*Dayton, etc., R. R. Co. v. Lewton*, 20 Oh. St. 401 (1870).

Breach of covenant to build and repair—damages.

In an action by the vendee of the original owner against the vendee of the company, for failure to build fences and crossings, the rule of damages is the amount of injury to the use and enjoyment of the adjoining land, occasioned by the want of such fences and crossings during the time the railroad or right of way was owned by the defendant.—*Huston v. Cincinnati, etc., R. R. Co.*, 21 Oh. St. 235 (1871).

Gates left open.

Where gates to permit passage to and from fields across the track are constructed at the request of the landowner, and where he uses them exclusively, the company owes him no duty to see that they are kept closed.—*Didman v. Michigan, etc., R. R. Co.*, 31 W. L. B. 240 (1894).

Gates—duty to close.

Where a company puts in a private crossing with gates, and stock wanders through the gate upon the company's track and is killed, the duty of keeping the same closed devolves primarily upon the landowner, and not upon the company, and evidence showing a gate was carelessly left open is not admissible on the issue as to the condition of the fence.—*Megruv v. Lennox*, 59 Oh. St. 479 (1878).

Same subject.

The same rule applies to a third person whose cattle break into a field which has gates which have been left open.—See *Baltimore, etc., R. R. Co. v. Reamer*, 24 W. L. B. 222 (1890).

Partition fences under old act.

See *Railroad Co. v. Miami County Infirmary*, 32 Oh. St. 566 (1877); *Sandusky, etc., R. R. Co. v. Sloan*, 27 Oh. St. 341 (1875); *Haxton v. Pittsburg Ry. Co.*, 26 Oh. St. 214 (1875).

When fences must be built after passage of act.

See *Baltimore, etc., R. R. Co. v. McElroy*, 35 Oh. St. 147 (1878).

Barbed wire fence law.

See § 4239a (95 v. 470).

Same subject.

The allowance of six months to comply with the statute is not a vested right which cannot be divested by repeal. The effect of a repeal of the six months' limitation is to require compliance within a reasonable time.—*Railroad Co. v. Shultz*, 43 Oh. St. 270, 274 (1885).

Crossings—inclines.

Where the grade of the track is higher than that of the road the approaches need not be built by the railroad company so far on both sides of the crossing that there would be prac-

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tically no incline on the approaches, so that the approaches are brought practically to a level with the railway crossing. They had a right to make inclines, and where the inclines are made safe and sufficient for ordinary and regular purposes of travel, that is a sufficient compliance with the statutes.—*Lake Shore, etc., R. R. Co. v. Brazzill*, 13 O. C. C. 622 (1895); s. c., 6 C. D. 363.

Crossing defined.

Under this section the company is liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of a crossing over its tracks. The word "crossing" is used in a limited or restricted sense, and includes only that part of the structure immediately over and across the tracks, and sufficient space on either side to make a sufficient and safe way over such tracks.—See *Lynch v. Railway Co.*, 20 O. C. C. 248 (1899).

Crossings over roads and streets.

See § 3284 and notes.

Cattle-guards at private crossings.

The company should provide cattle-guards at private as well as public crossings.—See *Railroad Co. v. Cunningham*, 39 Oh. St. 327 (1883).

Cattle-guards in towns and station yards.

This section, so far as it relates to cattle-guards, may be construed as allowing exceptions, required by public necessity and convenience, and the proper use of a station yard by the company, but when the company is thus relieved, it is its duty to construct the guards at the first point where they will not interfere with the needs of the public and the company; and in an action against the company for damages, the question whether the guards are properly located and placed is for the jury.—*Railroad Co. v. Newbrander*, 40 Oh. St. 15 (1883); *Railroad Co. v. Cunningham*, 39 Oh. St. 327 (1883); *Pierce v. Andrews*, 13 O. C. C. 513 (1896); s. c., 7 C. D. 105.

Company not entitled to compensation for putting in cattle-guards.

A railroad company exercising its powers subject to the provisions of the present constitution, and required by this act passed since its incorporation to construct and maintain cattle-guards at places on its road where public highways are or may be constructed across its track, is not entitled to compensation for making or maintaining cattle-guards.—*Railway Co. v. Sharpe*, 38 Oh. St. 150 (1882).

§ 3325. **WHEN LANDOWNERS MAY CONSTRUCT FENCE AT COMPANY'S EXPENSE.**—If such company or person neglect or refuse to construct such fence, as provided in the preceding section, the owner of any land abutting on the line of the land of the railroad may construct the fence therein provided for, so far as his land abuts on the railroad lands; and when he has completed the same, he may present for payment, to the agent of the company for receiving and shipping freight at the station nearest to the tract of land so fenced, an itemized account of the expense thereof, including materials and labor; and if such company or person neglect or refuse, for thirty days, to pay such account, such landowner may recover the reasonable cost of such fence from the owner of the road, in any court having jurisdiction of the same. (April 18, 1874, 71 v. 85, § 1.)

See notes to preceding section.

§ 3326. **COMPANY TO KEEP FENCE IN REPAIR.**—When the fence is completed the company shall keep it in good repair; and if any such company or person permit any part of the fence on the line of its road to get out of repair so that it will not turn stock, the owner of the land abutting on the railroad lands where the fence is out of repair, may notify the agent of the company for receiving and shipping freight at the station on the road nearest to the place where the fence is out of repair, that a portion of the fence on the line of the road is out of repair, stating where, how, and the probable cost of repairing the same; and if such company or person fail, for twenty-four hours thereafter, to repair the fence so that it will turn stock, the owner of the land may furnish materials and repair the same, and present to such agent, for payment, an itemized account of the expense thereof, including materials and labor, and if the same be not paid within thirty days thereafter, such landowner may recover from the owner of the road the reasonable expense of such repairs, before any court having jurisdiction thereof. (April 18, 1874, 71 v. 85, § 1.)

See notes to section 3324.

Private Crossings, §§ 3327, 3328.

§ 3327. **WHEN PRIVATE CROSSINGS MUST BE BUILT.**—A person owning fifteen or more acres of land in one body through which any such railroad passes, and which is so situate that he can not use a crossing in a public street, road, lane, or highway, in passing from his land on one side of the railroad to that on the other side without great inconvenience, the company or person operating the road shall, at the request of the landowner, within four months after such request, at the expense of such company or person, construct a good and sufficient private crossing across the railroad and the lands occupied by the company, between the two pieces of land of the landowner, to enable him to pass with a loaded team, and over which he shall have the privilege of passing at all times when such company or person is not using the railroad at the crossing, or so near thereto as to render crossing thereat dangerous. (April 18, 1874, 71 v. 85, § 1.)

Rights when railroad was constructed before enactment of this section.

The owner of land through which a railroad passes has a right to a private crossing, although the right of way was appropriated, and the railroad constructed before the passage of this section.—*Mitchell v. Wabash R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

Who entitled to crossing.

The omission of the word "farmer," implies an intent to provide generally for private crossings.—*Mitchell v. Wabash R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

Records as to compensation for crossings.

Where the record in proceedings in which the land was appropriated is not in evidence, even though the land was condemned before the passage of this section, it will not be held that compensation for crossings was given.—*Mitchell v. Wabash R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

Constitutionality.

The section is constitutional as a valid exercise of the police power.—*Mitchell v. Wabash R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

What determines right to crossing.

The right to a private crossing depends upon the fact that the public crossing cannot be used "without great inconvenience," and

that such private crossing shall be used only when not dangerous; a crossing, therefore, should be constructed at the point most convenient and least dangerous.—*Mitchell v. Wabash R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

When court will fix location.

Where the matter is before a court of equity, if the parties cannot agree as to the location, the court will fix it by means of engineers and referees.—*Mitchell v. Wabash R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

Injunction against interference with crossing.

Where a landowner has complied with these sections, and the railroad company has declared its intention of preventing the construction of the crossing, an injunction may be allowed to prevent such interference.—*Mitchell v. Wabash R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

See generally *Jones, etc., Co. v. C. C. C. T. & S. Ry. Co.*, 7 N. P. 245 (1894).

Gates at private crossings.

See notes to § 3324.

Contract for private crossing, remedies for breach.

See *Bell v. Dayton, etc., R. R. Co.*, 3 O. C. C. 31 (1887); s. c., 2 C. D. 19; *Dayton, etc., R. R. Co. v. Lewton*, 20 Oh. St. 401 (1870).

§ 3328. **WHEN LANDOWNER MAY BUILD AT COMPANY'S EXPENSE.**—If such company or person neglect, for four months after request by any such landowner for that purpose, to construct a good and sufficient private crossing as provided in the preceding section, such landowner may, after having given reasonable notice to the agent of the company for receiving and shipping freight at the station on the railroad nearest to the land where it is proposed to construct such private crossing, of the time when such landowner will proceed to construct such crossing, enter upon the lands of the company, at any point he may desire between the two pieces of his land, and construct a good and sufficient private crossing; and such company or person shall be liable to him for all the reasonable expense thereof, not exceeding the sum of fifty dollars, and he may recover the same in an action against such company or person, before any court having jurisdiction thereof. (April 18, 1874, 71 v. 85, § 1.)

Fences, Crossings, etc., §§ 3329-3331.

§ 3329. **WHEN FIVE PRECEDING SECTIONS DO NOT APPLY.**—The provisions of the five preceding sections relating to fences and private crossings shall not apply to any case in which compensation for building a fence or a private crossing has been or may hereafter be taken into consideration, and estimated as a part of the consideration to be paid for the right of way, so far as the fence, or right to private crossing, has been or may be settled or paid for; nor shall said sections be held to affect, in any manner, any contract or agreement between any railroad company, or person having the control and management of a railroad, and the proprietors or occupants of lands adjoining, for the construction and maintenance of fences, cattle-guards, and railroad crossings. (March 25, 1859, 56 v. 62, § 4; April 18, 1874, 71 v. 85, § 1.)

Where compensation has been made.

Where compensation for building a fence or private crossing was taken into consideration when the right of way was acquired, the company is not liable either to the landowner or the public for failure to fence or for insufficient fences.—*Railway Co. v. Wood*, 47 Oh. St. 431 (1890).

Parties affected.

The effect of this provision is limited by its terms to the parties making the agreement, though the agreement may be made to run with the land.—*Railway Co. v. Bosworth*, 46 Oh. St. 81 (1888).

Records of compensation must be made.

Where the defense of the company is that it has made compensation for fencing under this section, and the records of the condemnation proceedings are silent upon the subject, no presumption arises that the matter of fences was considered, even if the proceedings were had prior to the passage of this act.—*Railroad Co. v. Hoffhines*, 46 Oh. St. 643 (1888); *Mitchell, etc., Co. v. Wabash R. R. Co.*, 3 N. P. 231 (1896); s. c., 6 Dec. 135.

Effect of agreements of record.

See *Huston v. Cincinnati, etc., R. R. Co.*, 21 Oh. St. 235 (1877).

See generally as to effect of agreements as to fences, § 3324, notes.

§ 3330. **WHEN COMPANY MAY BUILD FENCE AT LANDOWNER'S EXPENSE.**—If an owner of lands abutting on the line of the lands of a company, who is legally bound in any manner to build or repair the fence dividing his lands from the lands of the company, neglect or refuse to build or repair such fence within the time in which he is bound to build or repair the same, the company may build or repair such fence, and present an itemized account of the cost of labor and materials expended in such construction or repair, to the person bound to build or repair the fence, for payment; and if the same be not settled or paid within thirty days thereafter, the company may recover from such person the reasonable cost of such labor and materials, before any court having jurisdiction thereof. (April 18, 1874, 71 v. 85, § 1.)

§ 3331. **PENALTY FOR NOT CONSTRUCTING FENCES.**—A company or person having the control and management of a railroad neglecting or refusing to construct fences, cattle-guards, or public crossings, or to keep the same in repair, as prescribed in section thirty-three hundred and twenty-four after thirty previous days notice or request to do the same, made in writing by any person, shall forfeit and pay for each and every day such company or person so refuses or neglects, any sum not exceeding fifty dollars per day, to be recovered in a civil action, in the name of the state, for the use of the county in which the suit is brought. (March 25, 1859, 56 v. 62, § 5.)

An Act to Provide for One Steam Railroad Crossing Another Steam Railroad.

Be it enacted by the General Assembly of the State of Ohio:

§ 1. **COMMON PLEAS COURT GIVEN JURISDICTION TO ASCERTAIN AND DEFINE MANNER IN WHICH ONE RAILROAD SHALL CROSS ANOTHER.**—That where it becomes necessary for the track of one railroad company to cross the

Cattle Ways, Crossings over Railroads, §§ 3332, 3333.

track of another railroad company, unless the manner of making such crossings shall be agreed to between such companies, it shall be the duty of the court of common pleas of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party to ascertain and define by its decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road which is intended to be crossed; and if in the judgment of such court or such judge thereof it is reasonable and practicable to avoid a grade crossing, it shall by its process prevent a crossing at grade. (May 10, 1902, 95 v. 530.)

§ 2. This act shall take effect and be in force from and after its passage. (May 10, 1902, 95 v. 530.)

§ 3332. **USE OF CULVERT FOR CATTLE WAY.**— Any owner of land through which a railroad is constructed, and upon which there is a culvert, waterway, or opening through the embankment of the railroad, of sufficient height for such purpose, may use such culvert, waterway, or opening, for the purpose of a stock or cattle way, under the track of the road, so as to permit stock to pass and re-pass; but the land-owner shall build and maintain all necessary fences on both sides of said opening, and shall not, by use, or otherwise, permit the foundations of any structures about such opening to be injured or interfered with. (R. S. 1880.)

Contract for cattle pass.

See *Lowe v. W. & L. E. R. R. Co.*, 12 O. C. C. 743 (1894); s. c., 4 C. D. 25.

Contract for waterway, specific performance.

See *Bell v. Dayton, etc., R. R. Co.*, 3 O. C. C. 31 (1887); s. c., 2 C. D. 19.

§ 3333. **RAILROAD CROSSINGS, HOW MADE; CROSSING OF TRAINS, REGULATIONS.**— When the tracks of two railroads cross each other, or in any way connect at a common grade, the crossings shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks; all trains or engines passing over such tracks shall come to a full stop not nearer than two hundred feet, nor further than eight hundred feet from the crossing, and shall not cross until signaled so to do by the watchman, nor until the way is clear, and when two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence if the tracks are both main tracks over which all passengers and freights on the road are transported; but if only one track is such main track, and the other is a side or depot track, the train on the main track shall take precedence; and if one of the trains is a passenger train and the other a freight train, the former shall take precedence, and regular trains on time shall take precedence over trains of the same grade not on time, and engines with cars attached, not on time, shall take precedence of engines without cars attached not on time; provided, however, and in case such two railroads crossing each other, or in any way connecting at a common grade, shall by any works or fixtures to be erected by them render it safe to pass over said crossing without stopping, and such works and fixtures shall first be approved by the commissioner of railroads and telegraphs, and the plan of said works and fixtures for such crossing, designating the plan of crossing shall have been filed with such commissioner of railroads and telegraphs, then, and in that case, the provisions of said section thirty-three hundred and thirty-three, and the provisions of sections thirty-three hundred and thirty-four, thirty-three hundred and thirty-five, shall not apply; but if such commissioner of railroads and telegraphs shall disapprove such plan, or fail to approve the same within twenty days from the filing thereof, such companies may apply in the county where said crossing is situated, to the court of common pleas, or to a judge thereof in vacation, in the manner provided in section thirty-three hundred and seventeen, and the same

Crossings over Railroads, § 3333.

proceedings shall be had, and with the same effect as provided in said last named section. (April 14, 1882, 79 v. 95; R. S. 1880; March 24, 1860, 57 v. 106, § 1.)

See also as to appliances, § 247d.

Lessee is owner.

A railroad company which has possession and control of a railroad in this state as lessee thereof is one "owning the tracks" of such railroad within the meaning of this section.—Baltimore, etc., R. R. Co. v. Walker, 45 Oh. St. 577 (1888).

Duty of lessee.

The necessity for keeping the crossing in repair, and maintaining watchmen thereat, grows out of the use and operation of the railroads crossing each other at a common grade, and the benefits thereof accrue to the companies using and operating the roads; and as a lessee company, while operating its road, receives the benefit and security resulting from a safe crossing and the services of the watchmen, it takes them subject to the burden of their expense, as provided by the statute.—Baltimore, etc., R. R. Co. v. Walker, 45 Oh. St. 577 (1888).

Joint duty, expense.

This section imposes a joint duty and obligation of making and maintaining the crossings and keeping watchmen thereat, and requires the expense to be borne by the companies jointly. The burden is common to both companies, and where either performs the whole duty and pays the whole expense it is entitled to recover from the other its equal proportion thereof.—Baltimore, etc., R. R. Co. v. Walker, 45 Oh. St. 577 (1888).

Expense of crossing.

This section imposes on both companies the expense of making and keeping up such crossing as is required, without regard to the date of their respective charters, or the location or construction of their respective roads.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

Apportionment of expense.

Whether in a case under this section the expense should be apportioned according to the use of the crossing, or otherwise than equally, quare.—Baltimore, etc., R. R. Co. v. Walker, 45 Oh. St. 577 (1888).

Constitutionality.

This act is a valid exercise of the police power of the state, and is a reasonable regulation of the manner in which railroad trains shall be run so as to avoid danger to the lives and property of people using a railroad.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

All railroads subject to police power.

Every railroad company in this state accepts its charter and maintains and operates

corporate property as a railroad, subject to the inherent power of the state to adopt such police regulations as this, whenever public necessity requires them.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

Right to cross tracks.

Such corporate charters and franchises are subject to the power of the state to authorize the construction of other railroads across their tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

Same subject.

The right of one railroad corporation to cross the track of another in constructing and operating its road is derived by grant of the franchise so to do from the state, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to such crossing for its use against the right of the public to a crossing, provided compensation is made.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

Consequential damages.

In a proceeding under the statute by a railroad corporation to appropriate a strip of land across the track of another, to be used in common by each as a railroad crossing, at a common grade, the owner of such track has no right to recover as consequential damages the additional expense rendered necessary in operating its road caused by complying with the provisions of this section.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

Measure of damages.

In such condemnation proceeding the company whose tracks it is sought to cross is entitled to compensation for the property or interest in its right of way and tracks actually appropriated, and for such consequential damages, not provided for by this section, as are the direct and proximate consequence of such appropriation.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

Same subject.

The jury in such condemnation proceeding cannot include the additional expenses provided for by this section, nor take into account the detention of trains, loss of future business, nor additional expenses incident to the future exercise of their corporate powers.—Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co., 30 Oh. St. 604 (1876).

Crossings over Railroads, §§ 3334-3336.

Negligence in operating crossing.

For a charge to a jury in a negligence case involving this section, see *Moulder v. Cleveland, etc., R. R. Co.*, 1 N. P. 361 (1894); s. c., 5 Dec. 664.

Specific performance of contract to maintain crossing.

See *Columbus, etc., Ry. Co. v. Ohio Southern Ry. Co.*, 1 O. C. C. 275; s. c., 1 C. D. 151 (1885).

See generally § 247d, § 3443-5.

§ 3334. **RULES TO BE MADE AND PUBLISHED.**—The managing agent or superintendent of every railroad shall establish, and publish to all the employes on the road, such rules and regulations as shall, in all cases, secure strict compliance with the provisions of the foregoing section, and shall republish such rules and regulations on each time table or card issued to the employes on the road; if such managing agent or superintendent fail or neglect to establish and publish such rules and regulations, or to re-publish the same on each time table or card issued to the employes on the road, he shall be personally liable, for every such neglect or refusal, to a penalty of one hundred dollars, to be recovered, together with costs, in an action against him in favor of the state, to be brought in the court of common pleas of any county wherein any such crossing is; and such agent or superintendent, and the company of which he is agent or superintendent, shall also be liable in damages to any person or company injured in person or property by an accident arising from such failure or neglect. (March 24, 1860, 57 v. 106, § 2.)

§ 3335. **PENALTIES FOR VIOLATIONS OF § 3333.**—Every engineer or person in charge of an engine who wilfully fails to comply with the provisions of section thirty-three hundred and thirty-three or fails to bring the engine of which he is in charge, with the train, if any, thereto attached, to a full stop at least two hundred feet before arriving at any railroad crossing or connection, or crosses the same before signaled so to do by the watchman, or before the way is clear, shall be personally liable to any person injured by reason of such failure to a penalty of one hundred dollars to be recovered by civil action, at the suit of the state, in the court of common pleas of any county wherein such crossing or connection is; and the company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to any person or company injured in person or property by such neglect or act of such engineer or person. (March 31, 1874, 71 v. 50, § 3.)

§ 3336. **SIGNALS AT RAILROAD CROSSINGS.**—Every company shall have attached to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engine, and a steam whistle; and the engineer or person in charge of an engine in motion and approaching a turnpike, highway, toward (town road) crossing or private crossing where the view of said private crossing is obstructed by embankment, trees, curve or any other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from the place of such crossing, and ring such bell continuously until the engine passes such crossing; but the provisions of this section shall not interfere with the proper observance of any ordinance passed by any city or village council regulating the management of railroads, locomotives and steam whistles thereon, within the limits of such city or village. (April 16, 1892, 89 v. 331; May 13, 1886, 83 v. 153; R. S. 1880; March 25, 1872, 69 v. 49, § 1.)

Duty of person about to cross tracks.

Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding

danger from an approaching train; and the omission to do so without a reasonable excuse therefor is negligence, and will defeat a recovery.—*Pennsylvania Co. v. Rathgeb*, 32 Oh. St. 66 (1877); *Bellefontaine Ry. Co. v. Snyder*, 24 Oh. St. 670 (1874); *Cleveland*,

Crossings over Railroads, § 3337.

etc., *R. R. Co. v. Crawford*, 24 Oh. St. 631 (1874); *Cleveland, etc., Ry. Co. v. Elliott*, 28 Oh. St. 340 (1876); *Lake Shore, etc., Ry. Co. v. Gaffney*, 9 O. C. C. 32 (1894); s. c., 6 C. D. 94; *Lake Shore, etc., Ry. Co. v. Schade*, 15 O. C. C. 424 (1895); s. c., 8 C. D. 316; *Railway v. Schneider*, 45 Oh. St. 678 (1888); *Lake Shore, etc., Ry. Co. v. Geiger*, 8 O. C. C. 41 (1893); s. c., 4 C. D. 307; *New York, etc., Ry. Co. v. Swartout*, 14 O. C. C. 582 (1895); s. c., 6 C. D. 768; *C. C. & I. Ry. Co. v. Reiss*, 13 O. C. C. 405 (1889); s. c., 7 C. D. 450.

Where turnpike is crossed by bridge.

This section requires the engineer having in charge an engine in motion to ring the bell and sound the whistle on approaching a place where the road crosses any highway or traveled place by a bridge or other structure.—*Railway v. Jump*, 50 Oh. St. 651 (1893).

Duty to persons on track.

This section is intended for the protection of such persons only as are crossing the track or are about to do so; and does not inure to the benefit of persons who are on the track but not at a crossing.—*Cleveland, etc., Ry. Co. v. Workman*, 66 Oh. St. 509 (1902). See *Dick v. Railroad Co.*, 38 Oh. St. 389 (1882); *Railroad Co. v. Depew*, 40 Oh. St. 121, 126 (1883).

Power of municipalities to regulate.

The most that can be claimed for the latter part of this section is that it by implication confers powers upon municipal corporations to regulate the management of locomotives and steam whistles and bells with reference to crossings in such municipalities. It does not enable municipalities to compel railroads to

employ watchmen.—*Ravena v. Pennsylvania Co.*, 15 Oh. St. 118, 125 (1887).

Evidence.

Though there is positive evidence that the whistle was blown before the train reached the crossing, the court cannot direct a verdict for defendant where some of the witnesses testify that the whistle was blown more than 2000 feet from the crossing instead of within 80 or 100 rods of it, as required by this section.—*Griffith v. Baltimore, etc., R. R. Co.*, 44 Fed. 574 (1890); s. c., 6 O. F. D. 666.

What is positive testimony as to whistle and bell.

The testimony of witnesses who testify that they were walking on the track, knew the train was coming, were giving their attention to the train, and that they heard no whistle or bell, is not negative, but positive testimony.—*Lake Shore, etc., R. R. Co. v. Schade*, 15 O. C. C. 424 (1895); s. c., 8 C. D. 316.

Affirmative and negative testimony—weight.

Other things being equal, the testimony of the engineer and fireman of the train that the whistle was blown and the bell rung as it approached the crossing is entitled to more weight than the negative testimony of other witnesses that they did not hear either or both.—*Griffith v. Baltimore, etc., R. R. Co.*, 44 Fed. 574 (1900); s. c., 6 O. F. D. 666.

When failure not proximate cause.

Where it appears that the plaintiff was struck several hundred feet from a crossing, the failure to give signals for the crossing cannot be regarded as the proximate cause of the accident.—*Lake Shore, etc., R. R. Co. v. Harris*, 23 O. C. C. 400 (1891).

§ 3337. PENALTIES FOR VIOLATION OF PRECEDING SECTION.—Every engineer or person in charge of any such engine who fails to comply with the provisions of the preceding section shall be personally liable to a penalty of not less than fifty nor more than one hundred dollars, to be recovered by civil action, at the suit of the state, in the court of common pleas of any county wherein any such crossing is; and the company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to any person or company injured in person or property by such neglect or act of such engineer or person. (March 25, 1872, 69 v. 49, § 2.)

Contributory negligence.

The omission to ring the bell or sound the whistle at public crossings is not of itself sufficient ground to authorize a recovery, if the party, notwithstanding such omission, might, by the exercise of ordinary care, have avoided the accident.—*Cleveland, etc., Ry. Co. v. Elliott*, 28 Oh. St. 340 (1876); *Pennsylvania Co. v. Rathgeb*, 32 Oh. St. 66, 72 (1877); *New York, etc., Ry. Co. v. Swartout*, 14 O. C. C. 582 (1895); s. c., 6 C. D. 768; *Baltimore, etc., R. R. Co. v. Griffith*, 159 U. S. 603, 607 (1895); s. c., 8 O. F. D. 573; *Horn v. Baltimore, etc.,*

R. R. Co., 54 Fed. 301 (1893); *Pennsylvania Co. v. Alburn*, 23 O. C. C. 130 (1901).

Proximate cause.

It is evident from the language of this section that the failure to give signals must have occasioned the accident, that is, must have been the proximate cause of it, before a recovery can be had.—*Pennsylvania Co. v. Rathgeb*, 32 Oh. St. 66, 72 (1877); *Cincinnati, etc., R. R. Co. v. Murphy*, 18 O. C. C. 298 (1890); s. c., 10 C. D. 195; *Horn v. Baltimore, etc., R. R. Co.*, 54 Fed. 301 (1893).

Street and Highway Crossings, etc., §§ 3337-1-3337-4.

§ 3337-1. **Sec. 1. RAILROAD BRIDGES OVER STREETS.**—It shall be unlawful for any person, company or corporation owning, or operating any railroad, crossing, or that may hereafter cross, over and above any street, less than seventy feet in width, in any city in this state, at an elevation above such street, sufficient to permit persons to pass and repass along such street beneath such railroad crossing, to place or cause to be placed, or to suffer or permit to be or remain in such street, beneath such railroad crossing or bridge, any pier or other stay or support for such crossing or bridge, or to suffer or permit any such railroad crossing or bridge to be or remain in such condition, that any iron, coal or other hard substance, or any fluid or noisome matter, may fall or drop from or through any such crossing or bridge, upon persons traveling or passing beneath the same; and any such person, company or corporation owning or operating any such railroad, failing to comply with the requirements of, or violating any of the provisions of this section, shall, for each and every day during the continuance of such failure or violation, and on account thereof, forfeit and pay to such city the sum of one hundred dollars, which may be recovered in a civil action, in the name of such city, against the owner or operator of such railroad, or both, as the city may elect, and thereafter like recovery may be had in like manner, for subsequent failures and violations aforesaid. (April 3, 1889, 86 v. 197.)

§ 3337-2. **COUNCIL MAY PROHIBIT SWITCHING, ETC., ON SUCH BRIDGES.**—That the city council of any city may prohibit the switching of freight engines, trains, or cars, over or on said crossing or bridge, the sounding of locomotive steam whistles, on or near the same, and the standing or stopping of any railroad engine over or on the same, and may, by ordinance, constitute the same an offense, and provide for the punishment of any person committing such offense. (April 3, 1889, 86 v. 197.)

§ 3337-3. **HIGHWAY AND STREET CROSSINGS MUST BE BUILT AND REPAIRED BY COMPANY.**—All railway or railroad companies operating a line or lines of railway in this state, shall build or cause to be built, and keep in repair good and sufficient crossings over, or approaches to such line or lines of railway, its tracks, side-tracks and switches, at all points where any public highway, street, lane, avenue, alley, road or pike is now or may hereafter be intersected by such lines of railway, its tracks, side-tracks, or switches. And also good and sufficient sidewalks on both sides of streets intersected by their roads, the full width of the right of way owned, claimed or occupied by them; and as to crossings and approaches outside of municipal corporations, the township trustees shall have power to fix and determine the kind and extent thereof, and the time and manner of constructing the same; and as to crossings, approaches and sidewalks within municipal corporations, the municipal councils shall have and exercise the same powers as trustees concerning crossways and approaches outside of municipalities, and such crossways, approaches and sidewalks shall be constructed, repaired and maintained by the railroad companies as so ordered. (April 2, 1891, 88 v. 261.)

See generally § 3324 and notes, § 3284 and notes.

Crossing defined.

See *Lynch v. Railway Co.*, 20 O. C. C. 243 (1899).

Constitutionality.

See *Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 30 Oh. St. 604 (1876).

§ 3337-4. **SERVICE OF NOTICE ON RAILROAD COMPANIES.**—It shall be the duty of the officer or officers having charge of any public highway, street or alley intersected by any line of railway, to serve a written notice upon the nearest station agent or section foreman having charge of that portion of the railway where such intersection occurs, that such crossing, approach or sidewalk as herein described shall

 Street and Highway Crossings, etc., §§ 3337-5 3337-9.

be built or repaired, setting forth the kind and extent thereof, and time and manner of constructing the same, as ordered by the council or trustees. (April 2, 1891, 88 v. 261.)

§ 3337-5. **WHEN CROSSINGS, ETC., MUST BE BUILT.**—It shall be the duty of any railway company so notified, to comply with said notice within a period of thirty (30) days from and after receiving such notice, and on failure so to do, the township trustees, or council as the case may be, may cause such crossing, approach or sidewalk to be constructed or repaired as before ordered, and may recover the cost of so doing with interest thereon, in a civil action against the railroad company, in the name of the trustees or municipality as the case may be, before any court of competent jurisdiction. (April 2, 1891, 88 v. 261.)

§ 3337-6. **CROSSINGS MUST BE KEPT CLEAR OF SNOW.**—It shall be the duty of all railway companies owning or operating any line of railway within the limits of the state of Ohio to, at all times, keep all public highways now or hereafter crossing such line of railroad, clear of snow, so that the same shall at all times be in a safe and convenient condition for travel for a distance of fifty (50) feet each way from the center of said railroad along such highway. (April 2, 1891, 88 v. 261.)

Not negligence per se to fail to remove snow.

The company is only bound to use such care as a reasonable person would use under like circumstances.—*Cincinnati, etc., R. R. Co. v. Dagner*, 39 W. L. B. 19 (1898).

§ 3337-7. **PENALTIES.**—Any railroad company which shall neglect to comply with the terms of this act, shall be liable to pay damage to the city, village, town or township in which the highway is situated in the sum of thirty (\$30) dollars for such neglect, and a further sum of ten (\$10) dollars per day for each and every day such railroad company fails or neglects to comply with the terms of this act, the same to be recovered in an action brought in the name of the city, village, town or township as the case may be. It is hereby made the duty of the prosecuting attorney of the county to prosecute to judgment any claim arising under the foregoing provisions, without any charge to the said city, village, town or township. (April 2, 1891, 88 v. 261.)

§ 3337-8. **MANNER OF ALTERING OR ABOLISHING GRADE OR OTHER CROSSINGS.**—If the council or board of legislation of any municipal corporation in which any railroad or railroads, and a street or other public highway cross each other at grade (or) otherwise, or the commissioners of any county in which, outside of any municipal corporation, a railroad or railroads and any public road or highway cross each other at grade, and the directors of the railroad company or companies are of the opinion that the security and convenience of the public require that alterations shall be made in such crossing, or in the approaches thereto, or in the location of the railroad or railroads or the public way, or any grades thereof, so as to avoid a crossing at grade, or that such crossing should be discontinued with or without building a new way in substitution therefor, and if they agree as to the alterations which should be made, such alterations may be made in the following manner. (April 27, 1893, 90 v. 359.)

§ 3337-9. **RESOLUTION AS TO ALTERATION, ETC.; PUBLICATION OF NOTICE.**—When it is deemed necessary by any municipality or by any county to join with any railroad company or companies in the alteration or abolition of any grade or other crossing, the council or board of legislation of the municipality, by a two-thirds vote of all the members elected thereto, or the commissioners of the county, by a unanimous vote of all the members thereof, shall, by resolution, declare such necessity and intent, and shall state in such resolution the manner in which the

Street and Highway Crossings, etc., §§ 3337-10-3337-13.

alterations in the crossing are to be made, giving the method of constructing the new crossing with the grades for the railroad or railroads and the public way or ways; also what land or other property it is necessary to appropriate, and how the cost thereof shall be apportioned between the municipality or county and the railroad company or companies; also by whom the work of construction is to be done and how the cost thereof shall be apportioned between the municipality or county and the railroad company or companies. Such resolution shall be published and notice of its passage given to owners of property abutting on the proposed improvement in the manner provided in section 2304 of the Revised Statutes, and all claims for damages by reason of such improvement, must be filed in the manner and within the time provided by section 2315 of the Revised Statutes. (April 27, 1893, 90 v. 359.)

§ 3337-10. **ORDINANCE UPON DECISION TO PROCEED; AGREEMENT BETWEEN MUNICIPALITY AND RAILROAD COMPANY.**—In not less than thirty nor more than ninety days after the passage of the resolution provided for in section two (2) (§ 3337-9) hereof, the council, board of legislation or commissioners shall determine whether it or they will proceed with the proposed improvement or not; if it is decided to proceed therewith, an ordinance by the council or resolution by the commissioners shall be passed, which ordinance or resolution shall contain, in addition to the terms and conditions stated in the resolution under section two (2) (§ 3337-9) hereof, the plans and specifications of the proposed alteration and improvement, also a statement of the damages claimed or likely to accrue by reason thereof, and how the payment thereof shall be apportioned between the municipality or county and the railroad company or companies; also who shall supervise the work of construction. Upon the acceptance of this resolution or ordinance by resolution by the railroad company or companies through the directors thereof, the same shall constitute an agreement which shall be valid and binding on the municipality or county and the railroad company or companies respectively; provided, however, that such agreement shall be thereupon filed in the court of common pleas of the county in which the crossing is located, for entry upon the records thereof; whereupon it shall have the same force and effect as a decree of the court. (April 27, 1893, 90 v. 359.)

§ 3337-11. **PURCHASE OR APPROPRIATION OF NECESSARY LAND OR PROPERTY.**—The land or property required to make the alteration in the street or highway necessitated by the proposed improvement, shall be purchased or appropriated by the municipality or county after the manner provided by law for the appropriation of private property for public use, and the land or property required to make the alteration in the railroad or railroads necessitated by the proposed improvement, shall be purchased or appropriated by the railroad company or companies after the manner provided for the appropriation of private property by such corporation. (April 27, 1893, 90 v. 359.)

§ 3337-12. **APPORTIONMENT OF COST.**—The cost of the construction of the improvement in the crossing, including the cost of land or property purchased or appropriated, and the payment of damages to abutting property shall be apportioned as follows: The railroad company or companies (if several railroads cross a public way at or near the same point) shall pay not less than 65 per centum of such cost, and the municipality or county shall pay not more than 35 per centum of such cost. Within these limits the apportionment may be fixed by the agreement under section three (3) (§ 3337-10) hereof. (April 27, 1893, 90 v. 359.)

§ 3337-13. **REPAIRS.**—After the completion of the work, the crossing and its approaches shall be kept in repair as follows: When the public way crosses the railroad by an overhead bridge, the framework of the bridge and its abutments shall be

Street and Highway Crossings, etc., §§ 3337-14-3337-17.

maintained and kept in repair by the railroad company, and the surface of the bridge and its approaches shall be maintained and kept in repair by the municipality or county in which the same are situated. When the public way passes under the railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the public way and its approaches shall be maintained and kept in repair by the municipality or county in which they are situated. (April 27, 1893, 90 v. 359.)

§ 3337-14. **BONDS AND TAX.**—For the purpose of raising the money to pay the proportion of the cost of such improvement, payable by the municipality or the county, the bonds of the municipality or the county may be issued to the necessary amount, which bonds shall be of such denomination and payable at such place and times as the council or board of legislation, or the commissioners may determine, and shall bear interest not exceeding five per cent. per annum, and shall not be sold for less than their par value. A tax on the taxable property of the municipality or county not exceeding one-half mill in each year may be levied to pay the principal and interest of the bonds as the same may mature. After the completion of the improvement, a tax may be levied by the municipality or county to pay the cost of maintaining and keeping in repair that part of the work required to be maintained and kept in repair by it. (April 27, 1893, 90 v. 359.)

§ 3337-15. **ASSESSMENT AND DETERMINATION OF DAMAGES.**—All claims for damages, by reason of such improvement, filed in accordance with the provisions of section two (2) (§ 3337-9) hereof, shall be assessed and determined in accordance with the provisions of sections 2316 to 2326, inclusive, of the Revised Statutes, and either before commencing or after the completion of the proposed improvement, as the council or board of legislation or commissioners may decide at the time it is determined to proceed with the proposed improvement. (April 27, 1893, 90 v. 359.)

§ 3337-16. **PENALTY.**—In case the railroad company fails to comply with any provisions of any agreement entered of record in a court of common pleas, under this act, such court, upon the application of a city solicitor or prosecuting attorney, stating the nature of such non-compliance, may make such orders and decrees as it may deem proper and just to enforce the terms of the agreement and the requirements of this act on the part of the railroad company, and to secure its compliance therewith, and for such purpose may, if it deem the same necessary, restrain and enjoin the railroad company from the use of its track and the operation of its railroad on and over the crossing in question, until it shall have complied with the order and decree of the court; provided that nothing in this act shall be construed to exempt railroad companies from any obligations or liabilities under existing statutes. (April 27, 1893, 90 v. 359.)

§ 3337-17. **GRADE CROSSING ON COUNTY LINE ROAD.**—When any grade crossing is on a county line road, the commissioners of each county in which such crossing is situated may join in all the proceedings necessary for the abolition of such grade crossing as provided in this act, and that part of the cost of making such change in the crossing and of keeping the same in repair which is not agreed to be paid by the railroad company or companies, shall be paid by the counties in equal proportions, and the money for such purpose shall be raised in accordance with section seven (7) (§ 3337-14) of this act. (April 27, 1893, 90 v. 359.)

An Act to Abolish Grade Crossings in Municipal Corporations.

Be it enacted by the General Assembly of the State of Ohio:

§ 1. **GRADE CROSSINGS IN MUNICIPALITIES; MUNICIPALITIES MAY ABOLISH.**—Any municipal corporation may raise or lower, or cause to be raised or lowered, the grade of any street or way above or below any railroad tracks therein.

Grade Crossings in Municipalities — Abolishing, § 2.

and may require any railroad company operating a railroad in such municipality to raise or lower the grade of its tracks and may construct ways or crossings above the tracks of any railroad, or require the railroad company to construct ways or crossings that are to be passed under its tracks, whenever, in the opinion of the council, board of legislation or other legislative body the raising or lowering of the grade of any such railroad tracks, or the raising or lowering or construction of such ways or crossing may be necessary, upon the terms and conditions hereinafter set forth in this act. (May 2, 1902, 95 v. 356.)

§ 2. PREPARATION OF PLANS AND SPECIFICATIONS BY RAILROAD COMPANY AND CITY ENGINEER.— The council, board of legislation or other legislative body of any such municipality, for the purpose of making or causing any such improvement to be made, may, by ordinance, require the railroad company, in coöperation with the engineer of such municipality, or the engineer designated in said ordinance by the council, board of legislation, or other legislative body, to prepare and submit to said council, board of legislation or other legislative body, within six months, unless longer time is mutually agreed upon, plans and specifications for such improvement, specifying the grades to be established for the streets, and the height, character and estimated cost of any viaduct or any way above or below any railroad tracks, and the change of grade required to be made of such track, including side tracks and switches; but in changing the grade of any railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark.

PREPARATION OF SUCH PLANS AND SPECIFICATIONS BY CITY ENGINEER UPON REFUSAL OF RAILROAD COMPANY TO COÖPERATE IN PREPARATION.— If at the expiration of said six months the railroad company shall have refused or failed to coöperate in the preparation of said plans and specifications, the engineer of such municipality, or the engineer designated by said council, board of legislation or other legislative body, is hereby empowered to prepare and submit same to said council, board of legislation or other legislative body, and if said plans and specifications are not satisfactory to said council, board of legislation or other legislative body and said railroad company, and cannot be made so by mutual agreement within a further period of three months, and in the event that either the municipality or the railroad company shall not consent to the making of such improvements according to the plans and specifications submitted, then and in that case said plans and specifications, together with the points of difference between the council, board of legislation or other legislative body and the railroad company may be submitted by either party to the circuit court having jurisdiction in the county in which said municipality is situated, which court shall, after examination of such plans and specifications, and after hearing the evidence, make a finding as to whether or not the public safety requires such improvement to be made, and whether or not said plans and specifications are reasonable and practicable; and if such court finds such improvement is necessary to the public safety, and that the plans are reasonable and practicable, the municipality shall be required to make such improvements to its streets as may be necessary, and the railroad company be required to make the changes necessary to its tracks and road bed, in order to comply with the rulings of the court; but if the court finds that the improvement is not necessary to the public safety, or that the plans and specifications are not reasonable and practicable, then the improvement shall not be made upon said plans. And if more than one railroad company owns tracks on the crossing in question, then the said circuit court shall apportion the part of the expense payable by the railroad companies between or among the said railroad companies. The word "company" in

Grade Crossings in Municipalities — Abolishing, §§ 3 7.

this act is intended to include also the words "company or companies." (May 2, 1902, 95 v. 357.)

§ 3. APPORTIONMENT OF COST BETWEEN CITY AND RAILROAD COMPANY.—The cost of the construction of the improvement authorized, including the making of ways, crossings or viaducts, above or below the railroad tracks, and also including the raising or lowering of the grades of the railroad tracks and side tracks for such distance as may be required by such municipality and made necessary by such improvement, together with the cost of any land or property purchased or appropriated, and damages to owners of abutting property, or other property, shall be borne one-half by any such municipality and one-half by any such railroad company or companies; and any such municipality shall have the right of action against any such railroad company for the recovery of the one-half of such costs payable by such railroad company with interest from the time they become due; [and] any such municipality and railroad company may agree as to what part of such work shall be done by such railroad company, and also fix the amount which shall be allowed or credited to such railroad company for doing such work; and such railroad company shall be entitled to deduct from half of the cost of such improvement the expense and costs incurred by it in the change of its grade required by such municipality or made necessary by such improvement under such specifications, but only in case the amount of such cost and expense has been agreed upon in writing between the municipality and the railroad company, and if the amount of work that may be done by the railroad company, or made necessary by reason of such change of grade on lowering or raising its tracks, exceeds one-half of the cost of the improvement, then such railroad company shall have the right to recover the amount with interest in excess of one-half the costs and expenses, in an action at law against such municipality. (May 2, 1902, 95 v. 358.)

§ 4. HEIGHT OF VIADUCTS.—Any way, crossing or viaduct so constructed over any railroad track or tracks in any municipality shall be of such height as not to be less than twenty-one feet in the clear from the top surface of the rails of the railroad track to the lowest point or projection of such overhead way, crossing or viaduct, unless such company shall consent to or the circuit court order a less height, but in no event shall said circuit court order a less height than 16 feet and three inches. (May 2, 1902, 95 v. 358.)

§ 5. HOW NECESSARY LAND ACQUIRED.—The land or property required to make any alterations in the street or highway necessitated by the proposed improvement shall be purchased or appropriated by the municipality or company after the manner provided by law for the appropriation of private property for public use, and the land or property required to make any alteration in the railroad or railroads necessitated by the proposed improvement shall be purchased or appropriated by the railroad company or companies after the manner provided for the appropriation of private property by such corporation; but the municipality shall not appropriate land held or owned by any railroad company necessary for the use of such railroad company in maintaining and operating its road. (May 2, 1902, 95 v. 358.)

§ 6. COST OF MAINTENANCE, HOW BORNE.—After the completion of the work the crossings and the approaches shall be kept in repair as follows: When the public way crosses a railroad by an overhead bridge, the cost of maintenance shall be borne by the municipality. When the public way passes under the railroad the bridge and its abutments shall be kept and maintained by the railroad company, and the public way and its approaches shall be maintained and kept in repair by the municipality in which they are situated. (May 2, 1902, 95 v. 359.)

§ 7. BOND ISSUE TO PAY CITY'S SHARE OF SUCH IMPROVEMENT.—For the purpose of raising the money to pay the proportion of the cost of such improve-

Grade Crossings in Municipalities, etc., §§ 8-3337-18.

ment payable by the municipality, the bonds of the municipality may be issued to the necessary amount, which bonds shall be of such denomination and payable at such place and times as the council, board of legislation or other legislative body may determine, and shall bear interest not exceeding four per cent per annum, and shall not be sold for less than their par value. A tax on the taxable property of the municipality in addition to all other levies now allowed by law may be levied to pay the principal and interest of the bonds as the same may mature. After the completion of the improvement a tax in addition to all other levies allowed by law may be levied by the municipality to pay the cost of maintaining and keeping in repair that part of the work required to be maintained and kept in repair by said municipality. (May 2, 1902, 95 v. 359.)

§ 8. **STREET RAILWAY COMPANIES TO BEAR SHARE OF EXPENSE OF MAKING SUCH IMPROVEMENTS.**—In case the track or tracks of any street railway company or companies within the limits of any municipality where the improvements authorized by this act are made shall cross at grade or otherwise a public street or the right of way of any railroad company or companies at a point where, under the plans and specifications provided for in this act, it has been determined to construct the said improvements, the municipality shall have power by ordinance to require such street railway company or companies to bear a fair and reasonable proportion of the cost assumed by said municipality in the making of said improvement, not exceeding one-half the portion payable by said municipality; provided however, that said street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character which may be necessary to support such tracks. (May 2, 1902, 95 v. 359.)

§ 9. **REPEALS.**—All acts and parts of acts in conflict or inconsistent with this act are hereby repealed. (May 2, 1902, 95 v. 359.)

§ 10. This act shall take effect and be in force from and after its passage. (May 2, 1902, 95 v. 356.)

§ 3337-18. **REQUIRED HEIGHT OF BRIDGES, ETC., OVER RAILROAD TRACKS—COST.**—All bridges, viaducts, overhead roadways or foot-bridges, wire or other structure hereafter constructed over the track or tracks of any railroad or railroads within the state of Ohio, by any county, municipality, township, railroad company, or other private corporation or person shall be of such height as to be not less than twenty-one feet in the clear from the top of the rails of said track or tracks, to said wire and other structure or to the bottom of the lowest sill, girder or cross-beam, and the lowest downward projection on such bridge, viaduct, overhead roadway or foot-bridge, except in cases where the commissioner of railroads and telegraphs shall find such construction is impracticable, and in every such case said commissioner shall file a written statement in his office setting forth the facts relied upon by him in making such finding. But this provision shall not apply to any main track. Provided, that where any bridge, viaduct, overhead roadway or foot-bridge over a railroad track or tracks is rebuilt, it shall be brought under the provisions of this act, and in such case, if said structure is at, or in line of, a public street or highway, and is thus erected above the grade of any such street or highway and any cross-street or streets, the cost of making such street or streets or highway or highways conform to such new grade, and all damages to owners of property abutting on such street or streets, highway or highways, because of such change of grade, shall be ascertained and determined, and paid as follows: Said or any railroad company or its assigns shall pay all costs or damages resulting as aforesaid, from the raising or building of any of its bridges or structures, as aforesaid, in the line of any street or highway at

Bridges, etc., over Railroads—Tracks, etc., §§ 3337-19 3340.

a greater height than before the passage hereof; and if such company is only part owner of any such structure it shall pay its proportionate share of the cost of such change of grade and damages. Should a railroad company, or its assigns, raise the grade of its track or tracks under any of said structures not owned by it after the passage of this act, thereby causing any said bridge or structure to be put at a higher grade when rebuilt, said company shall pay all costs and damages as aforesaid made necessary thereby. (May 21, 1894, 91 v. 365; April 16, 1900, 94 v. 297.)

Jurisdiction of commissioner of railroads.

The jurisdiction of the commissioner of railroads extends under this act to regulating the overhead structures in city street railway crossings, independent of any interlocking de-

vice connected therewith.—Opinion of Atty.-Gen., 39 W. L. B. 115 (1898).

Duty of railroad to employees.

See *Lake Shore, etc., Ry. Co. v. Shook*, 16 O. C. C. 665 (1895); s. c., 9 C. D. 9.

§ 3337-19. **ENFORCEMENT OF ACT; PENALTY; INJUNCTION.**—It is hereby made the duty of the commissioner of railroads (and) telegraphs to see that the provisions of this act are carried into effect; and every railroad company in the state of Ohio, public or private corporation, or person building, or permitting to be built, any bridge, viaduct, overhead roadway or foot-bridge, or wire and other structure as specified in section one (§ 3337-18) of this act, shall file with the said commissioner plans and specifications, and first receive from him a permit before being allowed to proceed with said structure and the erection of said wire. Any person, corporation, public or private, violating the provisions of this act, upon conviction before a court of competent jurisdiction, shall be fined any sum not less than one hundred nor more than one thousand dollars; and every day that said structure or wire, not in conformity with the provisions of this act, is permitted to remain, shall constitute a separate offense. The observance of the provisions of this act may be enforced by injunction on complaint of any person, corporation or board interested therein. (May 21, 1894, 91 v. 365.)

§ 3338. **WHOLE TRACK TO BE OF UNIFORM GAUGE, CONNECTIONS.**—Every company shall make every railroad constructed or controlled by it of one uniform gauge or width of track from end to end; when any road connects with or crosses any other road, the companies owning or controlling such roads may adopt such uniform gauge or width of track as will enable each company to pass its cars over the road of the other; and in case roads so connecting or crossing are constructed of different gauges or widths of track, the companies controlling the same may lay down and maintain, upon the whole or any portion of such road or roads, an additional rail or rails, so as to admit the passage of the same cars over both roads, and may also maintain and operate either or both of such roads, upon the track or tracks originally constructed, as may be deemed expedient by the company or companies owning or controlling either or both of the roads. (April 3, 1866, 63 v. 88, § 1.)

§ 3339. **WHEN TRACKS MUST BE USED IN COMMON.**—When two or more companies have, in the same street, alley, public way, or opening, two or more tracks of the same gauge, through a city or village, the council of such city or village may require such companies to use such tracks in common, and to pass their locomotives and cars over each track in one direction only. (April 15, 1857, 54 v. 133, § 4.)

§ 3340. **WHEN CONNECTIONS MUST BE MADE.**—When the track of a company crosses, connects or intersects the track of the same gauge of another company, either company may connect the tracks of the two roads so crossing, connecting or intersecting so as to admit the passage of cars from one road to another with facility, and avoid the necessity of transferring freights from said car. And when the tracks of one company lie contiguous to coal mines, stone quarries, manufacturing establish-

Transporting Cars of Other Companies — Water-ways, §§ 3341-3342.

ments, elevators, warehouses, navigable waters or side tracks, suitable for loading or unloading, it shall be the duty of such company to switch the cars of other companies, at the request of such companies, or the shippers, over and upon the tracks so lying by such coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side tracks, for the purpose of unloading or loading grain or other freight into or from such elevators, warehouses, boats upon said navigable waters, or side tracks, without demurrage for forty-eight hours. (April 15, 1857, 54 v. 133, § 5; February 24, 1891, 88 v. 45.)

Penalty.

A penalty for violating this act is imposed by § 3376.— Chicago, etc., R. R. Co. v. Suffern. 129 Ill. 274 (1889).

Enforcement of duty.

See Chicago, etc., R. R. Co. v. Suffern, 129 Ill. 274 (1889).

§ 3341. **WHEN COMPANIES MUST TRANSPORT CARS OF OTHER COMPANIES; RATES FOR SWITCHING CARS.**— When the tracks of two companies are connected as aforesaid, either company shall, when required, transport over its road to its destination thereon, any freight offered, in the cars in which it is offered, at its local rates per mile as set forth in the company's freight tariff for the distance most nearly corresponding, and (to) return the cars, with or without freight, without unnecessary delay; and any company owning a track or tracks lying contiguous to coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks as aforesaid, and within the proper terminal limits of or about any city or village, shall be entitled to receive from the company whose cars are so switched, loaded and unloaded at such coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks, no more than one dollar per car for switching one-half mile or less on such tracks; for all distances over one-half mile, and not exceeding two and one-half miles, such charge shall not exceed one dollar and fifty cents per car; and for all distances over two and one-half miles and not exceeding five miles, the charge shall not be more than two dollars per car; and for all distances of more than five miles the charge shall not be more than three dollars per car; and when such service is on the roads of two or more companies, then the aforesaid charges shall be divided between said companies in proportion to the distances of each road; provided, however, that each company shall be entitled to at least one dollar for such service, regardless of distance, and there shall be no charge for returning empty cars from said coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks; and any such company shall be entitled to perform the service or do the switching work, herein provided for, in the daytime; and whatever private side-tracks are now, or may hereafter be constructed, it shall be the duty of the company to switch cars thereon at the rates herein specified; and the distance provided for in this section shall be computed from the general freight warehouse in such city or village, and from the siding used for the storage of cars nearest to where they may be required, outside municipalities; provided further, that nothing herein contained shall require any railway or railroad company now in operation to furnish its terminals and facilities at the rates herein named, to any similar company for any railroad to be built by it hereafter which shall not afford similar terminals and reciprocal facilities. (April 15, 1857, 54 v. 133, § 7; February 24, 1891, 83 v. 45; April 18, 1892, 89 v. 369.)

Penalty.

A penalty for violating this act is imposed by § 3376.

§ 3342. **WAYS FOR WATER MUST BE PROVIDED.**— There shall be constructed and kept open, along the road-bed of every railroad, except where the road extends through or by swamp land, by the company or person operating the road,

Water-ways along Road, etc., §§ 3343-3346.

ditches or drains of sufficient depth, width, and grade to conduct to some proper outlet the water which accumulates along the sides of such road-bed from the construction or operation of such road. (May 7, 1869, 66 v. 335, § 1.)

Ditch assessments.

Only the company owning the railroad, and not the lessees thereof, can be subjected to ditch assessments.—Baltimore, etc., R. R. Co. v. Pausch, 35 W. L. B. 1 (1896).

Agreement to maintain ditch.

See Madden v. Railway Co., 36 Oh. St. 46 (1880).

Specific performance of contract for waterway.

See Bell v. Dayton, etc., R. R. Co., 3 O. C. C. 31 (1887); s. c., 2 C. D. 19.

§ 3343. **PROCEEDINGS TO ENFORCE PRECEDING SECTION.**—If, after ten days' notice or request to any ticket or other agent of the company or person operating a railroad, to provide such drain or ditch, preferred by the person authorized to institute the proceedings hereinafter provided for, the provisions of the foregoing section be not complied with, any owner or tenant of land contiguous to such railroad feeling aggrieved by such neglect may give notice of the fact, in writing, to the probate judge of the county in which such neglect occurs, designating in such notice the place or places on such road where such drains or ditches have not been made; and upon the receipt of such notice the probate judge shall appoint a commission, of three disinterested freeholders of such county, who together with the county surveyor, shall proceed to the place designated in the notice, and, if upon inspection, it is found that the provisions of the preceding section are not complied with, the commission or a majority thereof, shall report the same to such probate judge, who shall keep a record of such proceedings; and the probate judge shall designate a time within which such ditches or drains shall be made or opened and shall forthwith notify the company or person operating such road, in writing, whose duty it shall be to make or open such ditches or drains within the time specified. (May 7, 1869, 66 v. 335, § 2.)

§ 3344. **WHEN THE PROBATE JUDGE MAY LET THE WORK.**—If such company or person neglect to comply with the notification of the probate judge, he shall forthwith, by advertisement for three consecutive weeks, in one or more of the weekly newspapers published in such county, give notice that the work of making or opening the ditches or drains will be let to the lowest bidder at such time and place as shall be designated in the advertisement. (May 7, 1869, 66 v. 335, § 3.)

§ 3345. **SALE OF THE WORK, AND PROCEEDINGS THEREON.**—The probate judge shall, at the time and place specified in the advertisement, sell the job or jobs of making or opening such ditches or drains to the lowest bidder, and take from such bidder a sufficient bond, with surety, for the performance thereof, and upon the completion thereof to the satisfaction of the probate judge, he shall give the bidder a certificate therefor, stating the amount due for the work; and upon presentation of the certificate to the auditor of the county, he shall place the amount so certified forthwith upon the tax duplicate of the county, against the company, together with all the costs and expenses for inspection by the commission and surveyor, notices, advertisements, sale of work, making contract therefor, approval of the work, and other costs, and interest on the amount certified to be due for the work from the time the work is approved until the amount can be collected by the treasurer of the county; and such tax shall be collected as other taxes, and be paid to the persons entitled thereto on the warrant of the county auditor on the county treasurer. (May 7, 1869, 66 v. 335, § 4.)

§ 3346. **FEEES OF OFFICERS IN SUCH CASES.**—The probate judge, commissioners, and surveyor shall be entitled to receive for their services such costs, fees

Regulations as to Passenger Cars, §§ 3347-3354.

and expenses as are provided by law for costs, fees, and expenses of county commissioners and others under proceedings relating to ditches. (May 7, 1869, 66 v. 335, § 5.)

§ 3347. **MOVABLE BRIDGE BETWEEN PASSENGER CARS REQUIRED.**—Every company conveying passengers shall provide the passenger cars in its trains with a flexible or movable bridge or apron, of the full width of the opening between the railings attached to the platforms of such cars, with side-boards or net-work of strap iron or large wire, or other suitable material, at each side of the bridge or apron, of at least equal height with the ordinary railings upon the platforms, or some other apparatus or arrangement equally efficient to enable passengers to pass from car to car with safety. (March 10, 1871, 68 v. 35, § 1.)

§ 3348. **PENALTIES FOR VIOLATION OF PRECEDING SECTION.**—A company which fails to comply with the provisions of the preceding section shall be subject to a penalty of one hundred dollars for each and every day of such failure, to be recovered in a civil action, in the name of the state, and paid into the state treasury. (March 10, 1871, 68 v. 35, § 2.)

§ 3349. **WHEN TWO PRECEDING SECTIONS DO NOT APPLY.**—Nothing contained in the two preceding sections shall require any company to provide an apron or bridge between the platform of a freight car and the platform of the passenger car attached to a freight train. (March 10, 1871, 68 v. 35, § 3.)

§ 3350. **COMMISSIONER OF RAILROADS MUST ENFORCE CERTAIN SECTIONS.**—The commissioner of railroads and telegraphs shall see that the provisions of sections thirty-three hundred and forty-seven and thirty-three hundred and forty-eight are enforced. (March 10, 1871, 68 v. 35, § 4.)

§ 3251. **HEATING APPARATUS FOR CARS.**—Each railroad company in this state shall, when necessary to heat any of its cars for carrying passengers, mail, baggage or express matter, do so by a stove or heater so constructed and protected as to most effectually guard the passengers against the danger by fire, in case of accident by collision, or the cars being overturned or thrown from the track, and it shall be unlawful for any such company to permit any other person or corporation to use cars carrying passengers, mail, baggage or express matter over its road unless the heating apparatus thereof shall conform to the requirements of this section. (May 4, 1869, 66 v. 94, § 1; R. S. 1880; April 14, 1880, 77 v. 202.)

Penalty.

See § 3354.

Constitutionality.

See *People v. New York, etc., R. R. Co.*, 55 Hun (N. Y.), 409 (1890).

§ 3353. **HOW PASSENGER CARS TO BE LIGHTED.**—No passenger cars on any railroad shall be lighted by naphtha, or any illuminating oil fluid made in part from naphtha, or wholly or in part from coal or petroleum, or other substance or material which will ignite at a temperature of less than three hundred degrees Fahrenheit; and the commissioner of railroads and telegraphs, by himself or agent, may, at any time, enter the cars running on any railroad and take from any lamp therein samples of the oil found there, for the purpose of testing the same, and if it proves of a lower grade than is required by the provisions of this section, he shall bring suit for the penalty provided in section thirty-three hundred and fifty-four. (May 7, 1877, 74 v. 207, § 2.)

§ 3354. **PENALTIES FOR VIOLATING CERTAIN SECTIONS.**—Any railroad company refusing or neglecting to comply with the provisions of section three thousand three hundred and fifty-one, shall be liable to a penalty of not less than one hundred, nor over five hundred dollars, to be recovered in a civil action in any court

Regulations as to Station Platforms, Passenger Cars, etc., §§ 3354-1 3354-4.

of record in any county through which such road shall pass, in the name of the state of Ohio for the benefit of the common schools of the state, to be prosecuted by the prosecuting attorney of the proper county, at the instance of the prosecuting attorney or at the instance of the railroad commissioner, as provided by law (sec. 263, Rev. St.) in other cases for the recovery of penalties and forfeitures against railroad companies, after due notice given by such railroad commissioner to the president or managing officer of such delinquent railroad company, and its neglect thereafter for a period of thirty days to comply with the provisions of said section; the prosecuting attorney to receive twenty-five (25) per cent. of all fines and costs collected under the provisions of this act. (April 14, 1880, 77 v. 202; R. S. 1880; May 4, 1899, 66 v. 94, § 4.)

§ 3354-1. REGULATING DISTANCE FROM STATION PLATFORM TO TOP OF LOWEST STEP ON PASSENGER CARS; PENALTY.—It shall be the duty of all railroad companies, and of all persons operating a railroad in this state, on and after October 1st, after the passage of this act, to so regulate the rise from the station floor or platform to the top of the lowest step on passenger cars that it shall not be necessary to rise more than twelve inches in one step. Where the rise in one step now exceeds twelve inches, the relation between said car step and the station platform or floor must be changed not to exceed twelve inches or safe portable or stationary steps provided that will make said rise within the required limit. Any railroad failing to comply with the provisions of this act shall pay a penalty not less than \$50.00 nor more than \$500 for each and every violation; and it is hereby made the duty of the prosecuting attorney of the county in which the violation occurs, to immediately commence suit against the railroad violating the same, upon the written complaint of any citizen; and in case personal injury results from the violation of this act, in addition to the liability for damages, the party in charge of the operation and management of the road shall be deemed to be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than five hundred dollars. (April 16, 1892, 89 v. 347.)

§ 3354-2. EQUIPMENT OF PASSENGER-TRAINS WITH FIRE-EXTINGUISHERS; COST.—Every person, company or corporation, operating a railroad, or railroads, in whole or in part in this state, shall be required, within one year from the passage of this act, to carry, on every passenger-train operated within and throughout this state, as a part of the equipment of said train, at least one portable chemical fire-extinguisher for the purpose of protecting the lives of its passengers and employes from fire, and that one portable chemical fire-extinguisher shall be added each year thereafter to every train operated until every passenger-coach comprising the train of passenger cars run on any of the railroads of this state shall be supplied with a portable chemical fire-extinguisher as a part of the equipment of said cars; provided that said extinguishers can be procured at a cost not exceeding fifteen dollars each. (April 27, 1896, 92 v. 396.)

§ 3354-3. SIZE, ETC., OF EXTINGUISHERS.—That the said fire-extinguishers shall be of sufficient size, durability, mechanical construction and able to withstand such pressure as will make it an efficient fire-extinguisher, provided that such extinguisher shall first be approved by the commissioner of railroads and telegraphs and such different makes of extinguishers, as shall come within the requirements of this act, shall be approved by him, and his discretion relative to the approval thereof, shall be exercised in such a way as to invite and encourage the most extended competition. (April 27, 1896, 92 v. 396.)

§ 3354-4. DESIGNATION OF CARS ON WHICH EXTINGUISHERS TO BE PLACED, AND PLACE AND MANNER OF ATTACHMENT; PENALTY.—It shall be the duty of the commissioner of railroads and telegraphs of this state to designate

Telegraph Line, etc.— Private Freight-ways, §§ 3354-5-3355.

on which car of every passenger-train the first, and every subsequent extinguisher shall be placed, until each coach of every train shall be fully supplied according to the provisions of this act. It shall be the duty of said commissioner of railroads and telegraphs to determine where, in such coach said extinguisher shall be placed and how attached, but in all cases, it shall be so attached as to be easy of access in case of emergency or necessity. It is hereby made the duty of said commissioner of railroads and telegraphs to see that the provisions of this act are carried into effect. Any person, company or corporation mentioned in section 1 of this act, violating any of the provisions of this act, upon conviction in any court of competent jurisdiction shall be fined not less than twenty-five dollars nor more than one hundred dollars, and every day that said above named persons, company or corporation run their trains in violation of the provisions of this act shall be construed to constitute a separate offense. (April 27, 1896, 92 v. 396.)

§ 3354-5. § 1. **RAILROAD COMPANIES TO ERECT AND MAINTAIN TELEGRAPH OR TELEPHONE WIRES.**— Every steam railway company operating ten miles or more of its railroad for the carrying or transportation of passengers and freight over its road within this state, shall erect and maintain or cause to be erected and maintained in complete working order, for use and operation along the line of its road used for the carrying and transportation of passengers or freight, a telegraph or telephone wire, with an office and proper means for communication by said wire at each of its principal railway stations.

UNLAWFUL FOR COMPANY TO ASK OR RECEIVE COMPENSATION UNLESS WIRES MAINTAINED.— And it shall be unlawful for any steam railway company operating ten miles or more of its railroad aforesaid having no telegraph or telephone wire along the line of its railroad, as provided herein, to ask, demand or receive any compensation whatever for the carrying or transportation of passengers or freight over its said railroad. (April 7, 1898, 93 v. 88.)

§ 3354-6. § 2. **FORFEITURE OF CHARTER.**— The charter of any steam railway or steam railroad company mentioned and provided for in the first section of this act, failing or neglecting to comply with the conditions of this act, shall be declared forfeited and shall be annulled upon or for a civil action brought for that purpose in the name of the state of Ohio, by the prosecuting attorney of any county in this state, in or through which any steam railroad is operated;

PENALTY.— and any officer, agent or other person acting for or in behalf of any such steam railway company, who shall order, direct, advise, ask, demand or receive any compensation whatever for the carrying or transportation of passengers or freight over its railroad by any steam railway company mentioned, designated, described or provided for in this act, shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days, nor more than ninety days, or both. (April 7, 1898, 93 v. 89.)

§ 3355. **WHEN AND HOW FREIGHT-WAYS MAY BE CONSTRUCTED.**— A person owning or operating a coal or iron-ore mine, stone quarry, rolling mill, or machine shop within this state, who, as a means of removing the product thereof, uses or desires to use a railway, may construct such railway, and run cars thereon, over or under any railroad or public highway, the consent of the owner of the fee in the land at such crossing first having been obtained; but such railway shall be so constructed as in no wise to impede or interfere with the running of cars or the travel upon such railroad or highway, or in any manner to injure or impair such railroad or highway, or any switch, building, or appurtenance connected therewith or belonging thereto; and when such freight-way is constructed over a railroad, it shall be at the

Private Freight-ways — Scrap Metals, §§ 3356-3361.

height of at least eighteen and one-half feet in the clear above the rails of the same. (May 1, 1873, 70 v. 194, § 1.)

§ 3356. WHEN PLAN OF FREIGHT-WAY MUST BE APPROVED BY COMMISSIONER.— Before any person shall construct such railway across a railroad he shall submit the plan of construction to the commissioner of railroads and telegraphs for his approval, who shall at the cost of such person for traveling expenses or otherwise, see that the structure shall, in all respects, conform to the requirements of the preceding section. (May 1, 1873, 70 v. 194, § 2.)

§ 3357. HOW RAILROAD SCRAP METAL SHALL BE SOLD.— No officer, agent, or employe of a company operating a railroad, except the superintendent, general managing agent, or the receiver of the company, shall sell or dispose of worn or scrap metal, or any iron, brass, or other metal owned by the company, and all sales and barter of such scraps or other metals owned by a company, made by any other officer, agent, or employe than such superintendent, general managing agent, or receiver, shall be null and void; and no such superintendent, general managing agent, or receiver shall sell or dispose of any such scrap or other metals in quantities less than one ton, nor without delivering to the purchaser a bill of sale thereof, a copy of which shall be retained and filed in the office of such superintendent, managing agent, or receiver. (April 12, 1876, 73 v. 227, § 1.)

§ 3358. PENALTIES FOR VIOLATIONS OF LAST SECTION.— If a superintendent, general managing agent, or receiver of any company sell or dispose of any railroad scrap metal in quantities less than one ton, or sell or dispose of such metal in any quantity without delivering a bill of sale thereof to the purchaser, the company which he represents shall not thereafter be entitled to the benefit of the three succeeding sections. (April 12, 1876, 73 v. 227, § 2.)

§ 3359. WHAT IS THE EVIDENCE OF TITLE TO SUCH SCRAP.— The person, company, or firm to whom is offered for sale, pledge, or trade, any worn or used links, pins, journal-bearings, or other worn or used and detached appendages of railroad equipment, or any scrap metal of iron, brass, or steel appertaining to such equipment, or to a railroad track shall, before purchasing or dealing in the same, ascertain whether the ownership thereof is lawfully derived, by bill of sale or otherwise, from a company, or from the superintendent, managing agent, or receiver thereof; and in any action in which the right or title to such article of metal is drawn in question, the person, company, or firm dealing therein, or his or its assignee, party to such action, shall be bound to establish and prove, *prima facie*, the title and ownership derived as aforesaid. (April 12, 1876, 73 v. 227, § 3.)

§ 3360. WHEN A MIXTURE OF SUCH SCRAP DEEMED A CONFUSION OF GOODS.— If, in such action, it appear, *prima facie*, from the evidence on the trial, that any of the articles or metals in controversy were stolen, or unlawfully obtained, and mixed or confused with other scrap metal, it shall be deemed a confusion of goods, unless the party claiming against the title of the company establish, *prima facie*, a lawful title to the residue from or through a railroad company. (April 12, 1876, 73 v. 227, § 4.)

§ 3361. COMPANY MAY REPLEVY SCRAP; PROCEEDINGS IN THE ACTION.— A company, by its proper officer or agent, or the receiver thereof, may claim to be the general owner of, and may replevy, any of the metals or articles mentioned in section thirty-three hundred and fifty-nine, and any metals with which they may have been confused as aforesaid, wherever found in the possession of any person, firm, or company, whenever there is good reason to believe that such metals or articles

Laying of Tracks — Bridges over Streams, §§ 3362-3365.

have been stolen or unlawfully taken from a railroad company or its receiver; and, instead of the usual averment as to ownership, in the affidavit for a writ of replevin, it shall be sufficient for the officer or agent of such company, or the receiver, to aver that he believes such metals or articles to have been unlawfully taken from such company or some other company; and the person, firm or company claiming in such action, or any other action, the right or title to any such metals or articles, shall be required to establish and prove, *prima facie*, a right or title thereto, lawfully derived as provided in the preceding sections; in the absence of such proof, the company or receiver claiming such metals or articles shall be held and considered to be the general owner thereof; but any other company or receiver, upon showing that any part of such metals or articles was unlawfully taken from it or him, shall be entitled to such part, upon payment of a proper share of the cost and expenses of the replevy thereof; and if any company, or its receiver, replevy any property under the provisions of this section without good and reasonable cause to believe that the same was unlawfully taken from some company or its receiver, such company or receiver shall be liable to the party entitled thereto, in any sum not exceeding double the amount of the value of the property so replevied, in addition to such damages as such party sustains thereby. (April 12, 1876, 73 v. 227, § 5.)

§ 3362. **PENALTIES FOR OBSTRUCTING THE LAYING OF A TRACK.**—No person or corporation shall willfully interfere with or obstruct any company engaged in laying the track of its road across any other railroad, if such company has fully complied with the law, and obtained the right to so lay its track; nor shall any person or corporation obstruct the full operation of any road so constructed; and the person or corporation violating the provisions of this section shall pay, for each day of such interference or obstruction, one thousand dollars, to be recovered by action in the name of the state, one-half of the recovery to go to the company so interfered with, and the other half to the county in which the interference occurs, and shall also be liable for damages to the party injured. (April, 1876, 73 v. 160, §§ 1, 2.)

§ 3363. **WHEN AND HOW A COMPANY MAY DISSOLVE.**—Any company which has been in existence for a period of three years, and has not commenced to build the road described in its articles of incorporation, or whose road having been commenced, has been abandoned for three years, may be dissolved by a vote of two-thirds of its stockholders, at a meeting called for that purpose by its president, notice of which must be published in each county through or into which the line of the proposed road passes at least thirty days before such meeting is held. (April 27, 1872, 69 v. 171, §§ 1, 2.)

§ 3364. **WHEN COMPANIES MUST CROSS STREAMS ON SAME BRIDGE.**—When it becomes necessary for two or more railroads to cross any of the navigable waters of this state at or near the same point, by draw or swing bridge, the companies or persons owning or controlling such roads shall, if practicable, use one and the same bridge, and approaches thereto; and the right to use any such bridge and its approaches, or other similar structure, so situate and used as to make it necessary for the companies or persons owning or operating two or more roads to agree upon a common use thereof, in order to comply with the provisions of this section, may, when such companies or persons can not so agree, be appropriated by the company or persons owning or operating a road for which such use is desired, in accordance with the provisions of law authorizing the appropriation of private property to the use of corporations. (February 10, 1860, 57 v. 10, § 1.)

§ 3365. **PROCEEDINGS TO APPROPRIATE JOINT USE OF BRIDGE.**—The statement to be filed in such appropriation proceedings shall, as near as may be, set forth the regulations according to which the joint use of such bridge and approaches,

Spark Arresters, § 3365-1.

or other structure, shall be regulated; and if the reasonableness of the same, or any part thereof, be denied by the defendant in the proceedings, the court shall hear and determine the issue, and enter on record its finding and order thereon, confirming or altering the regulations, as it may deem just and reasonable, subject to exceptions and reversal for error by the court of common pleas, on petition filed for that purpose; the order of the court fixing the regulations shall be made before the jury is empaneled to assess the amount of compensation for the right sought to be appropriated; and such compensation shall be a sum equal to the annual value of such use, to be paid quarterly each year, in advance, while the same continues. (February 10, 1860, 57 v. 10, § 2.)

§ 3365-1. **REQUIRING RAILROADS TO USE SPARK ARRESTER.**—Every railroad company operating a railroad or any portion of a railroad, wholly or partly within the state of Ohio, shall place, or cause to be placed, on every locomotive engine used in operating such railroads, or constructing or repairing the same, some device or contrivance that will most effectually guard against the emission of fire and sparks which would otherwise be thrown out by such engines, and such railroad companies shall keep such device or contrivance in good repair: Provided, that such railroad companies shall not be required to use such devices during the months of December, January and February. (April 9, 1885, 82 v. 118.)

Jurisdiction of justice of peace.

An action under any of these sections involves title to real estate, and a justice of the peace has no jurisdiction.—*Erie R. R. Co. v. Furry*, 18 O. C. C. 880 (1894); s. e., 31 W. L. B. 282.

Failure to comply—negligence per se.

A failure to comply with this section would be regarded as negligence per se.—*Continental Trust Co. v. Toledo, etc., R. R. Co.*, 89 Fed. 637, 40 W. L. B. 379 (1898).

Duty from December to February.

The exception in this section does not relieve a company from the ordinary legal duty to observe proper care to avoid injuring the property of others by fire.—*Toledo, etc., Ry. Co. v. Wickenden*, 11 O. C. C. 378 (1896); s. e., 5 C. D. 171.

What arrester must be used.

A company is not obliged to use the best and latest invented spark arrester, but only the best in general use.—*See Lake Side, etc., R. R. Co. v. Kelly*, 10 O. C. C. 322 (1895); s. e., 6 C. D. 555; *Cleveland, etc., R. R. Co. v. Fredenbur*, 3 O. C. C. 23 (1887); s. e., 2 C. D. 15.

Inspection and repair.

The inspection of the locomotive and appliances before sending it upon the road, and finding it then in good order, is not sufficient to avoid liability; they must be kept in good order on the line of road.—*Cleveland, etc., R. R. Co. v. Fredenbur*, 3 O. C. C. 23 (1887); s. e., 2 C. D. 15.

Spark arresters in use on other roads.

To show that a certain netting or arrester is in general use in the United States, the company cannot show its use on particular roads.—*Lake Side, etc., R. R. Co. v. Kelly*,

10 O. C. C. 322 (1895); s. e., 6 C. D. 555; *Cleveland, etc., R. R. Co. v. Fredenbur*, 3 O. C. C. 23 (1887); s. e., 2 C. D. 15.

High winds increasing draft.

The fact that a high wind caused a greater draft and fire to escape is no defense unless it appears that a locomotive properly constructed with suitable appliances necessarily emits fire during a high wind.—*Cleveland, etc., R. R. Co. v. Fredenbur*, 3 O. C. C. 23 (1887); s. e., 2 C. D. 15; s. e., 23 W. L. B. 434.

Burden of proof.

In an action against a railroad company for damages by fire emitted from the smoke-stack, when it is shown by the evidence that a locomotive properly constructed and equipped with the best appliances in general use, will not emit sparks, and that the fire was caused by sparks from the company's locomotive, the burden of proof is upon the company to prove that its locomotive and appliances were properly constructed and in good order.—*Cleveland, etc., R. R. Co. v. Fredenbur*, 3 O. C. C. 23 (1887); s. e., 2 C. D. 15.

Expert testimony.

It is not competent to ask a witness to examine the spark arrester complained of and to state whether it was the most efficient in preventing fires. The proper way is to get all the knowledge the expert has upon the different kinds of netting used, the different classes of spark arresters, their efficiency, etc., and to submit to the jury the question as to the efficiency of the arresters.—*Cleveland, etc., Ry. Co. v. McKelvey*, 12 O. C. C. 426 (1895); s. e., 5 C. D. 561.

Expert testimony.

The testimony of expert witnesses is competent to show the different kinds of netting

Spark Arresters — Fires, etc., §§ 3365-2, 3365-3.

that were used by different roads, to enable the jury to say whether the appliance used was proper. An expert may testify as to defects in the mode of attaching a spark arrester, and as to the effect of sparks and their vitality, and the distance they will carry and still start a fire.—*Cleveland, etc., Ry. Co. v. McKelvey*, 12 O. C. C. 426 (1895); s. c., 5 C. D. 561.

Expert testimony.

Expert testimony is admissible to prove that a properly constructed locomotive will not throw sparks a long distance, although the fact that the witness has not been in the employ of a railroad for a long time may affect the weight of his testimony.—*Martz v. Cincinnati, etc., R. R. Co.*, 12 O. C. C. 144 (1896); s. c., 5 C. D. 561.

Proof of fires set by other engines.

Where it is alleged that the appliances were defective and the management negligent, it is only competent to show that other engines of the company emitted sparks and coal on other occasions, when such evidence is limited and confined to a time and place not remote from the fire, and not until evidence has first been given tending to exclude the probability that the fire was communicated by any other means.—*Pennsylvania Co. v. Rossman*, 13 O. C. C. 111 (1896); s. c., 7 C. D. 119.

Proof of fire.

It is competent to show that the fire started in the grass along the track soon after the passage of the engine, and that about that time and immediately after the passage of the locomotive other fires occurred in the neighborhood.—*Lake Side, etc., R. R. Co. v. Kelly*, 10 O. C. C. 322 (1895); s. c., 6 C. D. 555.

Where engine cannot be traced.

Where the particular locomotive that is claimed to have set the fire is not traceable,

it may be shown that the railway company was reckless in this particular, and it would be competent to show that every one of the company's locomotives emitted fire.—*Lake Side, etc., R. R. Co. v. Kelly*, 10 O. C. C. 322 (1895); s. c., 6 C. D. 555; s. c., 56 Oh. St. 785; *Martz v. Cincinnati, etc., R. R. Co.*, 12 O. C. C. 144 (1896); s. c., 5 C. D. 451.

Specimens of wire as evidence.

Specimens of wire netting cannot be used as showing the netting used by the defendant, unless it is shown when it was used.—*Cleveland, etc., Ry. Co. v. McKelvey*, 12 O. C. C. 426 (1895); s. c., 5 C. D. 561.

Cinders as evidence.

If it is clearly established that sparks picked up and produced in evidence came from the engine, it would be competent to admit them in evidence.—*Cleveland, etc., Ry. Co. v. McKelvey*, 12 O. C. C. 426 (1895); s. c., 5 C. D. 561.

Charge to jury.

It is proper to charge a jury in a case under this section that "railroad companies are in no sense insurers, but in this state are required by statute in the use of their engines, to prevent loss or damage by fire, to place on their locomotives or engines, and keep in repair, some device or contrivance that will most effectually guard against the emission of fire and sparks which would otherwise be thrown out by such engine, having regard to the enterprise in which they are engaged, and the objects to be accomplished. And the law places no higher or further duty upon them than this in this particular, and when they have performed that duty they are not responsible for accidental fires caused by the escape of sparks from their engines.—*Lake Side, etc., R. R. Co. v. Kelly*, 10 O. C. C. 322 (1895); s. c., 6 C. D. 555.

§ 3365-2. **PENALTIES.**—Any railroad company or corporation violating the provisions of this act shall, upon conviction thereof in any court of competent jurisdiction, forfeit and pay for each and every such violation any sum not exceeding one hundred dollars; and in addition thereto the court of common pleas, in and for any county through which such railroads are, or may hereafter be constructed and operated, may enjoin such railroad companies or corporations from operating on such railroads, any locomotive not provided with the device as required by section one (3365-1). (April 9, 1885, 82 v. 118.)

§ 3365-3. **RAILROAD COMPANIES MUST KEEP RIGHT OF WAY FREE FROM COMBUSTIBLE MATERIAL.**—Every railroad company, or every person in charge of a railroad as manager or receiver, shall be required to keep the right of way of such company clear and free from weeds, high grass, (and) decayed timber, which from their nature and condition are combustible material, liable to take and communicate fire(s) from passing locomotives to abutting or adjacent property. And such company shall be liable for all damage sustained by the owner or occupant of

Fires, Damages by, etc., §§ 3365-4, 3365-5.

abutting property from any carelessness or neglect to keep such right of way clear of combustible material as herein provided. (March 24, 1890, 87 v. 99.)

Origin or fire immaterial.

Whether the fire was negligently allowed to escape or not is immaterial.—*Indiana, etc., Ry. Co. v. Overman*, 110 Ind. 538 (1880); *Louisville, etc., Ry. Co. v. Nitché*, 126 Ind. 229 (1890); *Galveston, etc., R. R. Co. v. Polk*, 28 S. W. (Tex.) 353 (1894). See *Pittsburg, etc., Ry. Co. v. Hixon*, 79 Ind. 111 (1881).

Right of way must be cleared whole width.

See *Blue v. Aberdeen, etc., R. R. Co.*, 23 S. E. (N. C.) 275 (1895).

Elevator is not combustible material.

An allegation that a company violated this section by having a grain elevator on its right of way, will be stricken out on motion. Such an elevator is not "combustible material" of the character contemplated by the statute.—*Martz v. Cincinnati, etc., R. R. Co.*, 12 O. C. C. 144 (1896); s. c., 5 C. D. 451.

Russian thistles.

See § 4732d.

§ 3365-4. **WHEN ABUTTING PROPERTY OWNER MAY REMOVE.**—Any person owning or controlling property abutting or adjacent to such railroad right of way, in case of failure to comply with the provisions of this act after twenty days' notice in writing, the default still continuing, may cause to be removed all combustible material from the right of way from (of) such railroad along or by such abutting or adjacent property and upon presentation of a reasonable account for the same to the agent at the nearest station of such company or receiver, and if such company or receiver refuse to pay the same within thirty days, the amount may be recovered by law, before any court having jurisdiction thereof. (March 24, 1890, 87 v. 99.)

§ 3365-5. **LIABILITY OF RAILROAD COMPANY FOR LOSS OR DAMAGE BY FIRE; RECOVERY; EVIDENCE OF CAUSE.**—Every railroad company operating a railroad or any portion of a railroad wholly or partially within the the state of Ohio, shall be liable for all loss or damage by fire originating upon the land belonging to such railroad company caused by operating such railroad. Such railroad company shall be further liable for all loss or damage by fires originating on lands adjacent to such railroad company's land caused in whole or in part by sparks from an engine passing over the line of such railroad, to be recovered before any court of competent jurisdiction within the county in which the lands on which such loss or damage occur are situated, and the existence of such fires upon such railroad company's lands shall be prima facie evidence that such fire was caused by operating such railroad. (April 26, 1894, 91 v. 187.)

Constitutionality.

This act and the next section are constitutional.—*Baltimore, etc., Ry. Co. v. Kreager*, 61 Oh. St. 312 (1899); *Martz v. Cincinnati, etc., R. R. Co.*, 12 O. C. C. 144 (1896); s. c., 5 C. D. 451.

Law prior to this act.

Before the passage of this act it was held that negligence could not be inferred from the mere fact that an injury to adjacent property was caused by sparks emitted from locomotives.—*Ruffner v. Cincinnati, etc., R. R. Co.*, 34 Oh. St. 96 (1877). See *Cleveland, etc., R. R. Co. v. Fredenbur*, 3 O. C. C. 23 (1888); s. c., 2 C. D. 15.

Rule when fire starts on right of way.

This section imposes upon every railroad company operating a railroad in this state an absolute liability for loss or damage by fire, originating on its land, caused by operating the road, and the fact that the fire originated

on the land of the company is made prima facie evidence that it was caused by operating the road. In an action for loss or damage, it is not necessary to allege or prove negligence on the part of the company; nor is the absence of such negligence a defense.—*Baltimore, etc., Ry. Co. v. Kreager*, 61 Oh. St. 312 (1899); *Lake Erie, etc., R. R. Co. v. Falk*, 62 Oh. St. 297 (1900).

Same subject.

The plaintiff having made out a prima facie case, the company can only show that the fire did not start on its land, or that if it did so it was from some cause beyond its control. The negligence is presumed and cannot be rebutted.—*Martz v. Cincinnati, etc., R. R. Co.*, 12 O. C. C. 144 (1896); s. c., 5 C. D. 451.

Proof of identity of defendant.

It is not necessary to show ownership of the tracks. If the proof shows the defendant was the owner, and operated the engine that

Fires — Evidence as to Negligence, etc., § 3365-6.

caused the fire, it is sufficient to make a case if the defendant was negligent.—*Toledo, etc., Ry. Co. v. Wales*, 11 O. C. C. 371 (1896).

Application when right of way acquired by deed and company in existence before passage of act.

See *Baltimore, etc., Ry. Co. v. Kreager*, 61 Oh. St. 312 (1899).

Measure of damages.

The measure of damages is the actual value of the property, and not what it would have cost to reconstruct or replace the same, with deductions for wear and tear. Under such a rule the damages might far exceed the actual value of the property and the actual loss to the plaintiffs. Where property totally destroyed has a market value, that market value is the measure of compensation for the loss.—*Cleveland, etc., Ry. Co. v. McKelvey*, 12 O. C. 426 (1895); s. c., 5 C. D. 561.

§ 3365-6. **EVIDENCE AS TO NEGLIGENCE.**—That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine, while upon or passing along any railroad in this state, the fact that such fire was so communicated, shall be taken as prima facie evidence to charge with negligence the corporation, or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad, either as owners, lessees or mortgagees, and also those who shall at such time have the care and management of such engine; and it shall not, in any case, be considered as negligence on the part of the owner or occupant of the property injured, that he has used the same in the manner, or permitted the same to be used or remained, had no railroad passed through or near the property so injured, except in cases of injury to personal property, which shall be at the time upon the property occupied by such railroad. (April 26, 1894, 91 v. 187.)

Rule when fire starts on land adjacent to right of way.

A different rule of liability and of evidence is provided by the act where the loss or damage is caused by fire originating on land adjacent to the land of the railroad company. In such cases the company is liable only when the fire was caused in whole or in part by sparks from an engine on or passing over the road; and the fact that the fire was so caused is made prima facie evidence of negligence on the part of the company or person operating the road. But this prima facie case of negligence may be overcome by proof, under a proper pleading, that the company exercised due care, the burden being on the company to show that it was free from negligence.—*Baltimore, etc., Ry. Co. v. Kreager*, 61 Oh. St. 312 (1899). See *Continental Trust Co. v. Toledo, etc., R. R. Co.*, 89 Fed. 637 (1898).

Pleading.

A petition which alleges that the plaintiff's loss was caused by fire that originated on land adjacent to the land of the railroad company, and that the fire was caused in whole or in part by sparks from an engine upon or passing over the railroad while the defendant

Same subject.

When the property destroyed under circumstances which make the company liable therefor is insured, the right of the owner as against the railroad company and the insurer is limited to indemnity for his loss.—*Lake Erie, etc., R. R. Co. v. Falk*, 62 Oh. St. 297 (1900).

Subrogation when property insured.

See *Lake Erie, etc., R. R. Co. v. Falk*, 62 Oh. St. 297 (1900).

Jurisdiction of justice of peace.

A justice of the peace has no jurisdiction for the reason that the action involves the title or possession to real estate, and not an action of trespass.—*Furry v. Erie R. R. Co.*, 31 W. L. B. 282 (1894); s. c., 18 O. C. C. 880.

See § 3365-6 and notes.

was operating it, is not subject to demurrer on the ground that it fails to charge the defendant with negligence. Though it does not in terms charge such negligence, it states facts which in law make a prima facie case of negligence, and show a complete cause of action.—*Baltimore, etc., Ry. Co. v. Kreager*, 61 Oh. St. 312 (1899).

What is prima facie case.

A prima facie case is made out under this statute when evidence is offered tending to prove the facts set out in the statute, the fire, the loss of property, and that the fire was caused by sparks coming from an engine belonging to the defendant.—*Toledo, etc., Ry. Co. v. Wales*, 11 O. C. C. 371 (1896); s. c., 5 C. D. 168.

Evidence in rebuttal.

A party may rest his case when he has made out a prima facie case under this statute, but he cannot withhold evidence confirmatory of such prima facie case and offer it in rebuttal, unless that evidence would also actually be rebutting evidence.—*Toledo, etc., Ry. Co. v. Wales*, 11 O. C. C. 371 (1896); s. c., 5 C. D. 168. See § 3365-5 and notes.

Regulations as to Employees, etc., §§ 3365-7 3365-11.

Proof necessary.

In an action under this section, it is necessary to go further than to show a mere possibility or conjecture that the fire was com-

municated by an engine.—*Minneapolis, etc., Co. v. Great Northern Ry. Co.*, 86 N. W. 750 (1901) (Minn.), 21 Am. R. R. Rep. 759.

§ 3365-7. **ATTORNEY'S FEE, AS TO.**—In case either party appeal from the judgment of the court in which an action under this act is originally begun, or may carry the case to a higher court on error, the party in whose favor judgment is finally rendered shall have included in his bill of costs against the adverse party, an attorney fee of fifty dollars (\$50) in case the appeal or error is not carried beyond the circuit court, and in case such appeal or error is carried to the supreme court of this state, there shall be an attorney fee of one hundred dollars (\$100) included in his said bill of cost. (April 26, 1894, 91 v. 187.)

Constitutionality.

Whether this section is constitutional, quære? But if not, it is severable from the remaining provisions, and does not affect

their validity.—*Baltimore, etc., Ry. Co. v. Kreager*, 61 Oh. St. 312 (1899). See *Coal Co. v. Rosser*, 53 Oh. St. 12 (1895).

§ 3365-8. **APPLICATION OF SECTION TWO.**—Section two of this act (§ 3365-6) shall apply to all cases now pending, as well as to those hereafter to be commenced. (April 26, 1894, 91 v. 187.)

§ 3365-9. **EMPLOYMENT OF COLOR-BLIND PERSONS BY RAILROAD COMPANIES FORBIDDEN, EXCEPT; EXAMINATION.**—Said act be so amended as to read as follows: That no railroad company shall hereafter contract to employ any person in a position which requires him to distinguish form or color signals, unless such person within two years next preceding has been examined for color-blindness in the distinct colors in actual use by such railroad company by some competent person employed and paid by the railroad company, and has received a certificate that he is not disqualified for such position by color-blindness in the colors used by a railroad company. Every railroad company shall require such employe to be re-examined at least once within every two years at the expense of the railroad company; provided, that nothing in this section shall prevent any railroad company from continuing in its employment any employe having defective sight, in all cases where such defective sight can be fully remedied by the use of glasses, or by other means, satisfactory to the person making such examinations. (February 19, 1885, 82 v. 65; March 3, 1888, 85 v. 58.)

Constitutionality.

This act is constitutional in all respects, and does not affect interstate commerce.—

Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 96 (1888); *Smith v. Alabama*, 124 U. S. 465 (1888).

§ 3365-10. **PENALTY.**—A railroad company shall be liable to a fine of one hundred dollars for each violation of the preceding section. (February 19, 1885, 82 v. 65; March 3, 1888, 85 v. 58.)

§ 3365-11. **REQUIREMENTS OF CONDUCTORS, LOCOMOTIVE ENGINEERS AND FLAGMEN; AS TO FLAGMEN; SAVING CLAUSE.**—That it shall be unlawful for any railroad company or corporation running or operating a steam railroad in the state of Ohio, thirty miles in length or more, and the same having been run and operated for three years or more, to employ any person in the capacity of conductor of passenger train or trains, unless such person has had at least two years' experience in the position of conductor of either passenger, freight or construction train, within six years next preceding the time of such employment. It shall also be unlawful for any such railroad company or corporation to employ any person in the capacity of freight conductor, or conductor of a construction train, unless such

Regulations as to Employees, Hours of Service, etc., §§ 3365-12-3365-14.

person has had at least two years' previous experience as conductor, for a term of two years, or has been employed as a brakeman for at least two years on either passenger, freight, or construction trains within five years next preceding the time of such employment. It shall be unlawful for any such railroad company to employ any person in the capacity of locomotive engineer unless such person has had at least three years' experience as locomotive fireman. It shall be unlawful for any such railroad company to employ any person in the capacity of flagman of any train or trains, unless such person shall have had at least two years' experience as a brakeman on passenger, freight or construction trains, within five years next preceding the time of such employment; and all persons employed in the capacity of flagman of either freight, passenger or construction trains, shall be held equally responsible with the conductor for any injury resulting from any act of negligence or carelessness of such flagman while in the discharge of his duty. But nothing in this act shall be so construed as to prevent any such railroad company or corporation from retaining conductors, engineers or flagmen in its employ at the time of its passage. (April 17, 1891, 88 v. 320; January 31, 1893, 90 v. 20.)

Constitutionality.

See notes to § 3365-9.

Flagman not fellow-servant of other employees.

It seems that this act makes the flagman, whose duty it is to attend to rear flags, sig-

nals, torpedoes, et cetera, to prevent rear-end collisions, is the superior of all train and engine men excepting the conductor.

§ 3365-12. **PENALTIES.**—Any railroad company or corporation knowingly violating the provisions of this act, shall be fined, for the first offense, not less than five hundred nor more than one thousand dollars, and for any subsequent offense shall be fined not less than one thousand nor more than fifteen hundred dollars, which shall be recovered in a civil action in the name of the state. (April 17, 1891, 88 v. 320.)

§ 3365-13. **DUTY OF RAILROAD COMMISSIONER.**—It is hereby made the duty of the railroad commissioner of this state to enforce the provisions of this act. (April 17, 1891, 88 v. 320.)

§ 3365-14. **HOURS OF SERVICE OF CERTAIN RAILROAD EMPLOYEES LIMITED; EXCEPTION; DAY'S WORK, ETC.**—Any company operating a railroad over thirty miles in length, in whole or in part within the state, shall not permit or require any conductor, engineer, fireman, brakeman or any trainman on any train, or any telegraph operator who has worked in his respective capacity for fifteen consecutive hours, to again be required to go on duty or perform any work until he has had at least eight hours' rest, except in cases of detention caused by accident, unavoidable or otherwise. Ten hours shall constitute a day's work, and for every hour that any conductor, engineer, fireman, brakeman or any trainman, or any telegraph operator of any company who works under the direction of a superior, or at the request of the company, shall be paid for such extra services in addition to his per diem. (March 26, 1890, 87 v. 112; April 23, 1891, 88 v. 344; April 15, 1892, 89 v. 311.)

Construction of act.

It is apparent the legislature intended to re-enact the words "in excess of said ten hours' work" after the words "and for every hour," and the words "shall be required or permitted to work, he," after the words "or at the request of the company," in the original section, which, by some inadvertence, are not in the amended sections.—Wheeling, etc.,

Ry. Co. v. Gilmore, 8 O. C. C. 658 (1894); s. c., 4 C. D. 366.

Constitutionality.

The provisions in this act for eight hours rest is a constitutional police regulation, but the act is unconstitutional so far as it attempts to fix ten hours as a day's work.—Wheeling, etc., Ry. Co. v. Gilmore, 8 O. C. C. 658 (1894); s. c., 4 C. D. 366.

Regulations as to Employees — Blocking Frogs, etc., §§ 3365-15 3365-18.

§ 3365-15. **PENALTY.**—Any railroad company or corporation knowingly violating any of the provisions of this act shall be liable to a penalty of not less than five hundred dollars (\$500), nor more than one thousand dollars (\$1,000) for the first offense, and for any subsequent offense, of not less than one thousand dollars (\$1,000) nor more than fifteen hundred dollars (\$1,500), which shall be recovered in a civil action in the name of the state. (March 26, 1890, 87 v. 112; April 15, 1892, 89 v. 311.)

§ 3365-16. **DUTY OF RAILROAD COMMISSIONER.**—It is hereby made the duty of the railroad commissioner of this state to enforce the provisions of this act when complaint is properly filed in his office. (April 15, 1892, 89 v. 312.)

§ 3365-17. **ENGINEERS ADDICTED TO DRINK NOT TO BE EMPLOYED.**—It shall be unlawful for any person, company or corporation operating a railroad in whole or in part in this state, knowingly to suffer or permit, either directly, or by, or through, any representative, any person to run or operate in any capacity a railroad locomotive on any part of his, their or its road in this state who is intoxicated, or in the habit of becoming intoxicated or to knowingly continue the employment of any person in any such capacity, after he becomes or is intoxicated, while in charge of such locomotive, and for every violation of this section, such company, person or corporation operating such road, shall forfeit and pay to the state of Ohio two hundred dollars to be recovered in the name of the state in a civil action to be prosecuted in any county through which the road runs, by the prosecuting attorney thereof, and he shall be entitled to twenty-five per cent. of the recovery and the balance shall be paid into the county treasury. (April 20, 1891, 88 v. 429.)

Intoxicated employees — personal injuries.

See *Baltimore, etc., Ry. Co. v. Henthorne*, 36 W. L. B. 62, 73 Fed. 634 (1896).

§ 3365-18. **BLOCKING OF RAILWAY FROGS, GUARD-RAILS, ETC.**—That every railroad corporation operating a railroad or part of a railroad in this state, shall on or before the first day of June, 1899, adjust, fill or block, all angles in frogs, switches and crossings on their roads in all yards, divisional and terminal stations where trains are made up, with the best known sheet steel spring guard or wrought iron appliances approved by the commissioner of railroads and telegraphs. (March 23, 1888, 85 v. 105; April 25, 1898, 93 v. 342.)

Penalty not exclusive.

The remedy of fine provided in this section is not exclusive, and an employee injured by reason of the failure of the company to comply with this section may maintain an action for damages.—*Narramore v. C. C. C. & St. L. Ry. Co.*, 42 W. L. B. 246 (1899); *New York, etc., R. R. Co. v. Lambright*, 5 O. C. C. 433 (1891); s. c., 3 C. D. 213; s. c., 29 W. L. B. 359.

Applies to trestles.

This act applies to trestles, although bridges are excepted, and the question whether a structure is a bridge or a trestle is for the jury.—*Johns v. Cleveland, etc., Ry. Co.*, 7 N. P. 592 (1900); s. c., 10 Dec. 348.

Fellow-servant rule.

The employee of the company charged with the duty of blocking the guard-rails, frogs, and switches is not a fellow-servant of the other employees of the company. In such a case the acts of the servant are those of the

master.—*New York, etc., R. R. Co. v. Lambright*, 5 O. C. C. 433 (1891); s. c., 3 C. D. 213.

Who are employees.

Where two railway companies receive cars from each other over a delivery track at a certain point, a person employed by one of them to take the number of its cars and to inspect their seals, as trains were made up at such place by the other, is an employee of the latter within the meaning of this section.—*Atkyn v. Wabash, etc., Ry. Co.*, 41 Fed. 193, 23 W. L. B. 151 (1890); s. c., 6 O. F. D. 395.

Assumption of risk and contributory negligence.

It is against public policy to permit a company to defend on the ground of assumption of risk, although it may defend on the ground of contributory negligence.—*Railroad Co. v. Ullom*, 20 O. C. C. 512 (1898); *Narramore v. C. C. C. & St. L. Ry. Co.*, 42 W. L. B. 246 (1899). See *Lake Shore, etc., Ry. Co. v. Winslow*, 10 O. C. C. 193 (1894); s. c., 4 C. D. 242;

Regulations as to Employees, etc., §§ 3365-19, 3365-20.

Lake Erie, etc., Ry. Co. v. Craig, 73 Fed. 642 (1896); s. c., 9 O. F. D. 589. Contra, Johns v. Cleveland, etc., Ry. Co., 7 N. P. 592 (1900); s. c., 10 Dec. 348; s. c., 23 O. C. C. 442 (1902).

Presumption that frogs are blocked.

A person crossing a railroad track has the right to assume that the company has obeyed the law, unless, in the exercise of ordinary care, he learns or ought to learn that the contrary is true.—Pittsburg, etc., Ry. Co. v. Burroughs, 6 N. P. 37 (1899); s. c., 9 Dec. 324.

Practicability of blocking.

In a case under this act, the question whether it was practicable to block the frog or switch is for the jury.—Lake Shore, etc., Ry. Co. v. Winslow, 10 O. C. C. 193 (1894); s. c., 4 C. D. 242.

Evidence, blocking frog after injury.

Evidence that after an accident a sufficient block was placed in the guard-rail without endangering trains is admissible to show that such block could be used with safety.—Cincinnati, etc., R. R. Co. v. Van Horne, 34 W. L. B. 183 (1895).

Proof of operation by company.

See Wheeling Ry. Co. v. Lewis, 33 W. L. B. 159 (1894).

During construction.

Frogs need not be blocked in a new switch while it is being constructed.—See Hauss v. Lake Erie, etc., R. R. Co., 12 O. F. Dec. 613 (1901).

§ 3365-19. **PENALTY FOR FAILURE SO TO DO.**—Any railroad corporation failing to comply with the provisions of this act, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars. (March 23, 1888, 85 v. 105.)

§ 3365-20. **CERTAIN REGULATIONS FOR PROTECTION OF RAILROAD EMPLOYEES.**—It shall be unlawful for any railroad or railway corporation or company owning and operating, or operating, or that may hereafter own or operate a railroad in whole or in part in this state, to adopt or promulgate any rule or regulation for the government of its servants or employes, or make or enter into any contract or agreement with any person engaged in or about to engage in its service, in which, or by the terms of which, such employe in any manner, directly or indirectly, promises or agrees to hold such corporation or company harmless, on account of any injury he may receive by reason of any accident to, breakage, defect or insufficiency in the cars or machinery and attachments thereto belonging, upon any cars so owned and operated, or being run and operated by such corporation, or company being defective, and any such rule, regulation, contract or agreement shall be of no effect. It shall be unlawful for any corporation to compel or require directly or indirectly an employe to join any company association whatsoever, or to withhold any part of an employe's wages or his salary for the payment of dues or assessments in any society or organization whatsoever, or demand or require either as a condition precedent to securing employment or being employed, and said railroad or railway company shall not discharge any employe because he refuses or neglects to become a member of any society or organization. And if any employe is discharged he may, at any time within ten days after receiving a notice of his discharge, demand the reason of said discharge, and said railway or railroad company thereupon shall furnish said reason to said discharged employe in writing. And no railroad company, insurance society or association, or other person shall demand, accept, require, or enter into any contract, agreement, stipulation with any person about to enter, or in the employ of any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts the same, any other right whatsoever, and all such stipulations and agreements shall be void, and every corporation, association or person violating or aiding or abetting in the violation of this section shall for each offense forfeit and pay to the person wronged or deprived of his rights hereunder the sum not less than fifty dollars (\$50) nor more than five hundred dollars (\$500) to be recovered in a civil action. (April 2, 1890, 87 v. 149.)

Defective Machinery, § 3365-21.

Constitutionality.

This act is unconstitutional, as a violation of art. 2, § 30, of the Ohio Constitution, and art. 1 of amendment 14 of the United States Constitution.—*Farrow v. Railway Co.*, 7 N. P. 606, 5 Dec. 582 (1895); *Shaver v. Pennsylvania Co.*, 71 Fed. 931 (1896); s. c., 9 O. F. D. 221. See *Pierce v. Van Dusen* (U. S. C. C. A.), 46 W. L. B. 102 (1901).

Certain contracts void.

It is against public policy for a railroad company to stipulate with its employees as a part of their contract of employment, that liability shall not attach to it for injuries caused to its servants by the carelessness of other employees who are placed in authority and control over them.—*Railway Co. v. Spangler*, 44 Oh. St. 471 (1866).

Object of section.

This section has three objects:

1. To prevent contracts cutting off liability.
2. To prevent employment or discharge of men on condition of joining or refusing to join relief association, and to compel companies to state reasons of discharge.
3. Preventing relief associations from stipulating for waiver of liability.

Relief association contracts giving option to take benefits or damages.

A relief department contract which does not stipulate that all claims for damages are waived, but requires the beneficiary to elect whether he will accept benefits from the relief fund, or rely on his right to sue the company for damages, is not interdicted by this section, nor is it against public policy.—*Pittsburg, etc., Ry. Co. v. Cox*, 55 Oh. St. 497 (1896); *Shaver v. Pennsylvania Co.*, 71 Fed. 931 (1896); s. c., 9 O. F. D. 221.

Same subject.

Such a contract does not lack mutuality or consideration where the company as a part of the relief agreement stipulates that it will make up deficiencies in the fund and assume the management of the fund, and do other things along that line.—*Pittsburg, etc., Ry. Co. v. Cox*, 55 Oh. St. 497 (1896).

Acceptance of benefits by widow.

Where the widow of a deceased member of a relief association, being the beneficiary named by him, accepts benefits from the association,

she is not barred from bringing an action as administratrix for wrongful death, although the amount she should receive in the probate court on final distribution may be affected by her acceptance.—*Baltimore, etc., R. R. Co. v. McCamey*, 12 O. C. C. 543 (1896); s. c., 5 C. D. 631. See *Cullison v. Baltimore, etc., R. R. Co.*, 4 N. P. 360 (1897); s. c., 7 Dec. 269.

Validity of release of damages.

Where a member of a relief department accepts benefits and signs a release of all damages, his right of action against the company will be defeated, if at the time he signed the release he was able to read and write, and was in no manner prevented from reading the release, and was capable of understanding the effect of the same.—*Farrow v. Railway Co.*, 5 Dec. 582 (1895); *Baltimore, etc., R. R. Co. v. Bryant*, 9 O. C. C. 332 (1895); s. c., 6 C. D. 418.

When member of relief department can resort to state courts.

See *Baltimore, etc., R. R. Co. v. Stankard*, 56 Oh. St. 224 (1897).

Liability for failure to furnish reason of discharge.

The failure or refusal of a company to furnish a discharged employee the reason in writing for such discharge does not make it liable in a civil action for the penalty provided in this act.—*Crall v. Toledo, etc., Ry. Co.*, 7 O. C. C. 132 (1893); s. c., 3 C. D. 696.

Where employee quits service.

Where an employee leaves the service of a company of his own accord he is not entitled to a certificate to that effect under this section.—See Editorial, 33 W. L. B. 109, 121.

Reason for discharge—constitutionality.

See *Wallace v. Georgia, etc., Ry. Co.*, 34 W. L. B. 220 (1894).

Company may refuse to give reasons for discharge.

See *New York, etc., R. R. Co. v. Schaffer*, 65 Oh. St. 414 (1902).

Blacklisting employee—clearance card.

See *New York, etc., Ry. Co. v. Schaffer*, 17 O. C. C. 77 (1898); s. c., 9 C. D. 158; *Mattison v. Lake Shore, etc., Ry. Co.*, 2 N. P. 276 (1895); s. c., 3 Dec. 526.

§ 3365-21. DEFECTIVE MACHINERY PRIMA FACIE EVIDENCE OF NEGLIGENCE.—It shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employe of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the

Defective Machinery, § 3365-21.

trial of any action in the courts of this state, brought by such employe, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation. (April 2, 1890, 87 v. 149.)

NOTE.—See General Defective Machinery Act, passed April 4, 1902, 95 v. 114.

Constitutionality and application.

This section is constitutional, and provides a rule of evidence applicable to all cases on trial in this state, and to all railroad companies any part of whose line of railway extends into this state, whether the injury complained of was received within or without the state.—*Pennsylvania Co. v. McCann*, 54 Oh. St. 10 (1896).

Burden of proof.

By reason of the presumption raised by this section, the burden is thrown upon the company to show that it has used due diligence, and is not guilty of negligence.—*Railway Co. v. Erick*, 51 Oh. St. 146 (1894).

Presumption may be rebutted.

A company may overcome the presumption of negligence by showing that in fact it did not have such knowledge, and that it used due diligence to ascertain and remedy defects.—*Railway Co. v. Erick*, 51 Oh. St. 146 (1894); *Railway Co. v. Meyers*, 12 O. C. C. 263 (1893); s. c., 4 C. D. 28; *Knighton v. Baltimore, etc., R. R. Co.*, 33 W. L. B. 216 (1894). See *Hill v. Lake Shore, etc., Ry. Co.*, 22 O. C. C. 291 (1901).

Want of appliance same as defective appliance.

Where an accident occurs to an employee of a railroad company, as a result of the absence of an appliance upon the locomotive which it is customary to provide, the company is placed in the same position under this act as though the appliance had been furnished and was defective.—*Crumley v. Cincinnati, etc., Ry. Co.*, 12 O. C. C. 164; s. c., 5 C. D. 353; s. c., 56 Oh. St. 781 (1897).

Who is employee.

Where a person is employed by one company to work in a yard shifting cars for it and another company under the usual arrangement between the companies for expenses, he is an employee of both companies.—*Pittsburg, etc., R. R. Co. v. Johnston*, 33 W. L. B. 248 (1895).

Retroactive effect.

Where the injury occurred before the passage of this act, but the action was not commenced until the law was in force, the action must be governed as to matters of evidence by this act.—*Cincinnati, etc., R. R. Co. v. Hedges*, 15 O. C. C. 254 (1897); s. c., 8 C. D. 265.

Inspection by employee — contract void.

A contract which a railroad company required its brakemen to sign when employing

them, making it their duty to inspect cars and appliances on which they were to work when in fact it would be impracticable for them to make such inspection, will not relieve the company.—*Lake Shore, etc., Ry. Co. v. Gilday*, 16 O. C. C. 649 (1890); s. c., 9 C. D. 27.

Employment of inspectors.

The presumption of diligence raised by proof of the employment of competent and careful inspectors will not be sufficient to overcome the effect of the knowledge of the defects, which by this statute it is deemed to have.—*Felton v. Bullard*, 42 W. L. B. 218 (1899); s. c., 94 Fed. 781; *Railway Co. v. Erick*, 51 Oh. St. 146 (1894); *Pittsburg, etc., R. R. Co. v. Johnston*, 33 W. L. B. 248 (1895); *Pittsburg, etc., Ry. Co. v. Thompson*, 82 Fed. 720 (1897).

Latent defect — inspection.

Proof that the defendant company employed competent inspectors, and that all cars underwent careful inspection, there being no proof of actual knowledge of the defect, which was latent (in the brake shaft), will not exonerate the company.—*Pittsburg, etc., R. R. Co. v. Johnston*, 33 W. L. B. 248 (1895).

Knowledge of defect.

This section does not dispense with the necessity of the plaintiff's alleging and proving want of knowledge of defects, or that, having such knowledge, he informed his superior and continued in the service, relying on a promise to remedy the defects.—*Hesse v. Columbus, etc., R. R. Co.*, 58 Oh. St. 167 (1898).

Notice of defect.

Where a car is inspected and has the usual three X mark put upon it indicating that it is defective and is to be repaired, a brakeman is not chargeable with notice if the mark cannot be seen, as at night. If he should see the mark he is chargeable only with such defects as have been discovered by the inspectors.—See *Michigan Central Ry. Co. v. Butler*, 23 O. C. C. 459 (1902).

Duty to inspect — extent of.

See *Lake Shore, etc., Ry. Co. v. Gilday*, 16 O. C. C. 649 (1890); s. c., 9 C. D. 27.

Foreign cars.

This section makes no distinction between the cars owned by the company and foreign cars which it may operate, and the duty of inspection applies to both.—*Felton v. Bullard*, 42 W. L. B. 218 (1899). See *Pennsylvania Co. v. Meyers*, 12 O. C. C. 263 (1893);

Superior Officer — Fellow Servant, § 3365-22.

s. c., 4 C. D. 28; *Pennsylvania Co. v. Snyder*, 55 Oh. St. 342 (1896); *Hunt v. Caldwell*, 22 O. C. C. 283 (1901).

Foreign contracts of employment.

Where the injured employee entered into the contract of employment and was injured out of the state, does this section apply when it changes the effect of the contract?—See

Pittsburg, etc., Ry. Co. v. Blair, 11 O. C. C. 579 (1896); s. c., 5 C. D. 366; s. c., 55 Oh. St. 639.

Flat car without sides or ends not defective.

See *Toledo, etc., Ry. Co. v. Beard*, 20 O. C. C. 681 (1898).

§ 3365-22. **SUPERIOR OFFICER AND FELLOW SERVANT DEFINED.**—That in all actions against the railroad company for personal injury to, or death resulting from personal injury, of any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employes, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employe of such company, is not the fellow servant, but superior of such other employe, also that every person in the employ of such company having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed. (April 2, 1890, 87 v. 149.)

Constitutionality.

See *Pierce v. Van Dusen*, 78 Fed. 693 (1897); s. c., 9 O. F. D. 419; s. c., (U. S. C. C. A.) 46 W. L. B. 102.

Applicable to receivers.

See *Pierce v. Van Dusen* (U. S. C. C. A.), 46 W. L. B. 102 (1901).

"Branch" — "department" — construction.

The terms "branch" and "department" should not be limited so as to embrace merely those large divisions created for convenience in administering the affairs of the company. On the contrary, it is more reasonable to suppose that they relate to those minute ones which concern the daily duties of the employees.—*Railroad Co. v. Margrat*, 51 Oh. St. 130, 145 (1894).

Authority to direct—question of fact.

Whether an employee of a company has authority to direct or control other employees of the same company is a question of fact to be determined in each case. This may be done, however, either by proof of express authority, or by showing the exercise of such authority to be customary, or according to the usual course of conducting the business of the particular company interested, or of railway companies generally.—*Railroad Co. v. Margrat*, 51 Oh. St. 130 (1894).

Where negligent party has no subordinates.

It seems this section would have no bearing on a case where the party alleged to have been negligent had no subordinates, and had no power to "direct or control any other employee." The now existing law is not changed by this section except in so far as is

specifically provided.—*Felton v. Bullard*, 42 W. L. B. 218 (1899).

Engineer.

An engineer in charge of a locomotive on one train or cars of a railroad company is in a branch or department of its service separate from that of a brakeman on another train of the same company, and therefore is his superior.—*Railroad Co. v. Margrat*, 51 Oh. St. 130 (1894). See *Pittsburg, etc., Ry. Co. v. Devinney*, 17 Oh. St. 197 (1867).

Hostler.

A "hostler," who takes charge of an engine when it arrives home, is the superior of a common laborer around the yard, assisting in caring for the engine.—*Baltimore, etc., R. R. Co. v. Sutherland*, 12 O. C. C. 309 (1894); s. c., 4 C. D. 115; s. c., 52 Oh. St. 676.

Yard brakeman.

A yard brakeman is not the fellow-servant of a conductor under whose control and direction he is placed.—*Pierce v. Van Dusen*, 46 W. L. B. 102 (1901).

Chief inspector not fellow-servant.

A chief inspector of cars, having other inspectors under him, is not the fellow-servant of a brakeman.—*Railway Co. v. Erick*, 51 Oh. St. 146 (1894); *Pittsburg, etc., R. R. Co. v. Blair*, 11 O. C. C. 579, 586 (1896); s. c., 5 C. D. 366. See *Felton v. Bullard*, 94 Fed. 781 (1899); s. c., 42 W. L. B. 218.

Telegraph operator.

A telegraph operator at a station on the line of a railroad whose duty it is to receive telegraphic orders relative to the movements of trains from the train dispatcher at another place, and communicate them to the engineers

Superior Officer — Fellow Servant, § 3365-22.

and conductors of trains at his station, is not the superior, but the fellow-servant, of the engineer of a train on such road.—*Baltimore, etc., R. R. Co. v. Camp*, 65 Fed. 952 (1895); s. c., 8 O. F. D. 391.

Switchman.

A switchman in a yard whose duty it was to open such switches as he was notified to open by the different conductors and engineers in the yard, is acting in a separate branch or department from that of such conductors or engineers.—*Lake Shore, etc., Ry. Co. v. Pero*, 22 O. C. C. 130 (1901).

Train dispatcher.

A train dispatcher who has complete control of the movements of all trains on a division of a railroad is not a fellow-servant of the engineer of a train running on such division.—*Baltimore, etc., R. R. Co. v. Camp*, 65 Fed. 952 (1895); s. c., 8 O. F. D. 391.

Yardmaster not fellow-employee.

A yardmaster in charge of a railroad yard of the company, with full control over all its employees who have occasion to be in such yard in the discharge of their duties under their contract of employment with the company, with authority to select from the employees of such company the men who are to operate all trains sent out from such yard over the road of defendant, is by virtue of this section the "superior" and not the fellow-servant of a brakeman.—*McCann v. Pennsylvania Co.*, 10 O. C. C. 139 (1895); s. c., 6 C. D. 610; s. c., 54 Oh. St. 10. See *Pennsylvania Co. v. Fox*, 10 O. C. C. 72 (1893); s. c., 4 C. D. 19.

Conductor riding on pass.

A conductor of a train on which another conductor is riding on a free pass is not the fellow-servant of such other conductor.—*Lake Shore, etc., Ry. Co. v. Bycroft*, 33 W. L. B. 166 (1895); s. c., 8 N. P. 588. See *Manville v. Cleveland, etc., R. R. Co.*, 11 Oh. St. 417 (1860).

Employee going home.

An employee going home after a day's work stands in the same relation to the company as a person not an employee, and the defense of negligence of a fellow-servant cannot be interposed.—*Columbus, etc., Ry. Co. v. O'Brien*, 25 W. L. B. 90 (1891); s. c., 4 O. C. C. 515; s. c., 2 C. D. 681. See *Lake Shore, etc., Ry. Co. v. Mau*, 9 O. C. C. 173 (1894); s. c., 4 C. D. 5.

Note — "now existing law."

The cases following are cited to show the law before the enactment of this section.

General rule.

From considerations of public policy, railroad companies are liable for injuries to their servants caused by the carelessness of those who are superior in authority and control over them.—*Railway Co. v. Spangler*, 44 Oh. St.

471, 478 (1886); *Little Miami, R. R. Co. v. Stevens*, 20 Oh. 415; *Cleveland, etc., R. R. Co. v. Keary*, 3 Oh. St. 202; *Pittsburg, etc., Ry. Co. v. Lewis*, 33 Oh. St. 196 (1877).

Authority — question of fact.

Whether or not one servant is placed by a common master under the control of another servant, thereby creating the relation of superior and subordinate between them, must be determined from the evidence in each particular case.—*Pittsburg, etc., Ry. Co. v. Lewis*, 33 Oh. St. 196 (1877).

Assumed risk of negligence of superior.

If an employee, with a full knowledge of an habitual and continued negligence of the company or his superior fellow-employee in some particular matter, acquiesces therein, and continues in the service of the company, without any objection or effort toward a correction of the neglect, he thereby waives his right against the company and takes the risk upon himself.—*Lake Shore, etc., Ry. Co. v. Knittal*, 33 Oh. St. 468 (1878).

Unreasonable rules — negligence of fellow-servant, no defense.

Where an action is brought against a railroad company by one of its employees to recover damages for personal injuries sustained by the enforcement of an order, made by the superintendent of the company, as to the management of a particular train, which order was unreasonable and the enforcement of the same was dangerous to such employee, the fact that the negligence of a fellow-servant of the injured person, while executing such order, contributed in producing the injury, affords no defense to the action.—*Railway Co. v. Henderson*, 37 Oh. St. 549 (1882). See *Dick v. Railroad Co.*, 38 Oh. St. 389 (1882).

Fellow-servant rule — contract of employment governed by laws of state where made.

Alexander v. Pennsylvania Co., 48 Oh. St. 623 (1891); *Pittsburg, etc., Ry. Co. v. Bishop*, 13 O. C. C. 380 (1896); s. c., 7 C. D. 73.

Engineer superior of fireman.

Jenkins v. Little Miami R. R. Co., 2 Dis. 49 (1858).

Engineer.

An engineer is the fellow-servant of an employee working on a gravel train.—*Kumler v. Junction R. R. Co.*, 33 Oh. St. 150 (1877).

Engineer.

An engineer is the fellow-servant of a brakeman on the same train.—*Railway Co. v. Ranney*, 37 Oh. St. 665 (1882); *Pittsburg, etc., Ry. Co. v. Lewis*, 33 Oh. St. 196 (1877); *Hill v. Lake Shore, etc., Ry. Co.*, 22 O. C. C. 291 (1901).

Automatic Couplers — Air-brakes, etc., §§ 3365-23-3365-23b.

Foreman of repair gang.

A car repairer is not the fellow-servant of the foreman of the repair gang as concerns giving notice of dangers to those working under cars.—*Lake Shore, etc., Ry. Co. v. Lavalley*, 36 Oh. St. 221 (1880).

Conductor superior of engineer.

Little Miami R. R. Co. v. Stevens, 20 Oh. 415 (1851); *Lake Shore, etc., Ry. Co. v. Hunter*, 13 O. C. C. 441 (1897); s. c., 7 C. D. 206; *Cleveland, etc., Ry. Co. v. Hudson*, 22 O. C. C. 586 (1898).

Conductor superior to brakeman.

Railway Co. v. Spangler, 44 Oh. St. 471 (1886); *Cleveland, etc., R. R. Co. v. Keary*, 3 Oh. St. 201 (1854); *Cleveland, etc., Ry. Co. v. Hudson*, 22 O. C. C. 586 (1898).

Section hand and fireman fellow-servants.

Whaalen v. Mad River, etc., R. R. Co., 8 Oh. St. 249 (1858).

Inspectors and brakemen fellow-servants.

Railroad Co. v. Fitzpatrick, 42 Oh. St. 318 (1884); *Columbus, etc., R. R. Co. v. Webb*, 12 Oh. St. 475 (1861). See *Lake Shore, etc., Ry. Co. v. Gilday*, 16 O. C. C. 649 (1890); s. c., 9 C. D. 27.

Brakemen fellow-servants.

Hawks v. Lake Shore, etc., Ry. Co., 16 O. C. C. 377 (1896); s. c., 8 C. D. 414.

Section boss.

Company cannot be held for failure of section boss to look up and have knowledge of time of trains so as to avoid collisions with section handcar.—*Railway Co. v. Leech*, 41 Oh. St. 388 (1884).

Conductor and car repairer fellow-servants.

Johnson v. Cleveland, etc., Ry. Co., 11 O. C. C. 553 (1896); s. c., 5 C. D. 290.

§ 3365-23. **EQUIPMENT AND OPERATION OF RAILROAD CARS WITH AUTOMATIC COUPLERS AND AIR-BRAKES.**—That every railroad corporation operating a railroad or part of a railroad in this state, shall, on or before the first day of August, A. D. 1900, equip and furnish all cars, owned and leased, used in its service in this state with automatic couplers, coupling automatically, and which can be uncoupled without the necessity of men going between the ends of the cars; and shall equip, furnish and operate all cars in its passenger service, and not less than thirty per cent. of the cars in its freight service with air-brakes; and no freight train shall, after such date, be run by any such railroad corporation over any part of its road lying within this state unless at least twenty-five per cent. of the cars composing such freight train are so equipped, furnished and operated with perfectly acting air-brakes and so as to enable the engineer to control the speed of the train without the use of hand-brakes; provided, that on or before January 1, 1900, twenty-five (25) per cent. of all the automatic couplers and air-brakes hereinbefore provided to be put upon cars shall be so furnished on or before January 1, 1900. (February 27, 1900, 94 v. 25; April 25, 1898, 93 v. 286; April 14, 1893, 90 v. 184.)

§ 3365-23a. **SEMI-ANNUAL REPORT TO BE MADE BY RAILROAD COMPANIES.**—And it shall be the duty of any railroad corporation operating a railroad or part of a railroad within this state, to report to the commissioner of railroads every six months after the passage of this act, and until the first day of August, A. D. 1900, the number and class of cars in their service equipped with such automatic couplers and air-brakes, and the number of cars not so equipped; to report upon blanks furnished by such commissioner. (February 27, 1900, 94 v. 25; April 25, 1898, 93 v. 286.)

§ 3365-23b. **INSPECTOR OF AUTOMATIC COUPLERS, ETC.; APPOINTMENT. TERM, VACANCY, ETC.**—An inspector of automatic couplers, air brakes and automatic power brakes on railroad cars, tenders and engines shall be appointed by the commissioner of railroads and telegraphs within thirty days after this act goes into effect, who shall hold office for two years, unless sooner removed for cause, and until his successor is appointed and qualified. At any time a vacancy occurs in the office, the commissioner of railroads and telegraphs shall immediately fill the vacancy by appointment.

Automatic Couplers, Air-brakes, etc.—Inspector of, §§ 3365-23c-3365-23f.

QUALIFICATIONS.—No person is eligible to the office who is an officer or employe of a railroad company or owns or is interested, directly or indirectly, in the stocks or bonds of any railroad company, or who has not had at least seven years' experience in the transportation department on some line of railroad of more than thirty miles in length, operated in the state of Ohio. (May 12, 1902, 95 v. 658.)

§ 3365-23c. **BOND AND OATH.**—Before entering on his duties, the inspector shall give bond to the state of Ohio in the sum of three thousand dollars, with two or more sureties, or a bond and security company, acceptable to the commissioner of railroads and telegraphs, conditioned for the faithful performance of his duties, and shall also take the usual oath of office, which oath and bond with the approval of the commissioner endorsed thereon, shall be deposited with the secretary of state. (May 12, 1902, 95 v. 659.)

§ 3365-23d. **SALARY AND EXPENSES.**—Said inspector shall be paid a salary of fifteen hundred dollars per year, and all necessary expenses, not to exceed one thousand dollars in any one year, which shall be paid in the manner now provided by section 250-2 for the salary and expenses of the department of railroads and telegraphs. Provided, that in addition to the fifteen thousand dollars (\$15,000) now authorized by said section for said department of railroads and telegraphs, there shall be assessed yearly in the manner and upon the corporations as provided in said section, the sum of two thousand, five hundred dollars (\$2,500) to pay the salary and expenses provided for in this act. Provided further, that for the purpose of paying the salary and expenses provided for in this act until the assessments herein provided for are available, there is hereby appropriated out of any money in the state treasury to the credit of the general revenue fund and not otherwise appropriated, the sum of three thousand dollars, and that for the purpose of paying the salary and expenses provided for in this act from the first day of August, nineteen hundred and three to the fifteenth day of February, nineteen hundred and four, there is hereby appropriated the sum of one thousand, six hundred and five dollars, or so much thereof as may be paid into the state treasury pursuant to the provisions of this act.

He shall have his office in the state house in the office of the commissioner of railroads and telegraphs, and shall be under the supervision of said commissioner.

Such inspector shall have the right of passing in the performance of his duties upon all the railroads within the state, and upon all trains, and any part thereof free of charge. (May 12, 1902, 95 v. 659.)

[3365-23e] § 3565-23e. **DUTIES OF INSPECTOR.**—It shall be the duty of the inspector to inspect the couplers, air brakes and automatic power brakes found on any road in Ohio, and make weekly reports of his inspection to the commissioner of railroads and telegraphs, reporting all cars, tenders and engines, giving number of same, road on which they are found, and the road owning same, if known, which is found to have a defective coupler or brake, describing the defect. He shall also on discovering a defective coupler or brake, immediately report the same to the superintendent of the road on which it is found and to the agent thereof at the nearest station, describing the defect. (May 12, 1902, 95 v. 659.)

[3365-23f] § 3565-23f. **PENALTY AGAINST COMPANY FOR FAILING TO MAKE REPAIRS UPON NOTICE.**—Any road whose superintendent or station agent shall receive such notice of a defective coupler or brake shall cause the same to be immediately repaired; and shall be liable in damages to any person injured by reason of such defective coupler or brake, for any injury received after the expiration of twenty-four hours after receiving the notice; and any such company shall be liable in damages by reason of any such defective appliance, for any injury received. But

Automatic Couplers, Air-brakes, etc., §§ 3365-23g-3365-27.

nothing herein shall be construed to diminish the existing legal liability of railroads for injuries to persons or property. (May 12, 1902, 95 v. 660.)

[3365-23g] § 3565-23g. **POWER OF INSPECTOR TO CONDEMN CAR, TENDER OR ENGINE.**—Said inspector may, on the discovery of a defective coupler or brake on any car, tender or engine, condemn said car, tender or engine, and order the same out of service until repaired and put in good working order. On receiving from the inspector an order condemning any car, tender or engine, the employes of the road in charge of said car, tender or engine shall put the same out of service at the first freight division terminal. (May 12, 1902, 95 v. 660.)

§ 3365-23h. **PENALTY FOR FAILURE TO COMPLY WITH THIS ACT.**—Any railroad which fails to comply with any of the provisions of this act shall forfeit and pay to the state of Ohio, the sum of twenty-five (\$25.00) dollars for each day such defective coupler or brake is kept in use contrary to the provisions hereof, to be collected in a civil suit in any county in the state where service of process can be had on said road. It is hereby made the duty of the attorney general or the prosecuting attorney of any county in which such company has a line of railroad, and such officer shall, on request from the inspector, immediately commence and prosecute, without unnecessary delay, proceedings to collect said sum, and the sum so collected, less 10 per cent. fees for collecting same, due such officer, shall be paid to the general revenue fund of the state. (May 12, 1902, 95 v. 660.)

§ 3365-23i. **PENALTY AGAINST OFFICERS OF COMPANY FOR NON-COMPLIANCE.**—Any superintendent conductor or other officer or employe of any road who shall wilfully refuse or neglect to comply with any of the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof fined any sum not less than twenty-five or more than five hundred dollars, and be personally liable for any injuries resulting to any employes therefrom. (May 12, 1902, 95 v. 660.)

§ 3365-24. **AS TO CARS CONSTRUCTED OR REPAIRED AFTER JULY 1, 1893.**—Every railroad corporation operating a railroad or part of a railroad in this state, shall, after the first day of July, A. D. 1893, equip and furnish all of its cars constructed after such date with automatic couplers and air-brakes, and all cars taken to its shops for general repairs after such date shall be equipped and furnished with automatic couplers and air-brakes. Provided that nothing herein shall require railroad companies to equip more than thirty per cent. of the cars in its freight service with air-brakes, unless a larger per cent. is necessary to provide at least twenty-five per cent. of all the cars in each freight train with such air-brakes and as aforesaid. (April 14, 1893, 90 v. 184.)

§ 3365-25. **EQUIPMENT OF ENGINES WITH POWER-BRAKES.**—Every railroad corporation operating a railroad or part of a railroad in this state, shall, after the first day of July, A. D. 1894, equip and furnish each of its engines used in the transportation of trains in this state with a power-brake. (April 14, 1893, 90 v. 184.)

§ 3365-26. **REPORT.**—And it shall be the duty of any railroad corporation operating a railroad or part of a railroad in this state, to report to the commissioner of railroads at the earliest practical date after the passage of this act, the number and class of cars in their service equipped with such automatic couplers and air-brakes, and the number of cars not so equipped. (April 14, 1893, 90 v. 184.)

§ 3365-27. **PENALTY.**—Any railroad corporation which shall fail to comply with any of the provisions of this act, shall forfeit and pay to the state of Ohio not

Overhead Wires — Freight Train — Rates, etc., §§ 3365-28-3366.

less than one thousand dollars nor more than five thousand dollars, to be recovered in an action to be brought by the attorney-general in the name of the state of Ohio, and which shall be prosecuted in accordance with the provisions of section 210 of the Revised Statutes. (April 14, 1893, 90 v. 184.)

§ 3365-28. **CONSTRUCTION OF OVERHEAD WIRES.**— Hereafter all telegraph, telephone, electric light or other wires of any kind constructed over the line of any steam railroad within the state of Ohio shall be put upon good substantial poles of a size not less than twelve inches in diameter at the bottom and not less than six inches in diameter at the top and that they be set in the earth not less than one-sixth of their length and well tamped.

Double cross-arms shall be used in all cases and all wires shall be insulated with glass or porcelain insulators, and securely fastened to both cross-arms.

All wires to clear the top of the rails at least twenty-five feet, except in cases of trolley wire crossings, when such height, as may be agreed upon, is approved by the commissioner of railroads and telegraphs shall govern. Where there is side-strain, poles shall be well guyed or braced. (April 21, 1898, 93 v. 154.)

See § 3337-18 and notes.

§ 3365-29. **DUTY OF COMMISSIONER OF RAILROADS AND TELEGRAPHS.**— It shall be the duty of the commissioner of railroads and telegraphs to see that the provisions of this act are enforced and he shall have the power to cause the removal of any such telegraph, telephone, electric light or other wires hereafter constructed over any railroad within the state of Ohio, not constructed according to the provisions of this act. (April 21, 1898, 93 v. 154.)

*An Act to Better Protect the Lives of Railway Employes and the Travel-
ing Public, and to Repeal an Act Therein Named.*

Be it enacted by the General Assembly of the State of Ohio:

§ 1. **UNLAWFUL FOR RAILROAD COMPANY TO RUN FREIGHT TRAIN WITH LESS THAN FULL TRAIN CREW.**— That it shall be unlawful for any railroad company in the state of Ohio, that runs more than four freight trains in every twenty-four hours, to run over their road, or any part thereof, outside of yard limits, any through freight train with less than a full train crew, consisting of five persons; one engineer, one fireman, one conductor, and two brakemen except that a light engine without cars shall have the following crew: One engineer, one fireman, and one conductor or flagman when running a distance of more than twenty-five miles from starting point. (May 10, 1902, 95 v. 522; May 2, 1902, 95 v. 343.)

§ 2. **PENALTY.**— That any superintendent or his assistants or other officer, or employe of any railroad company doing business in the state of Ohio, who shall send out on the road, or cause to be sent out on any road, that runs more than four freight trains in twenty-four hours, any through freight train whose crew consists of less than those named in section one of this act, shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars for each offense, the probate courts of the several counties of this state shall have final jurisdiction of offenses under this act. (May 10, 1902, 95 v. 522; May 2, 1902, 95 v. 343.)

§ 3. **COMMISSIONER OF RAILROADS AND TELEGRAPHS TO ENFORCE THIS ACT.**— It shall be the duty of the commissioners of railroads and telegraphs to enforce this act. (May 10, 1902, 95 v. 522; May 2, 1902, 95 v. 343.)

§ 3366. **FREIGHT RATES TO OR FROM POINTS COMPETING WITH THE PUBLIC WORKS.**— Every company whose line of road extends to any place in the

Tariff Rates, etc., § 3367.

vicinity of, or to a point of intersection with, any of the navigable canals or other works of internal improvement belonging to the state, shall fix and establish a tariff of rates for the transportation of merchandise, produce, and other property consigned to or from such place or point of intersection, and shall not charge or receive any higher rate for transporting similar merchandise, produce, or property over a shorter distance of its road, than is charged or received according to such fixed tariff for transportation to and from such place of intersection. (May 1, 1852, 50 v. 205, § 1.)

Right to equal rates.

Where a lower rate is given by a common carrier to a favored shipper, which is intended to give and necessarily gives an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. An injunction may be obtained to prevent discrimination.—*Scofield v. Railway Co.*, 43 Oh. St. 571 (1885).

Rights of shippers furnishing small shipments.

Where a railway company, as a common carrier, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agrees to make a rebate from the published tariff on such freights to the prejudice of the other shippers of like freights under the same circumstances, the contract so made is an unlawful discrimination in favor of the larger shipper, tending to create monopoly, destroy competition, injure, if not destroy, the business of smaller operators, contrary to public policy, and will be declared void at the instance of parties injured thereby.

And such a contract cannot be upheld simply because the favored shipper may furnish for shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined. A discrimination resting exclusively on such a basis will not be sustained. And such a contract will not be upheld simply because the business to be done under it is "largely profitable" to the company.—*Scofield v. Railway Co.*, 43 Oh. St. 571 (1885).

Same subject.

A railroad company is not warranted in making a contract whereby it binds itself to carry for one shipper crude petroleum, or other article, at half the rate it agrees to charge all others for the same service, at the same time, and as part of the agreement, binding itself to charge all others double the amount as a fixed open rate, and to pay such favored shipper one-half of it when collected, in consideration of his agreeing to establish and maintain a system of pipe lines to its road. Money so paid by a shipper, in igno-

rance of the agreement, and received by the favored shipper, may be recovered back in an action for money had and received by the former against the latter.—*Brundred v. Rice*, 49 Oh. St. 640 (1892).

Remedy by quo warranto.

A corporation created by this state, and engaged in carrying goods for hire as a common carrier, has no franchise, privilege, or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.—*State ex rel. v. Railway*, 47 Oh. St. 130 (1890).

Action to enforce rebate.

A railroad company whose line extends to a point of intersection with a canal of the state cannot make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers, such contract being prohibited by this section. An action cannot be maintained to enforce a promise of such repayment.—*Baltimore, etc., R. R. Co. v. Diamond Coal Co.*, 61 Oh. St. 242 (1899).

Purpose of act.

The intent of the statute was not to restrain companies subject to its provisions from charging the maximum rates allowed by their charters, but only to prevent them from fixing rates for longer distances below the maximum and below the rates fixed for shorter distances, either to the prejudice of the canals belonging to the state, or of the public whose shipments might be for the shorter distances.—*See Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168, 191 (1872).

Rights of shipper when agent fraudulently overcharges.

See Maple v. Railroad Co., 40 Oh. St. 313 (1883).

When consignee cannot sue.

Consignee cannot sue when he has a delivered price on the goods.—*Thompson v. Cleveland, etc., Ry. Co.*, 11 W. L. B. 211 (1884).

§ 3367. TARIFF OF RATES TO BE PUBLISHED. AND HOW CHANGED.—

Every such company shall publish its tariff of rates so established, on property consigned to and from such places or points of intersection, and cause the same to be

 Tariff Rates — Discrimination as to Freight, etc., §§ 3368-3371.

kept conspicuously posted at the several business stations on its road; no such company, its officers or agents, shall charge or receive, directly or indirectly, for transporting any property consigned as aforesaid, any less rate than is designated on such printed card, until such rate is changed by an order of the board of directors of such company and at least ten days' notice of such change given by bill or card to be posted as aforesaid; and no such company, its officers, or agents, shall evade, or attempt to evade, by drawback, free warehousing, or in any other manner, the payment of full freightage, according to the printed tariff of rates, as herein provided. (May 1, 1852, 50 v. 205, § 2.)

Constitutionality.

This section is valid as an exercise of the police power of the state.—See *Railroad Co. v. Fuller*, 17 Wall. (U. S.) 560 (1873).

§ 3368. **CERTAIN CONTRACTS INHIBITED.**—A company whose road forms part of any line of railway between points common to any other line, shall not contract or agree with any person, or with any other railroad company or companies, having a road or line of roads, or forming a part of any line of roads, between the same points, not to carry freight or passengers to or from such common points, nor shall it refuse to receive or carry any freight or passengers brought to it to be so carried. (April 11, 1861, 58 v. 74, § 1.)

See *Metropolitan Trust Co. v. Columbus, etc., Ry. Co.*, 95 Fed. 18 (1899).

§ 3369. **WHEN TRUNK ROADS MUST NOT DISCRIMINATE BETWEEN OTHER ROADS.**—When any railroad is a trunk road, or in the nature of a trunk road, and at or near the same place connects with or is intersected by two or more other railroads tributary to or competing lines for business to or from such trunk road, or to or from points on or beyond the same, any company or person operating or using such trunk road shall transport passengers and freight going to or coming from such tributary or competing roads without making any discrimination in the charges therefor, directly or indirectly, for or against either of such roads; and the company or person owning or controlling any such trunk road shall not, by lease or otherwise, permit the same to be used or operated in any manner contrary to the foregoing provision. (April 11, 1861, 58 v. 74, § 2.)

§ 3370. **MUST FORWARD FREIGHT BY LINE NAMED BY SHIPPER.**—Every company shall ship all freight that comes within its control by the railroads over which it is ordered to be conveyed by the shipper; and any company whose agent knowingly diverts, or permits to be diverted, any freight that comes under his control from the railroad over which the same is ordered to be conveyed, shall forfeit and pay to the company from which such freight is diverted three times the amount received for transporting the same, and such agent shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days, or both. (April 11, 1861, 58 v. 74, § 3.)

Recovery at common law.

A contract between a shipper and the defendant common carrier, whereby the defendant was to carry goods to its terminal point and there deliver them to the plaintiff, also a common carrier, for transportation to the point of destination, was not a contract made by other parties for the plaintiff's benefit, but only embodied an incidental advantage which

the plaintiff might derive from earnings for part of the transportation; and no right of action accrued to the plaintiff against the defendant for a violation of the contract in giving the extended transportation to a carrier other than the plaintiff.—*St. Louis, etc., Co. v. Missouri, etc., Ry. Co.*, 35 Mo. App. 272 (1889).

§ 3371. **PRECEDING SECTIONS MAY BE ENFORCED BY INJUNCTION.**—On complaint of the violation of any of the provisions of the three preceding sections,

 Freight Traffic — Discrimination in, §§ 3372-3373-2.

by petition as in other actions, the observance of the same may be enforced by injunction, and the party violating the same, or any of them, shall be liable in damages to the person or company injured, for the injury sustained in consequence thereof. (April 11, 1861, 58 v. 74, § 4.)

§ 3372. NOT TO DISCRIMINATE BETWEEN WAY AND THROUGH FREIGHT.

— Every company whose line of road, or any part thereof, is within this state, shall so employ its rolling stock used for the transportation of freight as to afford as ample facilities for the transportation of local and way freight, delivered to or discharged by it along its line of road, as it affords for the transportation of through freight, in proportion to the amount of its rolling stock, and shall not give facilities for transportation to either class of freight in preference to the other. (April 14, 1863, 60 v. 93, § 1.)

Discrimination between long and short haul.

See *Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168 (1872).

§ 3373. NOR AGAINST POINTS IN THE STATE.—No company or person owning, controlling, or operating a railroad, in whole or in part, within this state, shall charge or receive for transportation of freight for any distance within this state a larger sum than is charged by the same company or person for the transportation in the same direction, of freight of the same class or kind, for an equal or greater distance over the same railroad and connecting lines of railroad; and every such company or person who violates, or permits to be violated, the provisions of this section, shall forfeit and pay to the party aggrieved a sum equal to double the amount of the over-charge, but in no case less than twenty-five dollars, and shall also for every such unlawful act, forfeit and pay to the state a penalty of not less than one hundred nor more than one thousand dollars, to be recovered in a civil action, brought in the name of the state, by the prosecuting attorney of the county wherein such offense was committed, as part of his official duties, whenever complaint is made to him, and he is satisfied that the provisions of this section have been violated. (March 11, 1872, 69 v. 27, § 1.)

See § 3366.

§ 3373-1. RAILROAD COMPANIES MUST FURNISH EQUAL FACILITIES TO SHIPPERS OF SAME CLASS; DAMAGES.—It shall be the duty of all railroad companies and of all persons operating a railroad, to secure and extend to all persons, companies and corporations, the same and equal opportunities and facilities for receiving and shipping freights of all kinds, of the same class (and the same and equal opportunities and facilities for receiving and shipping freights of all kinds of the same class), that such railroad company or the person operating such railroad, extends to, has used or enjoys, of and concerning freights owned by such railroad company, or the person operating such road or any of the officers or stockholders therein, or in which it, they or either of them have any interest and any railroad company or person operating any railroad failing to comply with or observe the provisions or requirements of this section, shall be liable in a civil action to the party injured for the damages sustained, but for any violation of this section the recovery in any such action shall be not less than five hundred dollars. (April 29, 1891, 88 v. 429.)

§ 3373-2. MESSAGE FOR PASSENGER DELAYED BY ACCIDENT OR COLLISION MUST BE SENT.—That in case of any accident to or collision between any railroad train or trains, by reason of which any passenger is delayed, it shall be unlawful for any telegraph operator, at any office on the line of such railroad, whether he is employed by a railroad company or a telegraph company, or both, or whether

 Passenger Fare, Rates of, § 3374.

the office or station of which he has charge is a general commercial office, a railroad telegraph office only, or otherwise, to fail, neglect, or refuse on tender of the usual or regular charge at regular commercial offices, to receive from any persons so delayed, any telegram tendered during that time for transmission, or to send the same direct, to the person and point designated forthwith, and without any alteration, revision or approval of any person, and any such telegraph operator failing to observe or violating any of the provisions of this section, shall be fined not less than fifty dollars (\$50.00), nor more than five hundred dollars (\$500.00), and stand committed until the fine and costs are paid, and if such violation arose from observing any order or rule of his employer, his employer shall repay to him such fine and costs, and the same may be recovered in a civil action. (April 29, 1891, 88 v. 429.)

§ 3374. **RATES OF PASSENGER FARE PRESCRIBED.**—A company operating a railroad, in whole or in part, in this state, may demand and receive for the transportation of passengers on its road not exceeding three cents per mile, for a distance of more than eight miles; but the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance. (April 6, 1876, 73 v. 102, § 13.)

What multiple may be charged.

A railroad company may charge as fare that multiple of five which is nearest to the product produced by multiplying the rate of three cents per mile by the distance, whether such multiple is above or below such product. If such product should be equi-distant from the multiple below and the one above, the company may charge as fare either multiple. — *C. C. C. & St. L. Ry. Co. v. Wells*, 61 Oh. St. 268 (1899). See *Railroad Co. v. Skillman*, 39 Oh. St. 444 (1883); *Heaton v. Cincinnati, etc., R. R. Co.*, 1 N. P. 433 (1894); s. c., 2 Dec. 47.

Right to establish ticket rate and car rate.

A railroad company may charge a higher price for carrying passengers when the fare is paid on the train than it does at its ticket offices, provided the price thus charged is reasonable, and the fare charged on the train does not exceed the maximum allowed by law. — *Railroad Co. v. Skillman*, 39 Oh. St. 444 (1883). See *Smith v. Pittsburg, etc., Ry. Co.*, 23 Oh. St. 10 (1872).

Duty of passenger when more than legal rate is demanded.

If a railroad company fix two rates of passenger fare, to wit, a ticket rate and a car rate, the former within and the latter beyond the limits of its authority, and the conductor of the train, under the direction of the company, refuse to accept from the passenger less than the illegal and unauthorized rate, it is not necessary, to entitle the passenger to remain on the train, to tender more than the ticket rate, although the company might have fixed such ticket rate at a higher sum. *Quære*, whether any tender is necessary in such case. — *Smith v. Pittsburg, etc., Ry. Co.*, 23 Oh. St. 10 (1872).

Distance less than eight miles — what is reasonable.

Whether the rate of passenger fare fixed by a company under this section for distances less than eight miles is reasonable or not is a question of fact for the jury, to be determined under such instructions by the court as the circumstances of the particular case may require. — *Smith v. Pittsburg, etc., Ry. Co.*, 23 Oh. St. 10 (1872); *Railroad Co. v. Skillman*, 39 Oh. St. 444 (1883). See *Peters v. Railroad Co.*, 42 Oh. St. 275 (1884); *Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168, 190 (1872).

Unit of measurement.

The unit of measurement provided by this section is one mile and fractions of a mile are not to be counted. The words "more than eight miles" are equivalent to nine miles. — See *Cleveland, etc., Ry. Co. v. Wells*, 65 Oh. St. 313 (1901).

Rights acquired under special charter.

Special privileges conferred on a railroad company by a private charter, granted under the constitution of 1802, do not so inhere in the road constructed under such charter as necessarily to pass to any corporation which may have acquired, under subsequent legislation, the right to operate the same. — *Shields v. State*, 26 Oh. St. 86 (1875); s. c., 95 U. S. 319; *Pittsburg, etc., R. R. Co. v. Moore*, 33 Oh. St. 384 (1878).

Same subject.

Railroad companies incorporated before 1851, which avail themselves of the general corporation act by becoming parties to leases, are to be regarded as thereby accepting a provision of said act within the meaning of § 3233, thereby relinquishing all rights under their charters inconsistent with the general

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corporation law. The right to demand and take fare free from legislative control is one of the rights thus relinquished.—*Cincinnati, etc., R. R. Co. v. Cole*, 29 Oh. St. 126 (1876).

What is a ticket.

A ticket is a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place therein designated.—*See Frank v. Ingalls*, 41 Oh. St. 560, 563 (1885).

Lost tickets, rights of owner.

The purchaser of a nontransferable commutation ticket, who has lost it, and refuses, on account of such loss, to pay his fare upon a train, cannot maintain an action against the company for being ejected from the train.—*Crawford v. Cincinnati, etc., R. R. Co.*, 26 Oh. St. 580 (1875).

Right of holder of fraudulently obtained ticket.

When the possession of a railroad passenger ticket, which entitles the holder to a first-class passage between points named therein, has been fraudulently obtained from the company, a person purchasing such ticket from the holder thereof, although for value and without notice of equities, acquires no title thereto.—*Frank v. Ingalls*, 41 Oh. St. 560 (1885).

Removal from cars on refusal to pay.

A railway company has the right to require passengers to pay fare, and a rule directing its conductors to remove from the cars those who refuse to comply with the requirement is reasonable.—*Shelton v. Lake Shore, etc., Ry. Co.*, 29 Oh. St. 214 (1876). See § 3434, notes; *Crawford v. Cincinnati, etc., R. R. Co.*, 26 Oh. St. 580 (1875); *Railroad Co. v. Skillman*, 39 Oh. St. 444 (1883); *Corry v. Cincinnati, etc., R. R. Co.*, 3 Gaz. 90 (1859).

Measure of damages for ejection on refusal to pay illegal rate.

A person is only entitled to compensatory damages where his object in taking passage on the train was to be ejected and to bring suit against the company.—*See Cincinnati, etc., R. R. Co. v. Cole*, 29 Oh. St. 126 (1876).

Time, manner, and place of expulsion from train.

See *Railroad Co. v. Skillman*, 39 Oh. St. 444 (1883); *Crawford v. Cincinnati, etc., R. R. Co.*, 26 Oh. St. 580 (1875).

Contract is for continuous passage.

In the absence of any agreement or rule or regulation to the contrary, the obligation created by a sale of the ticket was for one continuous passage, and if the passenger voluntarily left the train at an intermediate station while the carrier was engaged in the performance of its contract, he thereby released it from further performance, and had

no right to demand such performance on another train at another time.—*Hatten v. Railroad Co.*, 39 Oh. St. 375 (1883); *Cleveland, etc., R. R. Co. v. Bartrain*, 11 Oh. St. 457 (1860).

Rights of passenger taking wrong train.

Where a person has a ticket, purchased from a company, entitling him to be carried from a certain station to another on the line of its road, and is good only on trains stopping at his destination, is, by the fault of the company's station agent, induced to take a train that does not, under the schedule stop at such place, and as a consequence is ejected by the conductor on calling for his ticket, and before reaching his destination, such facts show a right in the passenger against the company to recover as for a tort, and not merely for breach of contract.—*Pittsburg, etc., Ry. Co. v. Reynolds*, 55 Oh. St. 370 (1896). See *Pennsylvania Co. v. Wentz*, 37 Oh. St. 333 (1881); *Haskins v. Lake Shore, etc., Ry. Co.*, 4 W. L. B. 951 (1879).

Free pass—liability for negligence.

The validity of a stipulation exempting a carrier from liability for negligence must be determined by the law of the place where made.—*Knowlton v. Erie Ry. Co.*, 19 Oh. St. 260 (1869).

Drover's ticket—liability for negligence.

A stipulation in a drover's ticket exempting the company from liability for negligence is void.—*Cleveland, etc., R. R. Co. v. Curran*, 19 Oh. St. 1 (1869).

Tender, when not good.

An offer to pay the fare to an employee on the train unauthorized to receive the same is not an offer to the company, and does not entitle the person to passage.—*Cleveland, etc., R. R. Co. v. Bartrain*, 11 Oh. St. 457 (1860).

When tender of fare must be made.

A person refusing to pay fare acquires no right to remain on the train by offering to pay the usual fare after the train has been stopped for the purpose of ejecting him.—*Railroad Co. v. Skillman*, 39 Oh. St. 444 (1883).

Authority of agent to sell tickets.

An agent authorized to sell tickets, and stamp and deliver the same upon receiving pay therefor, cannot bind his company by stamping and delivering such tickets, without the knowledge or consent of its proper officers, to a third person, to be sold by him, and to be paid for when sold.—*Frank v. Ingalls*, 41 Oh. St. 560 (1885).

Duty to pay fare.

The fact that a ticket has been purchased by a passenger, which was afterward wrong-

Rates of Freight, § 3375.

fully taken up by a conductor of one of the defendant's trains, will not relieve the passenger from the duty of providing himself with a ticket or paying fare on another train of the defendant in which he may be a passenger. In such case the right of action of the passenger would be for the wrongful taking up of the ticket, and not for having been removed from a train by another conductor for refusing to pay fare.—*Shelton v. Lake Shore, etc., Ry. Co.*, 29 Oh. St. 214 (1876).

Tickets limited in time.

Where a railroad company sold a ticket, which entitled the purchaser to ride upon its cars a certain number of times within a given period, for a price below the usual rate of fare, which ticket specified upon its face that it was only good during such period, the purchaser, having failed to ride the specified number of times within the period named, is not entitled to ride upon such ticket after the expiration of the period.—*Powell v. Pittsburgh, etc., R. R. Co.*, 25 Oh. St. 70 (1874); *Pennsylvania Co. v. Hine*, 41 Oh. St. 276 (1884).

Failure to provide seat.

A passenger failing to get a seat may refuse to ride, and bring suit, but if he rides he

must give up his ticket or pay.—*Close v. Cooper*, 34 Oh. St. 98 (1877). See *Railway Co. v. McLean*, 1 O. C. C. 112 (1885); s. c., 1 C. D. 67; s. c., 19 W. L. B. 217.

Passage on freight trains.

A railroad company has the right to prescribe reasonable conditions for the admittance of way passengers upon its freight trains; and payment of fare to its office agents, or procuring a ticket prior to taking passage on such trains, is not an unreasonable condition.—*Cleveland, etc., R. R. Co. v. Barta*, 11 Oh. St. 457 (1860).

Mileage—waiver of conditions.

A company may waive any of the conditions usually attached to its mileage, for example, the signature of the ticket holder to the conditions.—*Kent v. Railroad Co.*, 45 Oh. St. 284 (1887).

Mileage ticket—right to take up.

A railroad company has no right to take up a mileage ticket in the hands of a person other than the purchaser.—*Morton v. Lake Erie, etc., Ry. Co.*, 35 W. L. B. 359 (1896).

§ 3375. **RATES OF FREIGHT PRESCRIBED.**—Such company may receive for transportation of property not exceeding five cents per ton per mile, when the same is transported a distance of thirty miles or more, and in case the quantity transported is less than one ton in weight, or any quantity is transported a less distance than thirty miles, such reasonable rate as may be from time to time fixed by the corporation or prescribed by law; but until a tariff of specific rates is established by law for the transportation of property of such bulk that a quantity equal to the tonnage capacity of the car can not be carried in it, the corporation may contract for space in the car sufficient to secure the safe transportation of such property, at a rate which shall not exceed five cents per ton per mile if such car were loaded to its tonnage capacity; and for the transportation of coal, pig-iron, limestone, iron ore, or undressed stone or lumber, not more than five cents per ton per mile shall be charged for any distance of ten miles or more, and in case the same be transported a less distance than ten miles, such reasonable rates as may from time to time be fixed by the corporation or prescribed by law; and the corporation may charge on such freight a reasonable rate for loading and unloading, when the same is in fact done by the corporation. (April 6, 1876, 73 v. 102, § 13.)

What companies not bound by this act.

The provision in the twelfth section of the act of Feb. 11, 1848, that no reduction shall be made in the rates of fare and charges for freight allowed to companies organized under said act, unless where their net profits for the previous ten years amount to ten per cent. on their capital, is in the nature of a contract, and binding on the state, and companies which have not lost their rights under said act and have not realized ten per cent. profit, are not bound by later acts reducing freight rates.—*Iron R. R. Co. v. Lawrence Furnace Co.*, 29 Oh. St. 208 (1876); *Railway Co. v. Furnace Co.*, 49 Oh. St. 102 (1892).

Rights under special charters.

See *Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168 (1872).

Charges for less than thirty miles.

Where a company is authorized to charge for the transportation of goods for less than thirty miles such reasonable rates as it may fix from time to time, it is unreasonable, as a matter of law, to fix a greater sum for a distance less than thirty miles than the maximum for full thirty miles.—*Peters v. Railroad Co.*, 42 Oh. St. 275 (1884); *Campbell v. Marietta, etc., R. R. Co.*, 23 Oh. St. 168 (1872).

Freight and Freight Trains, Regulations as to, §§ 3375a-3376.

Same subject.

Whether a freight rate fixed by a company for distances less than thirty miles is reasonable or not is a question of fact for the jury, to be determined under such instructions by the court as the circumstances of the particular case may require.—*Peters v. Railroad Co.*, 42 Oh. St. 275 (1884). See *Smith v. Pittsburg, etc., Ry. Co.*, 23 Oh. St. 10 (1872).

Recovery of overcharges.

A shipper has the right to have his goods transported at legal rates over the usual line of a common carrier of such goods; and if, to procure the services of such carrier, the shipper is compelled to pay illegal rates, the payment is not such a voluntary payment as will

preclude recovering back the illegal charge, nor will it preclude such recovery, if payments, by arrangement of parties, are made at the end of each month.—*Peters v. Railroad Co.*, 42 Oh. St. 275 (1884).

Contracts for freight.

The board of directors of a railroad company may, within the limit of the maximum rate authorized by law, make contracts for transportation for a fixed future period. Such a contract, if otherwise valid, is not ultra vires and void, for the reason that it binds the company for a fixed time.—*Railroad Co. v. Furnace Co.*, 37 Oh. St. 321 (1882); *Hinrod Furnace Co. v. Cleveland, etc., R. R. Co.*, 22 Oh. St. 451 (1872).

§ 3375a. **RIDING ON FREIGHT TRAINS.**—Physicians in the discharge of their professional duties and sheriffs, and deputy sheriffs, in the performance of their official duties, and officers and guards of the Ohio penitentiary and the Ohio state reformatory, in pursuit of escaped prisoners or returning them to their respective institutions, shall be permitted to ride at their own risk, and take a prisoner or prisoners upon freight trains, between stations where such trains stop, paying therefor the regular passenger fare. (April 15, 1902, 95 v. 153; April 13, 1892, 89 v. 275; April 23, 1891, 88 v. 381.)

Between what points can passage be taken.

To give a sheriff the right to ride on freight trains in the performance of his official duties, "between stations where such trains stop," it is not necessary that such trains should regularly stop at such station, or be scheduled to stop there; it is sufficient, if they are in fact stopping there at the time the sheriff gets aboard. It is not necessary to allege that the train stopped regularly at the

point the sheriff came aboard.—*Allen v. Lake Shore, etc., Ry. Co.*, 57 Oh. St. 79 (1897).

When sheriff may ride.

The right of a sheriff to ride upon a freight train is not confined to cases in which a prisoner is taken upon such train; but the right exists whenever the sheriff is in the performance of any official duty, and complies in other respects with the statute.—*Allen v. Lake Shore, etc., Ry. Co.*, 57 Oh. St. 79 (1897).

§ 3376. **PENALTIES FOR VIOLATION OF TWO PRECEDING SECTIONS, OR OF SECTIONS 3340 AND 3341.**—That any such company which violates or permits to be violated any of the provisions of the two preceding sections, or of sections 3340 and 3341, or which demands or receives a greater sum of money for the transportation of passengers or property, or for the service provided for in either of said sections, 3340 and 3341, than the sum allowed by law, shall pay to the party aggrieved for every such overcharge, a sum equal to double the amount of the overcharge; and any officer, employe, or agent of any such company who violates, or permits to be violated, any of such provisions, or demands or receives such sum of money, shall be subject to the like penalty to the party aggrieved; but in no case shall the amount to be paid be less than one hundred and fifty dollars to any bona fide claimant using the road of such company, or demanding or receiving any of the service provided for in said sections 3340 and 3341 in due course of business. Provided that a separate action shall be brought for each overcharge, unless the party aggrieved give notice in writing at the time of such overcharge, except the first one, to the officer, agent or employe of such railway making or receiving such overcharge, of his intention to bring such action; and no judgment shall be rendered in any action for the penalties herein provided, for more than one overcharge, unless such written notice shall have been given by the party aggrieved. (April 6, 1876, 73 v. 102, § 13; March 17, 1892, 89 v. 117; April 14, 1900, 94 v. 220.)

Freight, etc.—Conditional Sales of Equipment, etc., §§ 3377–3378a.

Constitutionality.

This act is not unconstitutional.—*Cincinnati, etc., R. R. Co. v. Cook*, 37 Oh. St. 265 (1881).

Pleading.

Under an old act (71 v. 146) it was not necessary to allege that the purchaser of the ticket was, in fact, transported on the ticket for which excessive fare was exacted nor that the excessive fare was paid in the due course of business. As to latter averment, see section.—*Cincinnati, etc., R. R. Co. v. Cook*, 37 Oh. St. 265 (1881).

Jury to assess damages.

Where such action stands for judgment on the petition, it is not error to refuse to impanel a jury to assess damages.—*Cincinnati, etc., R. R. Co. v. Cook*, 37 Oh. St. 265 (1881).

Penalties charged in each case.

See *Pittsburg, etc., Ry. Co. v. Moore*, 33 Oh. St. 384 (1878).

Interest.

Before judgment, the penalty allowed by the act of March 30, 1875, for overcharges does not bear interest.—*Railway Co. v. Furnace Co.*, 49 Oh. St. 102 (1892).

Joinder of actions.

See *Cincinnati, etc., R. R. Co. v. Cook*, 37 Oh. St. 265 (1881).

Constitutionality of repeal as to pending suits.

See *Cleveland, etc., Ry. Co. v. Wells*, 65 Oh. St. 313 (1901).

§ 3377. WHEN THREE PRECEDING SECTIONS DO NOT APPLY.—The provisions of the three next preceding sections shall not apply to any railroad in course of construction and the gross earnings of which are less than four thousand dollars per mile per annum, when such railroad is not owned or operated by companies operating another railroad; provided, that such exemption shall not continue longer than five years after cars are run for the transportation of freight and passengers on said road. (April 6, 1876, 73 v. 102, § 13.)

§ 3378. RATES OF FARE AND FREIGHT ON BRANCH ROADS.—A company may demand and receive for the transportation of passengers on a branch road a fare not exceeding six cents per mile, and for transportation of property such reasonable rate as may be from time to time fixed by the company or prescribed by law; but if the length of such branch exceeds ten miles, the charge for passengers and freight upon the excess shall be the same as provided by law for main lines. (April 29, 1872, 69 v. 203, § 4.)

§ 3378a. CERTAIN CONTRACTS FOR SALE OF RAILROAD PROPERTY NOT VALID AGAINST CREDITORS OR INNOCENT PURCHASERS UNLESS RECORDED, OR COPY FILED WITH SECRETARY OF STATE.—No contract of, or for the sale of railroad equipment, rolling stock, or other personal property (to be used in or about the operation of any railroad), by the terms of which the purchase money, in whole or in part, is to be paid in the future, and wherein it is stipulated or conditioned that the title to the property so sold shall not vest in the vendee, but shall remain in the vendor until the purchase money shall have been fully paid, shall be valid against creditors or innocent purchasers for value, unless recorded in the office of the secretary of state, or a copy thereof filed in the office of said secretary of state, and when said contract is so recorded, or a copy thereof so filed as aforesaid, the title to the property so sold, or contracted to be sold, shall not vest in the vendee, but shall remain in the vendor until the purchase money shall have been fully paid, and such stipulation or condition shall be and remain valid, notwithstanding the delivery of the property to, and its possession by such vendee. (March 16, 1882, 79 v. 45.)

What contract within this section.

Where the agreement states that the property described is leased at a fixed rental, and that title to the property shall not vest in the railroad company, but shall remain in said trustees until the terms of the agreement

shall be fully complied with, it comes within this section as a lease or a contract of sale, or a contract for the sale of railroad equipment.—*Union Trust Co. v. New York, etc., R. R. Co.*, 17 W. L. B. 176, 180 (1887).

Conditional Sales of Equipments, etc.—Storage Certificates, § 3378b 3378-1.

Insolvency of railroads, etc.

Where the court appoints receivers of the property of a railroad company, and directs them to join the company in the execution of a lease, consolidating former leases of rolling stock, the terms of which have not yet expired, the purpose and provisions of which consolidated lease are to provide a lower monthly rental and extend the period of the leases—but leaving the title to the rolling stock in the lessors, with conditions of for-

feiture for nonpayment of the rentals and other breaches of the covenants, such consolidated lease is not a sale of the rolling stock to the receivers, and the lessors are entitled to a preference over the bonded indebtedness of the railroad company, only for the rentals which accrue after execution of such consolidated lease and during the existence of the receivership. *Central Trust Co. v. Ohio Southern R. R. Co.*, 17 O. C. C. 633 (1898); s. c., 9 C. D. 317.

§ 3378b. IN WRITTEN CONTRACTS FOR LEASING SUCH PROPERTY, PARTIES MAY PROVIDE FOR CONDITIONAL SALE OF SAME; PARTIES MAY PROVIDE THAT THE PROPERTY SHALL REMAIN IN THE LESSOR OR VENDOR UNTIL PURCHASE MONEY PAID.—In any written contract for the renting, leasing, or hiring of such property (to be used as aforesaid), it shall be lawful to stipulate or provide for a conditional sale of such property at the termination of such renting, leasing, or hiring, and to stipulate or provide that the rental reserved shall, as paid, or when paid in full, be applied to and treated as purchase money; and in such contract it shall be lawful to stipulate or provide that the title to such property shall remain in the lessor or vendor until the purchase money shall have been fully paid, notwithstanding delivery to and possession by the other party; subject, however, to the requirement as to recording or filing contained in the foregoing section of this act. (March 16, 1882, 79 v. 45.)

§ 3378c. SECRETARY OF STATE TO FILE CONTRACTS: HIS FEES, ETC.—The secretary of state, when so requested, and upon being paid the proper fees, shall record any such contract, and shall file in his office a copy of any such contract, when the same shall be delivered to him for that purpose, and for every such copy so filed he shall be entitled to receive one dollar. (March 16, 1882, 79 v. 45.)

§ 3378d. CONSTRUING APPLICATION OF FOREGOING SECTIONS.—The provisions of the foregoing sections three thousand three hundred and seventy-eight (a), three thousand three hundred and seventy-eight (b) and three thousand three hundred and seventy-eight (c), shall extend and apply, not only to contracts made with a railroad company, as vendee or lessee, but also to all contracts which may be made with any corporation, company, or person, as vendee or lessee, by which any such corporation, company, or person shall undertake to purchase, rent, lease, or hire any railroad equipment, cars, rolling stock, or other personal property, designed for use on, or in connection with, a railroad or railroads, in this or other states. (April 12, 1889, 86 v. 255.)

§ 3378-1. AUTHORIZING RAILWAY COMPANIES TO ISSUE STORAGE OR WAREHOUSE CERTIFICATES.—Any railway company, organized under the laws of this state, upon the receipt of iron ore or grain or other merchandise from any vessel, water-craft or other source for storage and deposit, duly consigned to said company may, upon the request or demand of the owner or owners of said ore, grain or other merchandise, and with the written consent of the consignee, issue to the owner or owners of said ore, grain or other merchandise, a certificate, receipt or voucher, which certificate, receipt or voucher, shall name the railway company by whom said ore or grain or other merchandise is held at the time said certificate, receipt or voucher is issued, to whom said ore, grain or other merchandise was consigned, the quantity held by said company, and so near as may be the quality or grade thereof, but not incurring any liability for the grade or quality, which certificate, receipt or voucher, shall be signed by the president or vice-president of said company, and countersigned by the general agent of said company appointed for that purpose, or such other officers as may be appointed by said railway company, and shall be transferable and negotiable by indorsement thereon, by the person or per-

Baggage — Bills of Lading — Consolidation, §§ 3378-2-3379.

sons to whose order the same is made payable. That on the presentation of said certificate, receipt or voucher, so indorsed to said railway company at its general offices, (by) the holder or holders thereof and on demand, the said railway company shall deliver to said holder or holders, the iron ore or grain or other merchandise so described therein, on the payment by such person or persons to said railway company (of) all proper charges thereon. (February 22, 1889, 86 v. 52.)

False warehouse receipts — crime.

See § 7086.

§ 3378-2. **BICYCLE AS BAGGAGE.**—That hereafter for the purposes herein specified, bicycles, with or without lanterns or tool boxes attached, are declared to be baggage, and shall be transported as baggage for passengers, by all railroad companies operating in this state, and be subject to the same charges and liabilities as other baggage, and no passenger shall be required to crate, cover, or otherwise protect any such bicycle; provided, however, that a railroad corporation shall not be required to transport, under the provisions of this act, more than one bicycle for a single person. (March 3, 1898, 93 v. 24; April 27, 1896, 92 v. 372.)

§§ 3378-3. **RAILROAD COMPANIES REQUIRED TO FURNISH BILLS OF LADING; EFFECT OF SUCH RECEIPT.**—All railroad companies operating any line of railway in the state of Ohio, upon demand of any person or corporation desiring to ship goods or merchandise of any kind in car lots, at any railway station or shipping point in the state of Ohio, shall count or check the packages composing each lot or car load, and furnish to the shipper of such goods a receipt or bill of lading, specifying the number of packages shipped in each car; and such receipt shall bind the railroad company so executing the same to deliver the same number of packages so specified, at the place of destination named in such bill of lading. (May 8, 1894, 91 v. 207.)

Effect of bill of lading when goods were never received.

Prior to the enactment of this section it was held in an action by a shipper against the owners of a steamboat engaged in the business of common carriers, to recover for the nondelivery of goods as per bill of lading, the defendants were liable only for so much of the goods as was actually received on the boat or delivered to some one authorized to receive freight on her account.—Dean v. King, 22 Oh. St. 118 (1871). See *Little Miami, etc., R. R. Co. v. Dodds*, 1 C. S. C. 47 (1870).

Parol evidence.

In such action, parol evidence is admissible for the purpose of explaining or contradicting the terms of the bill of lading, in so far as it purports to be a receipt for freight delivered

to the boat.—Dean v. King, 22 Oh. St. 118 (1871).

Scope of agency.

The mere employment of an officer or agent for such boat does not clothe him with apparent authority to issue bills of lading for goods not on board, or not delivered to one authorized to receive freight on account of the boat: and in case such officer or agent does carelessly or fraudulently issue a bill of lading acknowledging the receipt of freight, the owners are not estopped to deny the receipt thereof.—Dean v. King, 22 Oh. St. 118 (1871). See *Second National Bank v. Walbridge*, 19 Oh. St. 419 (1869); *Wood v. Perry, Wright*, 240 (1833).

False bill of lading — crime.

See § 7085.

§ 3378-4. **PENALTY.**—Any railroad company, or any agent or officer thereof, refusing to comply with the provisions of this act shall be liable to a penalty of fifty dollars, to be recovered by civil action against the railroad company by which such agent or officer is employed, or to which company such goods are offered for shipment. (May 8, 1894, 91 v. 207.)

§ 3379. **WHEN COMPANIES WHOSE ROADS ARE IN THE STATE MAY CONSOLIDATE.**—When the lines of road of any railroad companies in this state or any portion of such lines, have been or are being so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously,

Consolidation — Domestic and Foreign Companies, § 3380.

without break or interruption, such companies may consolidate themselves into a single company. (March 30, 1877, 74 v. 71, § 1.)

Power of state to impose conditions.

A state in granting a corporate privilege to its own citizens, or what is equivalent, in permitting a foreign corporation to become one of the constituent elements of a consolidated company, may impose such conditions as it seems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained.—*Ashley v. Ryan*, 153 U. S. 436, 443 (1893); s. c., 8 O. F. D. 215; s. c., 49 Oh. St. 504, 527.

Consolidated companies subject to general laws.

Consolidated railroad companies organized in pursuance of the consolidation act are corporations formed under a general law, within the meaning of the constitution, and as such subject to the limitations and reservations of the constitution; and the general assembly has power to alter and regulate rates of fare chargeable by such companies.—*Shields v. State*, 26 Oh. St. 86 (1875); s. c., 95 U. S. 319; s. c., 4 O. F. D. 471.

Powers of corporations pending consolidation.

Corporations, which are parties to an agreement to consolidate, continue in the full enjoyment of their powers and franchises respectively, and may accept subscriptions to their capital stock at any time before consolidation is consummated by filing the agreement of consolidation with the secretary of state.—*Mansfield, etc., R. R. Co. v. Brown*, 26 Oh. St. 223 (1875).

What companies are connected.

Two railroad companies owning lines of railroad connected only by other railroads, which such companies hold by lease, are not authorized to consolidate into one corporation under this section.—*State v. Vanderbilt*, 37 Oh. St. 590 (1881).

Same subject.

Companies connected by the lines of a union depot and terminal company, in which each has an interest, may consolidate.—*Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11 (1889). See § 3300 and notes.

What lines are competing.

The lines of two railroad companies, which are in their general features parallel and competing, cannot be connected for the carriage of freight and passengers over both "continuously" within the meaning of this section, and hence cannot consolidate.—*State v. Vanderbilt*, 37 Oh. St. 590 (1881); *Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11 (1889). See § 3300 and notes.

Subscriptions to stock.

Subscriptions to capital stock are to be construed with reference to consolidation statutes in force, and subscribers are bound thereby as if the statutes were a part of the contracts of subscription.—*Mansfield, etc., R. R. Co. v. Brown*, 26 Oh. St. 223 (1875).

Right of stockholders of constituent companies to enforce operation of roads.

See *Port Clinton, etc., R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 Oh. St. 544, 560 (1862).

§ 3380. CONSOLIDATION OF DOMESTIC WITH FOREIGN RAILWAY CORPORATION.—A company organized in this state for the purpose of constructing, owning and operating a line of railway, or whose line of road is made or is in process of construction to the boundary line of this state, or to any point either in or out of the state, may consolidate its capital stock with the capital stock of any company in an adjoining state, organized for a like purpose, and whose line of road has been projected, constructed or is in process of construction to the same point, where the several roads so united and constructed will form a continuous line for the passage of cars, and roads running or to be constructed to the bank of a river which is not bridged, or to the tracks and property of a union depot company, the use of which is enjoyed by either of the companies so proposed to be consolidated, shall be held to be continuous under this section. (April 18, 1890, 87 v. 219; April 22, 1885, 82 v. 150; March 30, 1877, 74 v. 71, § 1.)

Status of company formed under this section.

The result is that by consolidation, whether between Ohio companies or between an Ohio company and companies of another state, a new company is formed by the extinguishment of the old ones.

Many difficulties have been suggested, as arising if a company formed by the consoli-

dation of an Ohio company with a company of another state should be held to be a new corporation. We would have, it is claimed, the anomaly of a corporation with a capital stock, without the individual liability of the stockholders. The fallacy consists in the assumption, for such would not be the case. There has been some diversity of opinion as to the status of a corporation formed by the

Consolidation of Consolidated Companies, § 3380a.

consolidation of companies under the laws of different states. But it seems pretty well settled, upon principle at least, that where formed under co-operative legislation of the different states, it becomes a corporation in each state where its road is located. It is a legal entity residing and doing business in different states, with a status in each, derived from and determined by the laws of that state. If by the laws of one of these states an individual liability attaches to the holder of stock in an incorporated company, the same liability will attach to its stockholders. The liability will in this regard depend upon the laws of the state where it is used.

The stockholders of the company in the other states must be presumed to know what the Ohio law is in this regard; and by agreeing to consolidate with an Ohio company must be presumed to assent to the individual liability attached by Ohio law to the ownership of stock in an Ohio company.—*Ashley v. Ryan*, 49 Oh. St. 504, 529 (1892). See *Ohio, etc., R. R. Co. v. Wheeler*, 1 Black (U. S.) 286 (1861).

Adjoining state — meaning.

This act may as properly be construed to mean the state adjoining the state in which the first company has its line of road, as the state adjoining the state in which the first company is incorporated, so as to enable, for example, an Ohio company to consolidate with Indiana and Illinois companies.—*Adelbert College v. Toledo, etc., Ry. Co.*, 3 N. P. 15 (1894); s. c., 5 Dec. 14. See *Union Trust Co. v. New York, etc., R. R. Co.*, 17 W. L. B. 176, 177 (1887); *Continental Trust Co. v. Toledo, etc., R. R. Co.*, 82 Fed. 642 (1897); s. c., 9 O. F. D. 321; *Toledo, etc., R. R. Co. v. Continental Trust Co.*, 95 Fed. 497 (1899).

Removal of causes.

Notwithstanding the consolidation of two railroad corporations of different states, each retains its identity as a corporation of the state in which it was originally created; and in a suit against the consolidated corporation brought in one of such states, it cannot obtain a removal to the federal courts on the ground that it is a citizen of the other state, although the consolidation was had under the laws of the latter.—*Paul v. Baltimore, etc.,*

R. R. Co., 44 Fed. 513 (1890); *Ohio, etc., R. R. Co. v. Wheeler*, 1 Black (U. S.) 286 (1861).

Roads connected by union companies.

Where two railway companies owning lines of railroad, seeking consolidation, are connected by the tracks of a "union" company organized by several railway companies to secure union depot and terminal facilities, and where by law the interest of each company in the union company, in its capital stock, and in its property and effects of every kind, are deemed an appurtenance to the railroad of such proprietary company, and are not alienable except with and as part of the railroad of such proprietary company it will be held that the companies do unite and form a continuous line within the meaning of this section.—*Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11 (1889).

De facto consolidation.

Where two roads not coming under this section attempt and apparently complete consolidation by colorable proceedings in a formal way to the approval of the proper state officers, the certificate of incorporation, duly certified, being admitted to record in the office of the secretary of state, and its rights as a corporation having never been challenged by the state, it will be entitled to be considered at least a corporation de facto with power to mortgage its property, after it has acquired and disposed of valuable property and incurred numerous obligations.—*Union Trust Co. v. New York, etc., R. R. Co.*, 17 W. L. B. 176 (1887). See *Toledo, etc., R. R. Co. v. Continental Trust Co.*, 95 Fed. 497 (1899).

Estoppel.

A railroad company having possession of and operating property obtained through consolidation and foreclosures in which the consolidation was recognized as valid, is estopped to question the validity of the consolidation.—*Adelbert College v. Toledo, etc., Ry. Co.*, 3 N. P. 15 (1894); s. c., 5 Dec. 14; *Farmers' Loan Co. v. Toledo, etc., Ry. Co.*, 67 Fed. 50 (1895); s. c., 8 O. F. D. 435, 9 O. F. D. 230.

Under old acts road was required to be in process of construction.

See *Mansfield, etc., R. R. Co. v. Stout*, 26 Oh. St. 241 (1875); *Union Trust Co. v. New York, etc., R. R. Co.*, 17 W. L. B. 176 (1887).

§ 3380a. **CONSOLIDATED COMPANIES MAY CONSOLIDATE.**—Any railroad company formed by the consolidation of a company or companies of this state with a company or companies of another state or states, may make a further consolidation with a company or companies of another state or states owning a continuous and connected, but not parallel or competing lines. The constituent companies shall have power to fix by the agreement for such consolidation the terms and conditions upon which the same shall be made, which terms and conditions may include the payment or retirement of the preferred stock of either or any of the constituent companies, if they have such; and in case the new company shall issue preferred stock, the par value of the shares thereof may be fixed by the agreement of consolidation,

Consolidation — Proceedings for, § 3381.

or by the resolution for the issue thereof without regard to the par value of shares of the common stock of such company. (May 2, 1902, 95 v. 354.)

§ 3381. PROCEEDINGS TO EFFECT SUCH CONSOLIDATION.—The consolidations shall be made under the conditions and restrictions following:

1. The directors of the several companies may enter into a joint agreement, under the corporate seal of each company, for the consolidation of the companies, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new company, the number of directors and other officers thereof, and their places of residence, the amount of the capital stock of the new company agreed upon, the number of shares of capital stock, the amount of each share and the manner of converting the capital stock of each of the constituent companies into that of the new company, with such other details as they may deem necessary to perfect the new organization and the consolidation of the companies.

2. The agreement shall be submitted to the stockholders of each of the companies, at a meeting thereof called separately for the purpose of taking the same into consideration; due notice of the time and place of holding such meeting, and the object thereof, shall be given by written or printed notices addressed to each of the persons in whose names the capital stock of the companies stands on the books thereof, and also by a like notice published in some newspaper in the city or town where such company has its principal office or place of business; provided, that in case all the stockholders are present at such meeting, in person or by proxy, such notice may be waived in writing. At the meeting of stockholders the agreement of the directors shall be considered, and a vote by ballot taken for the adoption or rejection of the same, each share of stock on which has been paid all the installments called for by the board of directors, entitling the holder thereof to one vote; the ballots shall be cast in person or by proxy, and if two-thirds of all the votes cast at the meeting be for the adoption of the agreement, that fact shall be certified thereon by the secretary of each of the companies, and the agreement so adopted, or a certified copy thereof shall be filed in the office of the secretary of state. And all consolidation agreements heretofore entered into and ratified by such companies substantially in manner as in this section prescribed, shall be as valid as if entered into and ratified by virtue of this section. (April 22, 1885, 82 v. 150; R. S. 1880; March 30, 1877, 74 v. 71, § 2.)

Preliminary agreement for consolidation of corporations.

A preliminary agreement appointing parties named as agents and proxies to carry out an agreement and perfect the consolidation of corporations, authorizing them to attend any and all meetings of the corporation, called for the purpose of carrying out the terms of the agreement, and to vote the stock in such manner as they shall find necessary to carry out the purposes of the agreement, and agreeing to deliver to such parties stock of the consolidating companies, with the further provision that the shares of the consolidated company shall be delivered to the constituent companies, apparently contemplating delivery to such companies in their corporate capacity, becomes merged in the contract of consolidation, and does not fix the rights of the parties; it has no legal effect in and of itself, but is purely preliminary. —Robison v. Cleveland City Ry. Co., 13 Dec. 1.

Number and residence of directors.

The agreement of the directors of the consolidating companies is fatally defective if it

does not state the number and residence of the new directors. This provision of the statute is mandatory. —State v. Vanderbilt, 37 Oh. St. 590, 654 (1882). See Trester v. Mo. Pac. R. R. Co., 33 Neb. 171 (1891).

Constituent companies after consolidation.

Upon the instant of the consolidation of the corporations the consolidating companies cease to exist except as to creditors, and they survive then, under § 3384, Rev. Stat., for the mere purpose of enabling creditors to collect their debts against them. —Robison v. Cleveland City Ry. Co., 13 Dec. 1.

Powers of constituent companies.

Under this section the parties to a consolidation agreement continue in the full exercise of their franchises and powers, and may accept subscriptions to their capital stock at any time before consolidation is consummated by filing the agreement of consolidation with the secretary of state. —Mansfield, etc., R. R. Co. v. Brown, 26 Oh. St. 223 (1875).

Amount and nature of capital stock.

The companies may agree upon the number and amount of shares of the proposed consolidation company, may classify such new stock into "common" and "preferred," and may issue a greater or less number of shares than that of the aggregate of the constituent companies to secure a just and equitable division of property between the shareholders of the companies.—*Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11 (1889).

Contract giving veto power to preferred stockholders.

Where a contract of consolidation provided: "The consolidated company shall not issue any evidences of funded debt, or execute any lease of railway property which may entail fixed charges, except by the consent of a majority in interest of the holders of the said preferred stock, to be expressed in writing under their signatures respectively." etc., it was held that it did not conflict with § 3248 or § 3257.—*Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11, 15 (1889).

Delivery of new stock to old company or its officers, etc.

A delivery of stock of a consolidated company to constituent companies, as such, could not be made, inasmuch as, after the consolidation, such companies do not remain in existence, for any such purpose; such companies could not surrender the old stock without consent of the holders nor are they authorized to receive the new.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Nor could the stock of a consolidated company be delivered to the officers of the constituent companies, as such, for the reason that when the consolidation goes into effect, such officers cease to have any official relation to the old company, except so far as is necessary for the protection of creditors.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Blanket certificates representing the total amount of stock belonging to holders of stock in constituent companies after consolidation, executed by the vice-president and secretary of the consolidated company upon representation of the transfer agent, and by advice of general counsel that it would be all right, that the same were to be used simply for bookkeeping purposes, and that individual certificates subsequently issued would be charged against them, cannot be regarded as a delivery of the constituent companies' stock.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Valid issue of stock of consolidated company.

In order to constitute a valid issue of certificates of stock of a corporation formed by the consolidation of other corporations, certificates of the stock of the constituent companies should be surrendered and canceled.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Trust relation as to distribution of stock.

Where several companies are consolidated into one company, the new company sustains a trust relation to the holders of the stock in the constituent companies with reference to the new stock and its distribution to them.—*Fuller v. Cleveland, etc., Ry. Co.*, 8 N. P. 605 (1901); *Cleveland, etc., Ry. Co. v. First Nat. Bank*, 22 O. C. C. 165 (1901).

Issue of stock, statute of limitations.

In an action against a consolidated company by one entitled to a portion of the new stock the statute of limitations does not begin to run until there is a demand of the stock, and refusal to deliver.—*Fuller v. Cleveland, etc., Ry. Co.*, 8 N. P. 605 (1901).

Wrongful diversion of stock of consolidated company.

Where negligence, under ordinary circumstances, will not in and of itself constitute an estoppel, but inasmuch as the law casts upon a director the duty of exercising ordinary care, with reference to the concerns of the company, and failure to do so makes the director liable for such wrongs as follow from his negligence, if he is directly concerned with the wrongful diversion of stock, and his negligence was the proximate cause thereof, it would bar his recovery for losses which he might sustain thereby.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Where it appears that the transfer agent of a corporation formed by the consolidation of other corporations was permitted by the registrar and executive officers of the corporation to issue certificates of stock in the consolidated companies without surrender of the stock in the constituent companies, whereby all the stock of the consolidated company was issued and in part wrongfully diverted, leaving about \$800,000 of the stock of a constituent company unpaid and uncanceled, the majority of which was owned by the vice-president (a director, but not a salaried or active officer), the proximate cause of the loss was in permitting new stock to be issued without a surrender of the old, and the corporation is liable to the vice-president stockholder for his losses.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Where it appears that the officer and stockholder in question had no actual knowledge that the transfer agent, a man of high business standing, was wrongfully diverting the stock, and had no reason to distrust him, the mere fact that he was guilty of negligence generally, in that he failed to insist upon having the contract of consolidation, which contemplated an exchange of stock within a reasonable time, promptly executed, is not sufficient to defeat his recovery, in

Consolidation — Effects of; Defects in, §§ 3382, 3382-1.

view of the commissive negligence of executive officers in permitting the stock to be wrongfully issued.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

The measure of damages in such case is the amount of plaintiff's stock, less his share of the indebtedness of the constituent company. The fact that since the consolidation the indebtedness has been paid, does not entitle plaintiff to recover his stock free from debts where it does appear that his money contributed to the payment of such debts.—*Robison v. Cleveland City Ry. Co.*, 13 Dec. 1.

Duties and liabilities to pledgee of stock of constituent company.

The consolidated company has no right to issue its stock in lieu of stock of one of the constituent companies which was pledged to secure a debt of the owner. If such issue is made, it is liable to the pledgee.—*Cleveland City Ry. Co. v. First Nat. Bank*, 22 O. C. C. 165 (1901).

Duty where old stock is deposited with trustee for transfer.

See *Fuller v. Cleveland, etc., Ry. Co.*, 8 N. P. 605 (1901).

Contract partly illegal.

Where one clause of the contract of consolidation is illegal, and can be separated from the legal parts, the consolidation will not be enjoined, and the parties will be left to litigate the question as to legality of the clause when occasion requires it.—*Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11, 16 (1889).

Agreement to protect bonds.

Where bonds were issued by a company, which afterward was consolidated with another under a stipulation that said bonds should be protected by the new company, the holders of such bonds have a lien on the property of the company.—See *Compton v. Railway Co.*, 45 Oh. St. 592 (1888).

Application to street railroad companies.

For the application of §§ 3381 to 3392 to street railroad companies, see § 2505b.

Application to other corporations.

See §§ 3864 and 3865.

§ 3382. **EFFECT OF THE AGREEMENT TO CONSOLIDATE.**—When the agreement is made and perfected, as provided in the preceding section, and the same or a copy thereof filed with the secretary of state, the several companies parties thereto shall be deemed and taken to be one company, possessing within this state all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties, of a railroad company. (April 10, 1856, 53 v. 143, § 3.)

New company is formed.

By the consolidation of companies, whether of Ohio companies, or Ohio and foreign companies, a new corporation is formed which succeeds to all the property of the original companies and assumes their liabilities.—*Ashley v. Ryan*, 49 Oh. St. 504, 529 (1892); *Wabash, etc., Ry. Co. v. Ham*, 114 U. S. 587, 595 (1884); *Shields v. Ohio*, 95 U. S. 319 (1880); s. c., 4 O. F. D. 471; *Lee v. Sturges*, 46 Oh. St. 153, 169 (1889); *Robison v. Cleveland, etc., Ry. Co.*, 5 N. P. 293, 301 (1898); s. c., 7 Dec. 312.

When old companies deemed in existence.

So far as concerns unpaid dissenting stockholders, the old companies may be deemed in existence after the filing of the agreement.—*Railway Co. v. Garrett*, 50 Oh. St. 405, 417 (1893).

Decree against company.

A decree against a company formed by the consolidation of companies of several states may be made against the whole road, and not merely against so much as is in the state.—*Seofield v. Railway Co.*, 43 Oh. St. 571, 621 (1885).

§ 3382-1. **DEFECTS IN CONSOLIDATION AGREEMENTS; HOW CURED; PROVISIO.**—In all cases where the agreement for the consolidation of railroad companies heretofore filed in the office of the secretary of state is defective by reason of the omission of a statement either of the number of the directors or other officers, or their places of residence, or the number of shares of capital stock as required in such agreement by the laws of this state, such defect may be cured by filing in the office of the secretary of state a certificate signed by the president and the secretary of the consolidated company named in such agreement under its corporate seal, setting forth such omitted statements, which shall thereupon be considered a part of the agreement of consolidation, the same as if originally incorporated therein, and said agreement and all rights, remedies, powers, duties, and acts thereunder be construed ac-

Consolidation — Defects in Agreements, §§ 3382-2, 3382-3.

cordingly, and the said agreement and certificate, and copies thereof, duly certified by the secretary of state, shall be held and received in all courts and other places as constituting the agreement of the consolidation of such companies to all intents and purposes, as if no such omission or defect had ever existed in such agreement; provided, that nothing in this act shall impair the rights of any person or corporation acquired prior to the passage of this act. (April 17, 1882, 79 v. 126).

§ 3382-2. **AUTHORIZING THE CURING OF DEFECTS IN THE CONSOLIDATION OF CERTAIN RAILWAY COMPANIES; PROVISIO.**— In all cases where the agreement or certified copy thereof for the consolidation of railroad companies, heretofore filed in the office of the secretary of state, is defective by reason of the omission of a statement of the place of residence of the directors, and the number and places of residence of the other officers, as required in such agreement by the laws of this state, but when in pursuance to such agreement an election of directors has been had, and other officers have been elected or appointed, all such defects in said agreement, and any defect in the certificates thereon, may be cured by filing in the office of the secretary of state a copy of the proceedings of said election, duly certified by the secretary of said company to be such copy under the corporate seal of such company, and a certificate signed by the president and secretary of the consolidated company named in such agreement under its corporate seal, setting out the places of residences respectively of the directors first elected, and of the officers first elected or appointed, at the time they were so first elected or appointed, as well as their residences respectively at the time of the filing of the certificates last above mentioned, which shall thereupon be considered a part of the agreement of consolidation, the same as if originally incorporated therein; and upon filing said certified copy of said proceedings and certificate, all such defects existing prior to the filing of said certified copy of said proceedings and certificates shall be cured, and the several acts of said company shall be held valid, and the said agreement and all rights, remedies, powers, duties, and acts thereunder be construed accordingly, and the said agreement, proceedings and certificates and copies thereof, duly certified by the secretary of state, shall be held and received in all courts and other places as constituting the agreement of consolidation of such companies, to all intents and purposes as if no omission had ever existed in such agreement or the certificate thereto. Provided, that nothing in this act shall impair the rights of any person, firm or corporation acquired prior to the passage of this act. (January 20, 1887, 84 v. 3.)

§ 3382-3. **AUTHORIZING THE CURING OF DEFECTS IN CERTAIN RAILWAY CONSOLIDATION AGREEMENTS; PROVISIO.**— In all cases where the agreement or a certified copy thereof for the consolidation of railroad companies heretofore filed in the office of the secretary of state, states the number of shares of the capital stock of the new company, and the amount of each share, but is defective by reason of the omission of a statement of the amount of the capital stock of the new company agreed upon as required by the laws of this state in such agreement, such defect may be cured by filing in the office of the secretary of state a certificate signed by the secretary of said consolidated company, under its corporate seal, setting out the amount of the capital stock of the new company agreed upon, which shall be ascertained by multiplying the number of shares of capital stock named in said agreement by the amount of each share named in said agreement in dollars, as shown in the original agreement or the certified copy thereof filed in the office of the secretary of state, and which said certificate shall thereupon be considered a part of the agreement of consolidation the same as if originally incorporated therein; and upon filing said certificate such defect shall be cured and such consolidation and the several acts of said company shall be held valid, and the said agreement and all rights, remedies, powers, duties, and acts thereunder be construed accordingly; and certified copies of

Consolidation — Directors; Title to Property, §§ 3383, 3384.

the said certificate and the agreement of consolidation, duly certified by the secretary of state, shall be held and received in all courts and other places as constituting the agreement of consolidation of such companies, to all intents and purposes, as if no omission or defect had ever existed in such agreement. Provided, that nothing in this act shall impair the rights of any person, firm or corporation acquired prior to the passage of this act. (February 18, 1887, 84 v. 29.)

§ 3383. **ELECTION OF DIRECTORS.**—The stockholders at the meeting called to take into consideration the agreement, shall, after the adoption of the same, appoint a time and place for the election of the directors and other officers of the new company, notice of which shall be given by the secretary of each of the companies in some newspaper printed, or of general circulation at the place of the principal office of each company, at least three weeks previous thereto; provided, that if at such meeting all the stockholders of the constituent companies are present, either in person or by proxy, they may, in writing or by resolution, waive such notice, and consent to hold such meeting and election at any time, which election shall be conducted in such manner as may be prescribed by the stockholders at such meeting. (April 22, 1885, 82 v. 150; 53 v. 143, § 4.)

Enjoined election — receiver.

At the meeting provided for by this section the stockholders have no corporate duty to perform; therefore, the fact that some of the stockholders have been enjoined from participating in such a meeting does not constitute a ground for the appointment of a receiver of either of the consolidating companies, for such persons could act only in the capacity of stockholders.—*Railway Co. v. Jewett*, 37 Oh. St. 649 (1882).

When election may be held — power of old companies.

The election of directors under this section is unauthorized until the agreement has been filed with the secretary of state. The consolidating companies continue for the purpose of holding and controlling all rights and franchises until the election is had. The divesting of the old and the investing of the new corporations are simultaneous.—*Mansfield, etc., R. R. Co. v. Brown*, 26 Oh. St. 223 (1875).

§ 3384. **PROPERTY OF THE OLD COMPANIES VESTS IN THE NEW.**—Upon the election of the first board of directors of the company created by the agreement of consolidation, all and singular the rights, privileges, and franchises of each of the companies to the agreement, and all the property, real, personal, and mixed, and debts due on account of subscriptions of stock, or other things in action, shall be deemed to be transferred to and vested in such new company, without further act or deed; all property, rights of way, and other interests, shall be as effectually the property of the new company as they were of the companies parties to the agreement; the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this state, shall not be deemed to revert or be impaired by reason of the consolidation; but all rights of creditors, and all liens upon the property of either of such companies, shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies, shall thenceforth attach to the new company, and be enforced against it to the same extent as if such debts, liabilities, and duties had been contracted by it. (April 10, 1856, 53 v. 143, § 5.)

Equitable lien for debts of old company.

On the consolidation of companies under this act the new company takes the property in its own right, subject only to the payment of the debts of the constituent companies. This liability is created by statute, and an equitable lien results as a consequence.—*Compton v. Railway Co.*, 45 Oh. St. 592 (1888). See *Continental Trust Co. v. Toledo, etc., R. R. Co.*, 86 Fed. 929 (1898).

Notice of equitable lien.

This equitable lien is a result of the proceedings under which the new company acquired its title to the property, and of it the creditors of the new company have in law the same notice they have of prior mortgages on the same property.—*Compton v. Railway Co.*, 45 Oh. St. 592 (1888).

Agreement to protect debts.

Where the consolidation agreement undertakes to protect certain unsecured debts of

Consolidation — Stock, Bonds, etc., §§ 3384a, 3384b.

one of the constituent companies an equitable lien is established on the property of the old company to the extent of the debt.—*Compton v. Railway Co.*, 45 Oh. St. 592 (1888). See *Wabash, etc., R. R. Co. v. Ham*, 114 U. S. 595 (1884); *Compton v. Jesup*, 68 Fed. 263 (1895); *Tysen v. Wabash Ry. Co.*, 15 Fed. 763 (1883).

Claim of dissenting stockholder.

A dissenting stockholder may prosecute his claim against the new company which takes the property of the old company charged with the payment of its debts.—*Railway Co. v. Garrett*, 50 Oh. St. 405, 417 (1893).

Property of old companies not held in trust.

A corporation formed by the consolidation of two or more companies holds its property acquired by such consolidation in its own right, and not in trust for the constituent companies, and such property cannot be reached by creditor's bill.—*Greene v. Woodland, etc., R. R. Co.*, 62 Oh. St. 67 (1900).

Liability of new company for torts.

The new consolidated company is liable for the torts of the original company.—*Cincinnati, etc., Ry. Co. v. Fullbright*, 7 W. L. B.

18, (1882). See *Indianapolis, etc., R. R. Co. v. Jones*, 29 Ind. 465 (1868).

Subscriptions to capital stock.

See *Mansfield, etc., R. R. Co. v. Brown*, 26 Oh. St. 223 (1875); *Mansfield, etc., R. R. Co. v. Stout*, 26 Oh. St. 241 (1875).

Execution against property for debt of old company.

See *State of Ohio v. Brimson*, 46 W. L. B. 275 (1901).

Statute of limitations.

An action to enforce a lien upon the property of a consolidated railroad company, based upon an amount alleged to be due on equipment bonds issued by a constituent company, is an action not upon a liability created by statute, nor upon a written agreement, but is solely for equitable relief, and the period of limitation of such actions is ten years from the date when the cause of action accrues, and the cause of action accrues as to each installment when the same matures; the right to enforce the lien as to subsequently accruing installments of interest, or as to the principal of the bonds, cannot be said to have accrued prior to the time when such installments and principal respectively matured.—*Adelbert College v. Toledo, etc., Ry. Co.*, 3 N. P. 15 (1894); s. c., 5 Dec. 14.

§ 3384a. CONSOLIDATED COMPANIES MAY DISPOSE OF STOCK AND BONDS ACQUIRED BY CONSOLIDATION.—That any consolidated railroad company formed by the consolidation of a railroad company or companies created by or existing under the laws of this state and any other state or states, with a railroad company or companies of this state or of any other state, may take, hold, pledge or otherwise dispose of under such terms and agreements as the board of directors of such consolidated railroad company may prescribe, the stock and bonds of any other company acquired upon consolidation or received by virtue of any purchase or lease or operating contract heretofore or hereafter made or executed, and may maintain and operate any railroad purchased under authority of law, and may lease or contract to operate any part or all of a railroad constructed or in the course of construction by another company of this state or of any other state, if the line of road covered by such lease or operating contract is connected with the line of road of such consolidated railroad company, upon such terms as may be agreed upon between the companies. (April 11, 1890, 87 v. 183.)

§ 3384b. CONSOLIDATED COMPANY MAY ISSUE ITS OWN STOCK IN LIEU OF PURCHASE MONEY; RIGHTS, FRANCHISES, ETC., OF RAILROAD ACQUIRED BY PURCHASE VESTED IN CONSOLIDATED COMPANY.—Whenever any consolidated railroad company described in the next preceding section of this act, is in possession of or operating in connection with or extension of its own railroad line or lines, any other railroads or railroad in this state or in any other state or states under any purchase, conveyance, lease, contract, or agreement, such consolidated railroad company may take a surrender or transfer of the whole or any part of the capital stock of the company conveying, leasing, or owning such railroad, from any one or more stockholder or stockholders, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon by the directors of the consolidated railroad com-

Consolidation — Principal Office; Action; Taxation, §§ 3385-3387.

pany; and whenever the whole of the said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state, under the common seal of the consolidated railroad company to whom such surrender or transfer shall have been made, the estate, property, rights, privileges, and franchises of the said company whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the said consolidated railroad company to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said consolidated railroad company to whom such surrender or transfer of the said stock shall have been made, and the two companies shall thenceforth be consolidated and be one company under the corporate name of such consolidated railroad company, without any other formalities or proceedings whatever; but nothing herein contained shall relieve the said consolidated company from paying the fee specified in paragraphs two (2) and three (3) of section 148a of the Revised Statutes, as amended February 12, 1889. The rights of any stockholder not so surrendering or transferring his stock, shall not be in any way affected hereby, nor shall existing liabilities or the rights of creditors of the company, where stock shall have been so surrendered or transferred be in any way affected or impaired by the provisions of this section. (April 11, 1890, 87 v. 183.)

Constitutionality.

This section, in requiring the consolidated company to pay a percentage fee on the capital stock acquired, is constitutional.—See Ashley v. Ryan, 153 U. S. 436; s. c., 8 O. F. D. 215; s. c., 49 Oh. St. 504 (1892).

§ 3385. **PRINCIPAL OFFICE TO BE ESTABLISHED; AS TO DIRECTORS AND GENERAL OFFICE.**—The new company shall as soon as convenient after the consolidation, establish a principal office at some point in this state on the line of its road, and may change the same at pleasure; but public notice of such establishment or change shall be given in some newspaper. But this section and the other laws of this state respecting the residence of directors of corporations and the keeping of a principal or general office and the records of corporations, shall not apply to consolidated railroad companies formed by the consolidation of a railroad company or companies created by or existing under the laws of this state and any other state or states, with a railroad company or companies of this state or of any other state; and the election for directors of such consolidated railroad companies may be held at the principal office of the company, whether located in this state, or in any other state under the laws of which the said consolidated railroad company may have been created; provided, however, that at least two of the directors of such consolidated railroad company shall be residents of this state, and that a general office of the company shall be maintained at some place within this state, of which notice shall be given as aforesaid. (April 11, 1890, 87 v. 184; April 10, 1856, 53 v. 143, § 6.)

See § 3311.

§ 3386. **ACTIONS AGAINST NEW COMPANY.**—Suits may be brought and maintained against the new company in the courts of this state, for all causes of action, in the same manner as against other companies. (April 10, 1856, 53 v. 143, § 7.)

§ 3387. **TAXATION OF ROAD PARTLY IN STATE.**—That portion of the road of such consolidated company in this state, and all its real and personal property, shall be listed for taxation and taxed in the same manner as the road and property of other railroad companies in this state; and to ascertain the proportion of the rolling machinery subject to taxation in this state, the officer listing the same shall ascertain the value of all the rolling machinery of the company, and return a sum bearing

Consolidation — Dissenting Stockholders, §§ 3388-3390.

such proportion to the value of the whole, as the length of the line of such road in this state bears to the length of the whole line. (April 10, 1856, 53 v. 143, § 8.)

See § 2744.

§ 3388. STOCKHOLDER REFUSING TO CONSOLIDATE TO BE PAID HIGHEST MARKET PRICE OR MUST ARBITRATE.— A stockholder who refuses to convert his stock into the stock of the consolidated company, shall be paid the highest market value of such stock at any time within two years next preceding the time of the making of such agreement for consolidation by the directors, if, previous to such consolidation, he so require; and if a stockholder so refusing to consolidate, and the board of directors of the company desiring to consolidate, can not agree as to the value of such stock, the parties may submit the question to arbitration, which arbitration shall be conducted in accordance with the law regulating arbitrations, so far as the same may be applicable, by three disinterested persons, to be appointed upon the motion of either of the parties by the judge of the probate court of the county in which the person owning the stock resides, or, in case he is a non-resident of any county through or into which the road passes, then in the county in which the principal office of the company is kept. If the person so refusing to convert his stock refuses to submit the question to arbitration, the probate judge, upon the application of either of the companies desiring to consolidate, shall appoint the arbitrators, who shall proceed to ascertain the value of the stock, the same as if the question had been submitted by the consent of both parties; and if the party owning the stock refuses to receive the amount awarded in any case, the company may deposit the same with the probate court of the county in which the arbitration is held, which deposit shall authorize the parties to proceed to consolidate without further payment to such stockholder. Provided, however, if the agreement of consolidation provide that the preferred stock of the consolidated companies, or either of them, shall become and be the preferred stock of the consolidated company upon the same terms and conditions as those upon which it was issued, then this section shall not apply thereto. (March 15, 1892, 89 v. 88; April 4, 1890, 87 v. 159; April 10, 1856, 53 v. 143, § 10.)

Arbitration.

For ruling on arbitration proceedings under act of April 4, 1890, 87 v. 159, see *Railway Co. v. Garrett*, 50 Oh. St. 405 (1893).

each stockholder and the company and other stockholders, and if a stockholder does not assent he must sell his shares as provided by statute.—*Burke v. Cleveland, etc., Ry. Co.*, 22 W. L. B. 11, 16 (1889).

Right of dissenting stockholder.

The right to consolidate on the vote of two-thirds of the stock is a part of the contract of

§ 3388a. LAST SECTION APPLIES ONLY TO DOMESTIC CORPORATIONS.— In all cases of consolidation provided for in section 3330 of the Revised Statutes, the provisions of the section hereby supplemented shall apply only to stockholders of companies created and organized under the laws of this state, and not to stockholders of any corporation organized or existing under the laws of any other state or states, it being the intention that the rights of stockholders of such companies shall be determined by the law of such other state or states. (March 15, 1892, 89 v. 88.)

§ 3390. NOTICE TO BE GIVEN OF APPLICATION FOR SUCH APPOINTMENT.— In all such cases of arbitration the party desiring the arbitration shall give the opposite party at least ten days' notice of his intention to apply to the judge for the appointment of arbitrators, which notice shall be served in the same manner as is provided for the service of a summons, and shall specify the time and place of the hearing of the application; and in cases of non-residents the notice shall be by publication, for four consecutive weeks, in some newspaper printed in the county. (April 10, 1856, 53 v. 143, § 11.)

Consolidation — Joint Ownership, etc., §§ 3391 3392-2.

§ 3391. EFFECT OF THE AGREEMENT OF CONSOLIDATION AS EVIDENCE.

— A copy of the agreement and act of consolidation, duly certified by the secretary of state, shall be received in the courts of this state as prima facie evidence of the existence of the several companies parties to the agreement, prior to and at the time of the execution of the agreement, of the consolidation of the companies, as specified in the agreement, that such consolidation was authorized by the laws of the several states within which the several companies were chartered, and into which the consolidated road extends, and of all and singular the facts, statements, and covenants set forth and recited in the agreement and act of consolidation, and in the certificates indorsed thereon. (February 19, 1858, 55 v. 8, § 1.)

§ 3392. IN ACTIONS AGAINST NEW COMPANY CERTAIN PROOF DIS-
PENSED WITH.— It shall not be necessary to produce or prove the charters of the companies parties to such consolidation, the laws of the several states under and by virtue of which such consolidation was effected, or the original articles of consolidation, in any suit brought to charge such consolidated company with any liability of either of the companies parties to the act of consolidation, any law or custom to the contrary notwithstanding. (February 19, 1858, 55 v. 8, § 2.)

§ 3392-1. TWO OR MORE COMPANIES OWNING A RAILROAD MAY MAKE
DIVISION OF INTERESTS AND DISPOSE OF SAME.— In case two or more railroad companies, being the owners in common of the whole or any part of a railroad situated within this state, and by reason of inequality in the amount of business done thereon by each company, require a different degree and extent of improvement and development of the same, it shall be lawful for such companies to enter into any arrangement that may be agreed upon between them for enlarging, improving, developing or increasing the facilities of such railroad or any part thereof; and in pursuance of such agreement, or otherwise, to make such division of the railroad and appurtenances so owned in common, and to execute and deliver each to the other, or to any other railroad company having authority to purchase the same, such deed or deeds of conveyance for the whole or any part of such railroad, as may be agreed upon between such companies; provided, nothing herein contained shall impair the lawful lien of any creditor upon the railroad which may be conveyed as aforesaid. (April 11, 1883, 80 v. 111.)

§ 3392-2. PROCEEDINGS WHEN SUCH COMPANIES CAN NOT AGREE
UPON DIVISION.— In case such companies shall be unable to agree upon an equitable plan for improving and developing, or for the division and sale of the railroad and appurtenances or any part thereof so owned in common, it shall be lawful for either company from time to time to file with the commissioner of railroads and telegraphs a statement, under the seal of such company, of the character and estimated cost of any addition to, or change in the nature of the road-bed, the right of way, main or side track or tracks, bridges, culverts, buildings, structures, fixtures, or appurtenances, or either or any part thereof, of said railroad, or part of railroad, desired by such company, and of its inability to agree with the other joint owner or owners in respect to the making of such additions or improvements. Upon the receipt of such statement the commissioner of railroads and telegraphs shall, within thirty days of the filing of such statement, appoint a time when the owners of such railroad or part of railroad, may be heard respecting the reasonableness and necessity of such proposed additions or improvements, and give due notice in writing of the time and place of such hearing to each of the owners aforesaid, and it shall be lawful for such commissioner to make such order in respect to the reasonableness or necessity of the whole or any part of such additions or improvements, as well as the manner in which the same shall be made, and the periods within which the same shall be paid for, as to

Joint Ownership — Reorganization, §§ 3392-3-3393.

him shall seem proper, and his decision in the matter shall be final. (April 11, 1883, 80 v. 111.)

§ 3392-3. THE COST OF ADDITIONS OR IMPROVEMENTS; HOW PAID.—

The cost of such additions or improvements shall in all cases, unless otherwise agreed between the joint owners, be paid by them in proportion to their ownership in the joint property, irrespective of the amount of traffic which each owner may then have passing over such railroad. If either owner shall fail or refuse to pay the share of such cost as may be due from it on the basis herein fixed, or within the period or periods which may be fixed by the commissioner of railroads and telegraphs, as aforesaid, suit may be entered and judgment taken against the party so in default, and the judgment so entered shall be a valid lien upon the interest of the party in default in said railroad or part of railroad owned jointly as aforesaid, and such interest may be sold at public sale as in other cases upon execution, and it shall be lawful for any railroad company having authority to own or operate a railroad in this state to purchase such interest at such sale, and to enjoy and exercise in respect to the interest so purchased, all the rights, privileges and franchises which were exercised or enjoyed by the company owning the same at the time of said sale. Provided, that the compulsory power of enforcing additions or improvements provided for in this and the preceding section shall not extend to local or terminal depot or shop grounds or facilities, the joint use of which shall not be needed by all the joint owners. (April 11, 1883, 80 v. 111.)

Cited in *Stewart v. Railway Co.*, 53 Oh. St. 151 (1895).

§ 3392-4. PARTITION NOT TO BE COMPULSORY.— Nothing contained in this act shall be held to imply or confer a right or power of compulsory partition of the joint property against the will of either of the joint owners; but the same may be sold upon execution as herein provided. (April 11, 1883, 80 v. 111.)

§ 3392-5. COMPANY SELLING INTEREST IN ROAD MAY PURCHASE OR CONDEMN LAND ALONG CHARTERED ROUTE.— In case either company shall, pursuant to the agreement or to the proceedings aforesaid, sell or convey, or suffer to be sold or conveyed, its interest in the railroad or part thereof so owned in common, it shall be lawful for such company to acquire by purchase or condemnation, such land as may be needed to enable it to construct and maintain and operate a railroad along and adjacent to such portion of its chartered route as may have been sold or conveyed aforesaid, and such company shall have and enjoy all rights and franchises in respect to such newly acquired railroad as were held and enjoyed in respect to said railroad sold or conveyed as aforesaid. (April 11, 1883, 80 v. 111.)

§ 3392-6. TO WHICH COMPANIES THIS ACT APPLIES.— This act shall apply in case one or more companies, owners in common as aforesaid, shall have leased its interest in the portion of railroad so owned in common, and the lessee of such interest may unite with the lessor in the agreement provided for in section one (§ 3392-1) of this act, or may with such lessor and owner be compelled to make or pay for the addition and improvements contemplated in this act. (April 11, 1883, 80 v. 111.)

§ 3393. WHEN PROCEEDINGS FOR REORGANIZATION MAY BE HAD.— When proceedings are pending in any court for the sale of the road of a company, under a mortgage or deed of trust, and two-thirds in interest of the creditors and two-thirds in interest of the stockholders of the company agree, in writing, upon a plan for the readjustment or capitalization of the debt and stock of the company, the court shall render judgment against the company for the amount due and in arrear

Reorganization — Meetings, etc., for, §§ 3394, 3395.

upon such securities, which judgment shall, from its rendition, become a lien on all the property embraced in such securities, and upon all the franchises and powers of the company, including its franchise to be and act as a corporation, conferred by the charter and the amendments to the charter of the company; and upon a sale had under such judgment, and a purchase at such sale by trustees, on behalf of the parties to such agreement, appointed by the agreement, all the property so bound by the judgment, including said franchises, shall vest in such trustees; but every such agreement shall provide that the unsecured debts of the company, incurred for repairs or running expenses, shall be paid in money, or bonds of the reorganized company of the highest class issued, as hereinafter provided; and a copy of the agreement shall be filed in such court, before the rendition of the judgment. (April 11, 1861, 58 v. 70, § 1.)

Act of 1863 — constitutionality.

See *Mather v. Cincinnati, etc., Ry. Co.*, 3 O. C. C. 284 (1888); s. c., 2 C. D. 161.

Construction of agreement.

See *Hatty v. Painesville, etc., Ry. Co.*, 1 O. C. C. 426 (1886); s. c., 1 C. D. 238.

§ 3394. MEETING OF CREDITORS, AND PROCEEDINGS THEREAT.—The trustees shall, as soon as practicable after the sale, call a meeting of the parties to the agreement by a notice signed by a majority of the trustees, or of their survivors, and published not less than once a week, for four consecutive weeks, in a newspaper printed in the cities of New York and Philadelphia, and in a newspaper printed in each county on the line of the railroad, specifying the day, place, and object of such meeting — the place to be on the line of the road; at such meeting each of the parties to the agreement shall be entitled to vote according to the provisions thereof, but not exceeding one vote for every fifty dollars of the par value of the debt or stock of such party, according to a list of voters and of their respective interests, which shall be prepared by the majority of the trustees, who are empowered to act as judges of the election; such meeting, by a majority in interest of the persons present, in person or by proxy, shall be competent to retain or change the name of the company, to decide, for the time being, the amount of its capital, and the number of shares into which such capital shall be divided, to fix the number of directors, and their term of office, to elect such directors, a majority of whom shall be residents of the state or states in which such railroad is situate, and to do all things necessary or proper to reorganize the company; but any creditor shall be entitled to become a party to the agreement aforesaid, either at or any time before the meeting in this section provided for, and any stockholder shall be entitled to become a party to such agreement at any time within one year after such meeting. (April 11, 1861, 58 v. 70, § 2.)

When bondholder may vote.

Where a railroad corporation reorganizes under the act of April 11, 1861, and, in the agreement therefor, it is stipulated that certain bonds of the original company shall be assumed by the new company, and the holder thereof entitled to vote at all meetings of stockholders, upon conditions specified, which he performs, the new company becomes liable to pay the bonds, and the holders thereof entitled to vote, without further action on the

part of the new company.—*State v. McDaniel*, 22 Oh. St. 354 (1872).

Directors.

In a corporation reorganized under this act, it is not necessary that the directors should be stockholders. The statute only requires them to be residents of the state, and in the absence of a statute requiring it, the discretion of the stockholders in electing directors is not limited to stockholders.—*State v. McDaniel*, 22 Oh. St. 354 (1872).

§ 3395. WHAT MUST BE CERTIFIED TO THE SECRETARY OF STATE.—

A certificate, under the common seal of the company, specifying its name, and the railroad which it is to hold, maintain, and operate, shall be filed in the office of the secretary of state; and a copy of such certificate duly certified shall, in all courts and places, be evidence of a compliance with all the conditions and provisions of the two

Reorganization — Powers of New Company, §§ 3396, 3397.

preceding sections, and of the due reorganization and existence of the company. (April 11, 1861, 58 v. 70, § 3.)

§ 3396. **THE PROPERTY AND POWERS OF THE NEW COMPANY.**— Upon such reorganization, and a conveyance by the trustees, or of such of them as shall be vested with the legal title, or their survivors, all the railroad and other property and franchises and things purchased as aforesaid, and all the franchises, powers, faculties, privileges, and immunities which were possessed or enjoyed by the original company, or by any company with which it had been consolidated, shall pass to and be vested in the company as reorganized; and the same, and all property and things which the reorganized company shall thereafter acquire, except as hereinafter provided, shall be taken, held, and disposed of for the use and benefit of the creditors and stockholders of the company, who shall have become such upon and after such reorganization, according to their respective rights, but subject to the powers of the company, and shall be in no wise chargeable in respect to any debt, liability, or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for, but all property of the original company not embraced in the sale shall, upon the reorganization, be vested in the company as reorganized, in trust for all parties interested therein as creditors, stockholders, or otherwise. (April 11, 1861, 58 v. 70, § 4.)

§ 3397. **FURTHER POWERS OF THE NEW COMPANY.**— Such company shall likewise have power, at any time within six months after the organization, to assume such debts or liabilities of the original company, and to make such adjustments or exchanges with any bondholder of the original company, and, within one year, with any stockholder, as it may deem expedient, and may use for such purpose any bonds or stock which it may be authorized to issue or create; and it may make and issue such bonds, payable at such times and places, and bearing such rates of interest not exceeding six per centum per annum, as it may deem expedient, and may secure the payment of any bonds which it may issue or assume to pay, by mortgages or deeds of trust of its railroad, or any other of its property, real or personal, and may include therein with its road all its cars and other rolling-stock and equipments, and any machinery, tools, implements, fuel, materials, and all other things then held or thereafter acquired for constructing, operating, or repairing the road, or for repairing or replacing any of its equipments or appurtenances, as part and parcel of the road, and as constituting with the road one property, and may include in such mortgages or deeds of trust all franchises held by the company, and connected with or related to the road, and all other corporate franchises of the company, all which franchises, including the franchise to be a corporation, in case of sale by virtue of any such mortgage or deed of trust, or of any judgment specified in the next section, are hereby declared to pass to the purchasers, so as to enable them to reorganize the company in the manner hereinbefore provided; and such company may issue capital stock to such aggregate amount as it may deem proper, not exceeding any limit which may be fixed by agreement with the trustees purchasing as aforesaid, and may establish preferences in respect to dividends, in favor of any class of the stock, in such order and manner as it may deem expedient, not exceeding such limit as may be fixed by agreement as aforesaid; and may, if authorized by the agreement, confer on holders of any bonds which it may issue or assume to pay, such rights to vote at all meetings of stockholders, not exceeding one vote for every fifty dollars of the par amount of the bonds, as may have been provided for in the agreement, which rights, when once fixed, shall attach to and pass with such bonds, under such regulations as the by-laws may prescribe, to the successive holders thereof, but shall not subject the holder to any assessment by the company, or to any liability for its debts, or entitle any holder to dividends. (April 11, 1861, 58 v. 70, § 5.)

Stocks and Securities — Liens for Labor, §§ 3397a-3398a.

§ 3397a. **ISSUE OF STOCK OR SECURITIES BY COMPANIES ORGANIZED OR REORGANIZED UNDER AGREEMENTS; TERMS OF SUCH AGREEMENTS TO APPEAR ON STOCK AND SECURITIES ISSUED; RIGHTS OF HOLDERS.**—In all cases of railroad companies heretofore or hereafter organized or reorganized under the laws of Ohio, wherein the organization or reorganization agreement provides and stipulates that any class of creditors, bondholders or stockholders of the original company, shall in any wise be restricted or limited, in participation in profits or dividends, or in respect to liens or the right to vote as the holders of stock or securities in said reorganized company, the said reorganized company, its directors and officers, shall issue the certificates of stock or securities into which the original stock, securities or debt may be convertible, bearing upon the face of each, plainly and distinctly set forth, such restrictions or limitations, so that purchasers may be advised of the terms thereof, and all holders of stock or securities created under such reorganization agreements, shall hereafter have only such restricted or limited rights, liens, participation in profits, dividends and right to vote thereon, as may be in such agreements, certificate of stock or securities provided and set forth. (March 19, 1887, 84 v. 142.)

§ 3398. **LIEN OF MORTGAGES, ETC.**—The lien of the mortgages and deeds of trust authorized to be made by the preceding section shall be postponed to the lien of judgments recovered against the company, after its reorganization, for labor thereafter performed for it, or for materials or supplies thereafter furnished to it, or for damages, losses, or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts or liability as a common carrier thereafter made or incurred. (April 11, 1861, 58 v. 70, § 6.)

Cited in *Stewart v. Railway Co.*, 53 Oh St. 151, 172 (1895).

Applicable to foreign companies.

See *King v. Thompson*, 46 W. L. B. 210 (1901).

Construction.

This section should be fairly construed (not strictly) so as to effect the purpose for which it was enacted.—*Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co.*, 21 W. L. B. 275 (1889).

Constitutionality.

See *King v. Thompson*, 46 W. L. B. 210 (1901).

Burden of proof.

Where the holder of a judgment for materials and supplies claims a priority over mortgages existing before the supplies were furnished, the burden of proof is on such claimant to show that he has obtained a judg-

ment and that the cause of action upon which it was obtained was such as to come within the terms of this section.—*Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co.*, 21 W. L. B. 275 (1889).

Parties to action for judgment.

In an original action to obtain a judgment for the value or price of the supplies furnished, other lienholders are not necessary or proper parties. The question of priority can be properly determined in a subsequent action to marshal liens.—*Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co.*, 21 W. L. B. 275 (1889).

Assignment of claims.

Claims for supplies furnished under this section may be assigned and judgment thereon taken by the assignee, who thereupon obtains all the rights of the original claimant.—*Farmers' Loan, etc., Co. v. Cincinnati, etc., R. R. Co.*, 21 W. L. B. 275 (1889).

§ 3398a. **LIEN FOR LABOR PERFORMED FOR RAILROAD COMPANY.**—That in all actions now pending or hereafter commenced in any of the courts of this state, either as original actions, or as proceedings in error against any railroad corporation now existing or hereafter created, or any foreign railroad company operating and carrying on business in this state, when such action is for the purpose of recovering judgment against said corporation, for labor performed for it, or for materials or supplies furnished to it, or for damages or losses, or injuries suffered or sustained by the misconduct of its agents, or in any action founded on its contracts or liabilities as a common carrier made or incurred, which action, by virtue of statutory enact-

 Liens for Labor, etc., §§ 3398b-3399.

ment, or upon principles of equity, would, when reduced to judgment, become a lien upon the property of such corporation prior in law or equity to the lien of any mortgage or deed of trust authorized to be made by any of the statutes of this state, such judgment shall be and remain a prior lien upon such railroad property, notwithstanding any sale or conveyance of such property by virtue of any judgment or decree of foreclosure founded upon a breach of the terms and conditions of any such mortgage or deed of trust. (February 17, 1882, 79 v. 11.)

See § 3207 et seq., and § 3231-1 et seq.

§ 3398b. **HOW SUCH LIEN ENFORCED.**—That the party prosecuting such action in order to avail himself of the provisions of section three thousand three hundred and ninety-eight (a) of this act, shall, before the day fixed for the sale of the property of any such railroad under any judgment or decree of foreclosure and sale, file with the clerk of the court wherein such judgment or decree of foreclosure and sale was rendered, a notice in writing, setting forth the title of his action, the court wherein pending, the amount of his claim, the date from which he claims interest thereon, the probable amount of costs, and that he claims that the judgment by him sought to be recovered would, when obtained, become a lien prior in law or equity to the lien of the judgment or decree of foreclosure and sale. That he shall also before the day of sale, or at the time thereof, serve a certified copy of such notice upon the officer or other person making such sale, who shall, before offering said property for sale, read such notice publicly at the time and place of sale, and shall, with his return of such sale, return such certified copy of notice with the endorsement of his proceedings thereunder upon the same, to the court. (February 17, 1882, 79 v. 11.)

§ 3398c. **IN CASE OF SALE, COURT TO RETAIN AMOUNT OF LIEN.**—That the court, on the return of the officer or other person making such sale, before confirming the same and ordering distribution of the funds arising therefrom, shall retain in its custody or under its control, a sufficiency of such proceeds applicable to distribution to the claimants under the liens of the mortgage or deed of trust, to satisfy any judgment which may be recovered in the action provided for in section three thousand three hundred and ninety-eight (a) of this act, when ended and determined. (February 17, 1882, 79 v. 11.)

§ 3398d. **WHAT TO BE DONE IN CASE JUDGMENT RECOVERED.**—That within sixty days after the determination of the action referred to in section three thousand three hundred and ninety-eight (a), the party claiming such priority of lien, if he shall have recovered judgment against said railroad company, shall file his answer and cross-petition in the action pending in the court holding the fund as provided in section three thousand three hundred and ninety-eight (a) setting forth his legal and equitable claim thereto, and such court shall make the proper orders necessary to the determination of the questions of priorities and distribution of the retained fund, as in section three thousand three hundred and ninety-eight (c) provided. (February 17, 1882, 79 v. 11.)

§ 3399. **THESE PROVISIONS APPLICABLE TO OTHER CORPORATIONS — FOREIGN CORPORATIONS.**—The provisions of the seven preceding and the next succeeding sections shall extend and apply to companies whose railroads are partly within and partly without this state; a company of this state, possessing such a railroad, shall have capacity to exercise without this state all its powers, privileges, faculties, and franchises; a corporation of another state possessing a railroad which is partly in such other state and partly within this state, may exercise and enjoy within this state all its powers, privileges, faculties, and franchises, for the purpose of such railroad and its business, not inconsistent with the laws of this state; and all

Sale and Reorganization under Mortgage, etc., §§ 3400-3403.

mortgages and deeds of trust made by such corporation upon its railroad, equipments, or other property within this state, shall operate in the same manner and with the like effect as hereinbefore provided with respect to companies so reorganized; but such part of the railroad as is within this state shall be subject to taxation, and to all regulations of law, in the same manner as railroads of this state in like cases, and the corporation owning the same shall be subject to all duties in respect thereto imposed by law, and may sue and be sued in all cases and in the same manner as a company of this state might sue or be sued. (April 11, 1861, 58 v. 70, § 7.)

Power to condemn land.

There is not only no law of Ohio prohibiting the ownership and use of railroads in the state by foreign corporations, and no public policy of the state to be contravened thereby, but there is abundant legislation directly to the contrary. Where the act incorporating a foreign corporation gives it the power to condemn and appropriate private property, if its road is partly in this state and partly in a foreign state, it may exercise and enjoy within this state all its powers, privileges, faculties, and franchises, for the purpose of said railroad and its business not inconsistent with

the laws of this state. This section clearly gives the right to condemn and appropriate private property in Ohio to all railroad corporations of other states, which have the power of condemnation and appropriation given them in their charters of incorporation, where their roads lie partly within this state. — *State v. Sherman*, 22 Oh. St. 411, 431 (1872).

Foreign corporation does not become a domestic corporation by leasing road.

Baltimore, etc., R. R. Co. v. Cary, 28 Oh. St. 208 (1876); *Railway Co. v. Stringer*, 32 Oh. St. 468 (1877).

§ 3400. **THE PROPERTY MORTGAGED MAY BE SOLD WITHOUT APPRAISEMENT.**—Railroads, and other property mortgaged therewith by such company may, if the court deems it expedient, be sold without appraisement, at judicial sales under judgments upon such mortgage; but in such case, in order to prevent sacrifices, and protect the interests of all concerned, the court shall fix a minimum sum below which no such sale shall be made; and, in order to fix that amount, the court may if it deems it expedient to do so, refer the subject to a master, with instructions to take testimony, and report the sum. (April 11, 1861, 58 v. 70, § 8.)

§ 3401. **WHEN CREDITORS OF COMPANIES MAY AGREE ON CAPITALIZATION.**—When judicial proceedings are pending in any court sitting in this state for the sale of any railroad, and the same is in the hands of a receiver appointed by such court, two-thirds in interest of each class of mortgagees, or holders of the bonds issued under a mortgage, and two-thirds in interest of all other classes of creditors of such company, and the owners of two-thirds of the shares of the stock thereof, may agree in writing upon a plan for the adjustment of such indebtedness, by capitalization or otherwise. (April 7, 1863, 60 v. 55, § 1.)

Constitutionality.

In so far as this section applies to debts created before its passage, it is unconstitu-

tional.—*Mather v. Cincinnati Ry. Co.*, 3 O. C. C. 284 (1888); s. c., 2 C. D. 161.

§ 3402. **SECRETARY OF STATE TO PUBLISH NOTICE OF THE AGREEMENT.**—When such agreement is made, and filed in the office of the secretary of state, he shall cause public notice thereof to be given in a newspaper of general circulation published in each of the cities of Columbus, Cincinnati, and Cleveland, and also in a newspaper of general circulation published in each of the counties through or in which the road is located, which publication shall be made immediately after the agreement is filed, and be continued for six consecutive weeks, and the cost thereof shall be paid by the company. (April 7, 1863, 60 v. 55, § 2.)

§ 3403. **OTHER CREDITORS MAY SIGN THE AGREEMENT.**—A duplicate of the agreement shall be kept at the principal office of the company; and all persons in interest, not parties thereto, shall be at liberty, for the period of four months from and after the date of the first publication, to appear and become a party to such

Sale and Reorganization under Mortgage, etc., §§ 3404-3408.

agreement, either in person or by proxy, by signing the same, and thereby secure the benefits thereof. (April 7, 1863, 60 v. 55, § 3.)

§ 3404. **RIGHT OF THOSE WHO DO NOT SIGN.**—All persons in interest who fail to become parties to the agreement within the time aforesaid shall thereafter be entitled to the same rights, interest, and estate, remedy, liens, and action, and none other which parties in interest of like class and amount who signed the agreement obtained by, through, and under the agreement; but if any person in interest neglect and fail for the period of six years after the publication of the notice mentioned in section three thousand four hundred and two, to apply at the principal office of the company, either in person or by proxy, to become a party in interest in the agreement, such person, unless an infant, a married woman, or insane shall be barred of all interest, claim, right, or action under the agreement, or otherwise; and in case of such disability the rights above enumerated shall be extended for the period of two years after the termination of the disability. (April 7, 1863, 60 v. 55, § 4.)

§ 3405. **WHEN THE COURT TO MAKE ORDER TOUCHING COSTS.**—When the agreement is made, filed, and notice thereof given, and proof thereof made, or offered to be made, in the court in which the proceedings are pending the court shall dismiss the proceedings; but the court may make such order or decree touching the costs and expenses thereof as it may deem just and proper. (April 7, 1863, 60 v. 55, § 5.)

§ 3406. **AGREEMENT MAY BE BETWEEN EACH INTEREST AND THE COMPANY.**—The agreement shall not be required to be between the several interests hereinbefore specified, but may be between each interest separately, and the railroad company. (April 7, 1863, 60 v. 55, § 7.)

§ 3407. **WHEN THE ROAD IS USED BY TWO COMPANIES.**—If the railroad involved in such judicial proceedings is used, in whole or in part, by such company in common with any other railroad company, on the same track, between any points on the line common to both, and within the limits of the termini established by the charters of both companies, the company owning the railroad, if the same can be done without impairing the usefulness thereof to it, may lease for a period of years, for an annual rent, or sell for a fixed sum, to the company to which the line of road, in whole or in part, is common, an undivided interest in the same, upon such terms and conditions as may be agreed upon; and such lease or sale shall be reported to and approved by the court, and when so made and approved, the lessee or vendee thereof shall hold the same free from any previous lien which had been put thereon. (April 7, 1863, 60 v. 55, § 8.)

Partition.

Where by the purchase of an undivided interest under this section, a tenancy in common becomes established, partition cannot be

compelled by either party under the statutes in relation to partition or in equity.—*Railway Co. v. Railroad Co.*, 38 Oh. St. 614 (1883).

§ 3408. **WHEN STOCK OR BONDS ARE HELD IN A FIDUCIARY CAPACITY.**—When any portion of the stock or bonds of a company is held by the state, or a county, township, city, village, or other municipal corporation, or by an executor, administrator, or a guardian, or otherwise in a fiduciary capacity, the governor, county commissioners, township trustees, council, or other authority of the municipal corporation, or person holding in a fiduciary capacity, may become parties to any agreement for the reorganization of such company, and may control, exchange, or manage such stock or bonds according to the terms of the agreement, and take and receive new stock or bonds to be issued in lieu of the original stock or bonds, which

Sale of Road-bed, Regulation as to, §§ 3409 3412.

shall be held on the same terms, and subject to all liens, which attached to the original stock or bonds. (April 11, 1861, 58 v. 70, § 9; April 7, 1863, 60 v. 55, § 6.)

§ 3409. **WHEN A COMPANY MAY SELL ITS ROAD-BED, ETC.**—A company, owning in whole or in part any road-bed and right of way for a railroad within this state, including those acquired by purchase at judicial sale, which, from lack of means, or other cause, is unable to complete the construction of its proposed line of road thereon, may sell, assign, and transfer the same, or any part thereof, to any other company incorporated under the laws of this state, with authority to construct and operate a railroad over the same route, or any part thereof, which transfer shall include all work done upon such line of road, together with all material furnished therefor, not exempted by the terms of the grant, with all right(s), privileges, and easements, as fully as the same are or may be possessed by the company making the same, and shall to the same extent, vest the title of and the right to enjoy the same in such grantee. (May 5, 1868, 65 v. 142, § 1; May 7, 1869, 66 v. 334, §§ 1, 2.)

No power to sell stock subscriptions.

This section confers no authority on railway companies to sell subscriptions to their stock along with their roads when they find it impossible to complete the same, from lack of means. And if it were attempted to transfer a conditional subscription to the company purchasing the road, such company could not by performing the condition precedent fix the liability of the subscriber.—*Railroad Co. v. Hinsdale*, 45 Oh. St. 556 (1888).

Subscriber not released by sale of road.

This section is a part of every subscription

to stock, and a sale by the company of a part of its road under this section does not release the subscriber except when, and as, provision is made therefor by statute.—*Armstrong v. Karshner*, 47 Oh. St. 276 (1890).

Rights of conditional subscriber.

See *Armstrong v. Karshner*, 47 Oh. St. 276, 298 (1890).

Power of railroad company to sell property.

See *Donner v. Dayton, etc., R. R. Co.*, 1 C. S. C. 136 (1871).

§ 3410. **THE TRANSFER TO BE BY DEED.**—Such transfer shall be by deed, duly executed by the president of the company grantor, in the manner provided by law for the conveyance of real estate, and shall be for such consideration as the parties may agree upon. (May 5, 1868, 65 v. 142, § 2.)

§ 3411. **TWO-THIRDS IN INTEREST OF STOCKHOLDERS MUST CONSENT.**—Before any such transfer shall be made, the president of the company shall call a meeting of the stockholders of the company, at some convenient point on the line, or at a terminus of the road, of which he shall cause at least thirty days' notice to be published, in some newspaper printed or in general circulation in each county in which such road-bed and right of way are situate; such meeting may, by a concurrent vote of two-thirds in interest of the stock represented thereat by the owners thereof, in person, or by proxy, declare by resolution the inability of such company to complete its line of road, prescribe the terms of the proposed transfer of its road-bed and right of way, and direct the president of the company to execute the deed; and all such proceedings, resolutions, and directions shall be duly recorded in the proper record book of the company, and a copy thereof delivered to the grantee, and they shall also be recited in the deed. (May 5, 1868, 65 v. 142, § 3.)

§ 3412. **WHAT INTEREST DISSENTING STOCKHOLDER MAY RETAIN.**—No transfer shall be made against the dissent of any stockholder, expressly declared and filed in writing at such meeting, without the guaranty of the company grantee that it will cause to be issued to him certificates of its capital stock, equal in amount

Road-bed, etc.; Sale and Forfeiture of — Receiver, Action by, etc., §§ 3413-3415.

to his pro rata interest as a stockholder of the grantor, in the amount for which the property is sold. (May 5, 1868, 65 v. 142, § 4.)

Rights of conditional subscribers.

Conditional subscribers to capital stock do not acquire any rights under this section until the happening of the contingency upon which

payments on the subscription are made dependent.—See *Railroad Co. v. Hinsdale*, 45 Oh. St. 573 (1888); *Armstrong v. Karshner*, 47 Oh. St. 276, 299 (1890); R. S. § 3298.

§ 3413. **TITLE TO PROPERTY VESTS IN GRANTEE.**—The title to the property so transferred, together with the right to use, occupy, and enjoy the property, for any and all purposes proper for the construction, maintenance, and operation of a railroad thereon, shall pass to and vest in the company grantee, by the execution of the deed, to the same extent as the granting company might or could use, occupy, and enjoy the same. (May 5, 1868, 65 v. 142, § 5; May 3, 1873, 70 v. 245, § 1.)

§ 3414. **CERTAIN RIGHTS OF WAY FORFEITED.**—Where, upon an unfinished road, a right of way, or any part thereof, remains for ten years unused for railroad purposes, it shall be held forfeited, and shall revert to the owner of the land, unless at least twenty miles of the road have been completed by the company during that period, or unless an average of one thousand dollars per mile has been expended for construction before the expiration of said period of ten years. (May 5, 1868, 65 v. 142, § 6; April 22, 1898, 93 v. 207.)

Abandonment of easement.

See § 3281, notes.

§ 3415. **MAY SUE AND BE SUED WITHOUT LEAVE OF COURT.**—When a line of railroad, the whole or any part of which lies within the limits of this state, has been placed, by order of court, in the hands of a receiver, who has taken charge of and is operating the same for the purpose of carrying passengers and freight, and doing such other things as ordinarily belong to the running and management of railroads, such receiver may, in his official capacity, sue or be sued in the courts of this state without leave previously granted; provided, however, that no person shall act as such receiver unless he be a resident citizen of this state. (March 12, 1872, 69 v. 31, § 1.)

Suits against receivers, effect of section.

This section authorizes suits to be brought against the receiver of a railroad, and the same prosecuted to final judgment without leave of court; in other words, such suits stand upon the same footing and entitle those bringing them to the same rights and privileges as if leave had been granted, and no more. But this section does not authorize a levy or sale of property in possession of the receiver without leave of court.—*Croy v. Marshall*, 3 O. C. C. 489 (1888); s. e., 2 C. D. 280.

Ditch proceedings.

A receiver of a railroad company is a competent party plaintiff in a suit to restrain ditch proceedings against the company, commenced and prosecuted after his appointment as such receiver.—*Caldwell v. Trustees*, 2 O. C. C. 10 (1886); s. e., 1 C. D. 332.

Property wrongfully in hands of receiver.

If a creditor claims that property is improperly in the hands of a receiver, he must apply to the court appointing the receiver to

release the same so he may levy upon it.—*Croy v. Marshall*, 3 O. C. C. 489 (1888); s. e., 2 C. D. 280.

Judgments against companies in receiver's hands.

Where a plaintiff in an action against a railroad company, whose property is then in the hands of a receiver (appointed by the same court) to which action such receiver is not a party, recovers against the company a money judgment, the same is not void or invalid on the ground that the court had no jurisdiction. Such judgment is valid as against the company, and operates as a lien on its lands, and may be enforced after the discharge of the receiver.—*Mather v. Cincinnati, etc., Ry. Co.*, 3 O. C. C. 284 (1888); s. e., 2 C. D. 161.

Effect of section on U. S. courts.

This section cannot affect the power or authority of a federal court to pass on a motion for leave to sue a receiver appointed by it.—*Hayes v. Columbus, etc., Ry. Co.*, 34 W. L. B. 2 (1895).

Receiver, Regulations as to — Purchaser of Roads, §§ 3416-3419.

Liability of receiver for negligence.

See *Meara v. Receivers*, 20 Oh. St. 137 (1870); *Potter v. Bunnell*, 20 Oh. St. 150 (1870).

Powers of nonresident receivers of Ohio roads.

See *Caldwell v. Pittsburg, etc., R. R. Co.*, 33 W. L. B. 134 (1894).

Powers of foreign receivers — right to sue in Ohio.

See *Bank v. McLeod*, 38 Oh. St. 174 (1882).

Section cited.

See *Cleveland, etc., R. R. Co. v. Orme*, 1 O. C. C. 511 (1885); s. c., 1 C. D. 285.

Receiver not agent of company.

See *Consolidated Coal Co. v. Cincinnati, etc., R. R. Co.*, 10 W. L. B. 42 (1883).

Collection of taxes from receiver.

See *Treasurer v. Dale*, 60 Oh. St. 180 (1899).

Appointment of nonresidents.

See *Bayne v. Brewer Pottery Co.*, 82 Fed. 390 (1897). See § 3218.

§ 3416. **WHERE ACTION MAY BE BROUGHT, AND SERVICE.**— Actions may be brought against the receiver of a railroad in any county through or into which the road is constructed, and service of summons may be had upon the receiver, or upon the superintendent of the road, or upon any ticket or freight agent who is in the employment of or acting for the receiver; but no service made upon the ticket or freight agent shall be valid, unless the office or place of business of such agent is in the county where suit is brought. (March 12, 1872, 69 v. 31, § 2.)

Section cited.

See *Railroad Co. v. Orme*, 1 O. C. C. 513 (1885); s. c., 1 C. D. 285.

Service upon receivers.

See §§ 4988, 4991, 5044a.

§ 3417. **APPLICATION OF FUNDS, AND LIEN THEREON.**— The earnings of a railroad in the hands of a receiver, and all other money which comes into his hands as such receiver, shall be applied first to pay costs and expenses of the suit in which he was appointed, and the expenses of operating and managing the road, including all materials and supplies procured by him therefor, and liabilities incurred by him in such operation and management; and all judgments recovered against the receiver of a railroad for injuries to person or property, or for wages of employes or work done or materials furnished while he is operating or managing the road, shall be a lien on the funds in his hands as receiver, but shall affect him only in his trust capacity, and not individually. (March 12, 1872, 69 v. 31, § 3.)

Judgments against receivers.

Satisfaction on a judgment rendered against a receiver in an action for the recovery of damage for personal injuries can only be obtained out of the fund in his hands, as may be directed by the court appointing him.— *Meara v. Receivers*, 20 Oh. St. 137 (1870).

Rights of state — taxes.

The state is not included in this section, but the superiority of its claim for taxes is not thereby affected.— *Treasurer v. Dale*, 60 Oh. St. 180 (1899).

§ 3418. **WHERE RECEIVER MUST DEPOSIT MONEY.**— When the line of (a) railroad operated by a receiver lies wholly within this state, all money which comes into the hands of the receiver, whether arising from operating the road or otherwise, shall be kept and deposited in such place within this state as the court may direct, until properly disbursed; but if any portion of the road lies in another state, the receiver shall be required to deposit in this state at least such share of the funds in his hands as is proportioned to the value of the property of the company within this state. (March 12, 1872, 69 v. 31, § 4.)

§ 3419. **HOW PURCHASER OF RAILROAD MAY ACQUIRE FRANCHISE.**— The purchaser of a railroad, situate wholly or partly within this state, which has been or may hereafter be sold pursuant to judicial proceedings, may acquire the franchise to be a corporation originally vested in the company which held the road prior to such sale, by grant of such company, under such terms and conditions as may be agreed upon by the directors of the company, with the consent of the stockholders

Judicial Sale, etc., §§ 3420-3422.

owning two-thirds of the stock; which grant shall be in the same form as is required by law to convey real estate, and shall pass such franchise to the persons or company becoming the owner, by purchase as aforesaid, of such railroad; but no such grant shall be made unless provision be made for granting to the stockholders in the original company stock in the reorganized company, upon equal terms with the stockholders thereof, and as shall be acceptable to the directors making such grant. (April 13, 1865, 62 v. 169, § 1.)

New charter granted.

The effect of a transfer under this section is a surrender or abandonment of the old charter by the corporators, and a grant de novo of a similar charter to the so-called transferees or purchasers.—Ohio v. Sherman, 22 Oh. St. 411, 428 (1872).

Constitutionality.

This section is a general law within the meaning of article 1, section 2 of the constitution.—Ohio v. Sherman, 22 Oh. St. 411 (1872).

Repeals and amendments of charters.

Where a special charter, not subject to repeal or amendment, is transferred under this section, the new charter granted by implication, being granted under the present constitution, would be subject to alteration and repeal.—Ohio v. Sherman, 22 Oh. St. 411 (1872).

Stockholder's liability.

Where a special charter, providing for no double liability of stockholders according to the present constitution, is transferred, the

transferees do not become a corporation or do not acquire the charter so attempted to be transferred for the reason that the legislature has no power to create a corporation without provisions for at least double liability of stockholders, and the company accepting a transfer under this section has no power to bind its stockholders to double liability by the act of acceptance.—Ohio v. Sherman, 22 Oh. St. 411 (1872).

Legality of corporation, estoppel.

In an action brought to determine the priority of liens on, and for the sale of, a railroad, neither lienholders nor general creditors can question the legality of the incorporation of the railway company, or the validity of mortgages of such company upon the ground of such illegality.—Hattry v. Painesville, etc., Ry. Co., 1 O. C. C. 426 (1886); s. c., 1 C. D. 238.

Charter cannot be sold in absence of statute.

See Atkinson v. Marietta, etc., R. R. Co., 15 Oh. St. 21 (1864).

§ 3420. **CERTAIN ROADS MAY BE SOLD AT JUDICIAL SALE.**—The real and personal property, road-bed, right of way, fixtures, and franchises of a company in this state which has not completed, nor conveyed by deed of trust, or mortgage, any part of its road, and which is insolvent, and whose property is in the hands of a receiver appointed by a court of competent jurisdiction, may be sold at judicial sale; and the title thereto, with all the rights, liberties, faculties, and franchises, shall pass by such sale, and vest in the purchaser thereof, as fully as the same had been possessed, exercised, and enjoyed by such company. (May 14, 1868, 65 v. 192, § 1.)

§ 3421. **THE RECEIVER MUST PETITION THEREFOR.**—Before any such sale shall be ordered the receiver shall file in such court his petition therefor, in which he shall set forth the names of the creditors of the company, with the sums due to each, as nearly as can be ascertained, a statement of its assets, exclusive of its road-bed, rights of way, and franchises, and a pertinent description, in general terms, of the road-bed, right of way, and property so sought to be sold, and shall cause notice thereof to be published, for six consecutive weeks, in some newspaper printed and of general circulation in each of the counties in which any part of the road-bed is situated; and any creditor shall, at any time before the distribution of the proceeds of the sale, have the right to appear and set up his claim by answer, and have it determined by the court, if it is omitted from or inaccurately stated in the petition. (May 14, 1868, 65 v. 192, § 2.)

§ 3422. **ORDER FOR APPRAISEMENT OF ROAD.**—The court, on proof of the publication of such notice, and on being satisfied that a sale is necessary for the payment of the indebtedness of the company, shall order the sale of such road, road-bed,

Judicial Sale, etc., §§ 3423-3426;.

rights of way, property, and franchises, upon such terms of payment as the court may deem proper, and shall issue its order to the receiver, commanding him that he cause the same to be appraised by commissioners, to be selected by the court, skilled in the construction and value of such road-beds as they may be called upon to appraise, having the qualifications of a freeholder, not less than three in number, and consisting of at least one from each county in which any part of the road-bed is situate; and such proceedings shall be had under such order as are provided by law in case of sales of real estate made by order of court in other cases, so far as the same may be applicable. (May 14, 1868, 65 v. 192, § 3.)

§ 3423. NOTICE OF SALE TO BE PUBLISHED.— Before any such sale shall be made, notice thereof shall be given by publication, for six consecutive weeks, in some newspaper published and of general circulation in each of the counties through or in which such road is located, and also in some newspaper published and of general circulation in each of the cities of New York and Cincinnati, for at least thirty days prior to the day of sale; but the sale shall not be made for less than two-thirds of the appraised value of the property and rights, unless, upon the same having been twice offered and not sold the court, in its discretion, order a reappraisement. (May 14, 1868, 65 v. 192, § 4.)

Deposits with bids.

Deposits filed with bids should be returned to the bidder in case he does not buy the property.— *Feike v. Cincinnati, etc., Ry. Co.*, 3 O. C. C. 72 (1887); s. c., 2 C. D. 41; s. c., 27 W. L. B. 75.

§ 3424. CONFIRMATION OF SALE, AND DEED.— When a sale is made, and reported to the court, if the court is satisfied that the same was fairly and properly conducted, in all respects, according to law and the order of the court, it shall cause the sale to be confirmed, and shall order the receiver to execute and deliver to the purchaser a deed of conveyance for the road, road-bed, rights of way, real estate, fixtures, and franchises so sold. (May 14, 1868, 65 v. 192, § 5.)

§ 3425. HOW PROCEEDS OF SALE DISTRIBUTED.— The proceeds of the sale, after paying the costs and expenses thereof and the unpaid expenses of the trust against the company, shall be distributed pro rata among all the creditors of the company. (May 14, 1868, 65 v. 192, § 6.)

§ 3426. WHO MAY PURCHASE SUCH PROPERTY.— A company organized under the laws of this state may become the purchaser of such property; and any number of persons, not less than five may become the purchasers of such road, road-bed, rights of way, property, and franchises, at such sale, and upon filing a transcript of the decree of confirmation in the office of the secretary of state, shall become a corporation of this state, amenable to its process, and, with perpetual succession by such name as they may assume to themselves, subject to the laws of this state regulating corporations, and shall hold the property, rights, and franchises so purchased, free and discharged from all liability for the debts of the original corporation. (May 14, 1868, 65 v. 192, § 7.)

§ 3426a. PURCHASER OF RAILROAD AT JUDICIAL SALE MAY SELL SAME; GRANT TO BE RECORDED.— The purchaser or purchasers of the real and personal property, road-beds, rights of way, fixtures and franchises of any railroad company in the state of Ohio, and situated wholly or in part in this state that have been or shall hereafter be sold pursuant to judicial order, judgment, or decree, and which sale has been confirmed by the court making the order of sale, may sell the same, or any portion thereof; and the title thereto, with all the rights, liberties, faculties, and

Judicial Sale, etc.—Railroad Police, §§ 3426b, 3427.

franchises shall pass by such sale and vest in the purchaser or purchasers thereof, as fully as if the same had been possessed, exercised and enjoyed by such railroad company, and which passed by said judicial sale; which grant, being in the same form as by law required to pass real estate, shall be recorded in the record of deeds of the county or counties in which said real or personal property is situated, and said rights and franchises are or may be exercised. (March 11, 1880, 77 v. 60.)

§ 3426b. RAILROAD COMPANY, AND ANY NUMBER OF PERSONS, MAY BECOME PURCHASERS; PURCHASERS MAY BECOME INCORPORATED, AND MAY PAY IN STOCKS AND BONDS.—That any railroad company organized or existing under the laws of this state may become the purchasers of such property, as provided in the first section (3426a) of this act, and any number of persons may become the purchasers of such road, road-beds, rights of way, property and franchises, as provided herein, either directly at such judicial sale or by grant from the purchasers at such sale, whether the same shall have been heretofore or may hereafter be made; and upon filing a copy of said deed or grant in the office of the secretary of state with articles of incorporation executed in accordance with sections thirty-two hundred and thirty-six and thirty-two hundred and thirty-seven of the Revised Statutes of Ohio, they and such persons as they may associate with them, not less than five in number, shall become a corporation, with perpetual succession, by such name as they may assume to themselves, with full capacity to maintain and operate such railroads, whether located wholly within this state, or partly within this state and partly within another state or states, and with authority to provide for the purchase price of the railroad and other property so purchased, by the issue of its capital stock, preferred or common, and bonds secured by mortgage or otherwise, bearing interest at a rate not exceeding seven per cent. per annum, and stock and bonds heretofore or hereafter issued as such purchase price, in whatever amounts the incorporators, in good faith, may have agreed on, shall be valid and taken as fully paid for by the transfer to said corporation of such railroad and property, and also by such issue of stock or bonds, to raise the necessary means suitable to improve such railroad property and equipment for the uses and purposes for which it is employed; and in the operation and maintenance of such railroad, the said corporation shall be entitled to all the rights, and be subject to all the obligations and restrictions imposed upon railroad companies by the general laws of this state. (April 24, 1890, 87 v. 270; March 11, 1880, 77 v. 60.)

§ 3427. APPOINTMENT OF RAILROAD POLICE; THEIR QUALIFICATIONS, TERM OF OFFICE, AND REVOCATION OF COMMISSION.—The governor, upon the application of a company owning or using any railroad in this state, shall appoint and commission such persons as the company may designate, or as many thereof as he may deem proper, to act as policemen for and upon the premises of such railroad or elsewhere, when directly in the discharge of their duties for such railroad; and all policemen so appointed shall be citizens of the state of Ohio, and men of good character, and said policemen shall hold their office for three years, unless their commissions be revoked by the governor for good cause shown, or by the railroad company as provided by section three thousand four hundred and thirty-two of the Revised Statutes, and all commissions heretofore issued by the governor of this state, under and by virtue of section three thousand four hundred and twenty-seven of the Revised Statutes of Ohio, as passed March 18, 1867, shall expire, and the authority under and by virtue of the same shall be revoked on and after the first day of June, 1885. (February 18, 1885, 82 v. 51; R. S. 1880; March 18, 1867, 64 v. 60, §§ 1, 2.)

Police regulations — constitutionality.

See *Railway Co. v. Railroad Co.*, 30 Oh. St. 604 (1877).

Railroad Police, etc., §§ 3428 3434.

§ 3428. **OATH; RECORD OF COMMISSION; POWERS AND LIABILITIES OF SUCH POLICE.**—Each policeman so appointed shall, before entering upon the duties of his office, take and subscribe an oath of office, which shall be endorsed upon his commission; a certified copy of such commission, with the oath, shall be recorded in the office of the clerk of the court of common pleas in every county through or into which the railroad for which such policeman is appointed runs, and for which it is intended he shall act; and policemen so appointed and commissioned shall severally possess and exercise all the powers, and be subject to all the liabilities of policemen of cities of the first class, in the several counties in which they are authorized to act while in the discharge of their duties for which they are appointed. (February 18, 1885, 82 v. 51; R. S. 1880; March 18, 1867, 64 v. 60, § 3.)

§ 3429. **POWER OF SUCH POLICE TO ENFORCE REGULATIONS OF ROAD AND MAKE ARRESTS.**—A company which avails itself of the provisions of the two preceding sections may make needful regulations to promote the public convenience and safety in and about its depots, stations, and grounds, not inconsistent with the laws of the state, and cause the same to be printed, and posted conspicuously upon its depots or station buildings, and such policemen may enforce and compel obedience to the same; and the keeper of jails, lock-ups, or station-houses in any of such counties shall receive all persons arrested by such policemen, for the commission of any offense against such regulations or the laws of the state, upon or along the railroad or premises of any such company to be dealt with according to law. (March 18, 1867, 64 v. 60, § 3.)

§ 3430. **SUCH POLICE TO WEAR BADGES, WHEN.**—Each policeman so appointed and commissioned, shall wear in plain view, when on duty, as heretofore specified, a metallic shield with the word "Police," and the name of the railroad for which he is appointed inscribed thereon, except while acting as detective in the discharge of his duties for such railroad. (February 18, 1885, 82 v. 51; R. S. 1880; March 18, 1867, 64 v. 60, § 4.)

§ 3431. **COMPENSATION OF POLICE.**—The compensation of such policemen shall be paid by the company for which they are respectively appointed, and at such rates as may be agreed upon by the parties. (March 18, 1867, 64 v. 60, § 5.)

§ 3432. **WHEN POWERS CEASE.**—When a company no longer requires the services of a policeman so appointed, it may file a notice to that effect, under its corporate seal, attested by its secretary, in the several offices where the commission of such policeman is recorded, which shall be noted by the clerk upon the margin of the record where the commission is recorded, and thereupon the power of such policeman shall cease and determine. (March 18, 1867, 64 v. 60, § 6.)

§ 3433. **WHEN A PASSENGER CONDUCTOR IS A POLICEMAN.**—The conductor of every train carrying passengers within this state is hereby invested with all the powers, duties, and responsibilities of police officers, while on duty on his train. (April 11, 1876, 73 v. 166, § 1.)

§ 3434. **WHEN CONDUCTOR MAY EJECT A PASSENGER.**—When a passenger is guilty of disorderly conduct, or uses any obscene language, or plays any game of cards or chance for money or any other thing of value, upon any passenger train, the conductor of such train shall stop his train at the place where such offense is committed, or at the next stopping place of such train, and eject such passenger from the train, using only such force as may be necessary to accomplish such removal; and the conductor may command the assistance of the employes of the company and of the passengers on such train to assist in such removal: but before doing so he

 Railroad Police, etc., §§ 3435, 3436.

shall tender to such passenger such proportion of the fare he paid as the distance he then is from the place to which he has paid fare bears to the whole distance for which his fare is paid. (April 11, 1876, 73 v. 166, § 2.)

Place of removal.

The expulsion of a person may be at a place other than a railroad depot, or usual stopping place, provided care is taken not to expose him to serious injury or danger.—*Railroad Co. v. Skillman*, 39 Oh. St. 445 (1883).

Damages.

Where a person is wrongfully ejected, it is error to charge that he can only recover the price of the ticket, and for the labor of walking to the place of destination. The jury may in such a case take into consideration the place where the plaintiff was left, the circumstances under which it was done, the humiliation, disgrace, and injury to his feelings, in having the train stopped and being compelled to leave the coach and train in a public manner.—*Lake Shore, etc., Ry. Co. v. Teed*, 14 O. C. C. 356 (1895); s. c., 6 C. D. 339.

Exemplary damages.

A corporation by the malicious misconduct of its agents or servants acting within the scope of their employment, may render itself liable to exemplary or punitive damages; but this doctrine being capable of great practical abuse, the giving it in charge to the jury in a case clearly not warranting its application, tends to mislead them; and where, in such a case, a verdict for damages is obviously exorbitant, it is error in the court to refuse to set it aside, and award a new trial.—*Pitts-*

burg, etc., R. R. Co. v. Slusser, 19 Oh. St. 157 (1869). See *Atlantic, etc., Ry. Co. v. Dunn*, 19 Oh. St. 170 (1869).

When force amounts to wanton assault.

When the force used to eject amounts to wanton assault, the fact as to whether the plaintiff was rightfully or wrongfully upon the train is not an element in the question of mere recovery.—*Toledo, etc., Ry. Co. v. Marsh*, 17 O. C. C. 379 (1898); s. c., 9 C. D. 548; *Cincinnati, etc., R. R. Co. v. Boyer*, 18 O. C. C. 327 (1897); s. c., 10 C. D. 199.

When action in tort.

Where one is wrongfully ejected from a railway train, even in the absence of use of excessive force by the servants of the railroad company, and whether or not the relation of the parties originated in contract, he may seek his remedy as for tort.—*Toledo, etc., Ry. Co. v. Marsh*, 17 O. C. C. 379 (1898); s. c., 9 C. D. 548. See *Pittsburg, etc., Ry. Co. v. Reynolds*, 55 Oh. St. 370 (1896).

Car in motion—question of negligence.

Whether it is due and proper care to attempt to remove a person from a car, while the same is in motion, is a question of fact for the jury, and not of law for the court.—*Healey v. City, etc., R. R. Co.*, 28 Oh. St. 23 (1875). See § 3374, notes.

§ 3435. **WHEN HE MAY ARREST A PASSENGER.**—When a passenger is guilty of any offense upon a passenger train, the conductor of such train may arrest him and take him before any magistrate having cognizance of such offense, in any county in this state in which such train runs, and file an affidavit before such magistrate, charging him with such offense; but in no case shall the liability of a railroad company for damages caused by the conduct of its conductor be affected by the provisions of this and the next preceding section. (April 11, 1876, 73 v. 166, § 3.)

§ 3436. **PENALTIES AGAINST CONDUCTORS FOR VIOLATIONS OF CERTAIN SECTIONS.**—A conductor having charge of a passenger train within this state, who willfully neglects his duty as required by the two preceding sections, or fails to use all the means in his power to carry out the requirements of such sections, shall be deemed guilty of negligence of official duty, and on conviction thereof, before any court having competent jurisdiction, shall be fined not less than five nor more than twenty-five dollars. (April 11, 1876, 73 v. 166, § 4.)

PART V.

STREET RAILROAD CORPORATIONS.

- § 3437. Where street railway may be constructed.
- § 3439. Written consent of owners of more than one-half of feet front necessary.
- § 3439a. When consents cannot be withdrawn.
- § 3440. When property may be appropriated for such railways, Toledo, Cuyahoga county.
- § 3441. The authority controlling the public road must consent.
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- § 3443-3. Screens for mortorman.
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- § 3443-8. Construction, etc., of street railroads outside of municipalities.
- § 3443-9. Occupancy and use of public highways.
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- § 3443-11. Leases, purchases, and traffic arrangements.
- § 3443-12. Consolidation.
- § 3443-13. Regulations and powers.
- § 3443-14. Street railroad in Mansfield may operate a light and power plant.
- § 3444. Powers of inclined plane railway companies.
- § 3445. How street crossings to be made.

§ 3437. **WHERE STREET RAILWAYS MAY BE CONSTRUCTED.**—Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village; and offices, depots, and other necessary buildings for such railways may also be constructed. (February 10, 1870, 67 v. 10, § 1.)

Other statutes.

See § 2502 et seq.

What provisions of railroad act applicable to street railroads.

Nothing in § 3309a or in the sections of the Revised Statutes relating to railroad companies, prior to § 3437, other than in §§ 3287, 3288, and 3289, shall be construed as affecting street railroads. See § 3309a.

Street railroad company may borrow money.

See §§ 3287, 3288, and 3289.

Power to mortgage property.

See Louisville Trust Co. v. Cincinnati, etc., Ry. Co., 91 Fed. 699 (1897).

What determines character of road.

When a road is laid in a street, on the surface of the street, because it is a street, and to facilitate the use of the street by the public, it is a street railroad, whatever the means used to propel cars over it. It is the nature of the use, not the motive power, which determines whether a road belongs to one class or the other, and a change from horse power to electric or cable power does not change the character of the road and make it other than a street railroad.—Clement v. Cincinnati, 16 W. L. B. 355 (1886); Sells v. Columbus, etc., Ry. Co., 28 W. L. B. 172 (1892); Pelton v. East Cleveland R. R. Co., 22 W. L. B. 67 (1889); Sanfleet v. Toledo, 10 O. C. C. 460 (1893); s. c., 8 C. D. 711; Simmons v. Toledo, S. O. C. C. 535 (1890); s. c., 4 C. D. 69; Oviatt v. Akron,

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etc., R. R. Co., 2 N. P. 84 (1895); s. c., 3 Dec. 252; Harrison v. Mt. Auburn, etc., Ry. Co., 17 W. L. B. 265 (1887).

Power to make grant.

Authority to lay down the necessary structure for a street railway, in a common highway or street, and to run cars thereon for the carriage of passengers for hire, may be lawfully granted to a company incorporated for that purpose, when no private right of adjoining landowners is thereby impaired, but the property rights of such landowners cannot be impaired without first making compensation.—Cincinnati, etc., Ry. Co. v. Cummins-ville, 14 Oh. St. 523 (1863). See Cincinnati, etc., Ry. Co. v. Snell, 54 Oh. St. 206 (1896).

Insulation of wires.

The act of March 12, 1886, § 3 v. 143, does not apply to the use of wires in the streets of a city for conducting electricity to operate street railway cars.—Simmons v. Toledo, 5 O. C. C. 124 (1889); s. c., 3 C. D. 64.

Right to use ground circuit.

A telephone company does not obtain an exclusive right to use a ground circuit by reason of having its poles, wires, etc., installed first or before a street railroad company makes use of a ground circuit which interferes with the telephone business.—Railway Co. v. Telegraph Co., 48 Oh. St. 390 (1891).

Electrolysis — liability — remedy.

See Dayton v. City Ry. Co., 12 Dec. 258 (1902).

Power to carry freight.

A company organized under the general law for the purpose of operating a street railway has, in the absence of a statute prescribing its power, corporate power to carry freight as well as passengers.—State ex rel. v. Dayton Traction Co., 18 O. C. C. 490 (1899); s. c., 10 Dec. 212; affirmed by Supreme Court March, 1901, 45 W. L. B. 225.

A steam railroad is an additional burden.

See Lawrence R. R. Co. v. Williams, 35 Oh. St. 168 (1878); Cincinnati, etc., Ry. Co. v. Cummins-ville, 14 Oh. St. 523 (1863); Taphorn v. Cincinnati, etc., R. R. Co., 8 Am. L. R. 490 (1880).

Foreclosure, subrogation.

See Mill Creek, etc., Ry. Co. v. Carthage, 18 O. C. C. 216 (1899).

Nuisance — laying tracks without grant.

The placing of tracks in a highway, without authority, is generally held to constitute a nuisance, and it is also generally held that the right to complain rests solely with the public, and not with any individual, unless he suffers a special injury, and abutting owners do not, in contemplation of law, from the mere fact

that they are abutters suffer special injury.—See Glidden v. Cincinnati, 30 W. L. B. 213 (1893).

Power of commissioners to grant franchise in hamlet.

The county commissioners have no power to grant a franchise to a street railway company over the streets and roads in a hamlet, and cannot maintain an action to enjoin the construction of the road in violation of the terms thereof. The trustees of the hamlet have jurisdiction by virtue of § 1651.—Verera v. A. B. & C. R. R. Co., 11 C. D. 664 (1896).

A grant is a contract within the meaning of § 1777.

Contracts made by the council granting to street railroad companies easements in the streets of the city, are contracts made in behalf of the city which may be attacked under § 1777 et seq.—Cincinnati, etc., R. R. Co. v. Smith, 29 Oh. St. 291 (1876).

Exclusive rights cannot be granted.

Municipal corporations have no power to grant an exclusive right to any street railway company to use the streets of the municipality for railway purposes.—Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 O. C. C. 362 (1892); s. c., 3 C. D. 493; Kinsman Street R. R. Co. v. Broadway Street R. R. Co., 36 Oh. St. 239 (1880); Cincinnati Street R. R. Co. v. Smith, 29 Oh. St. 291 (1876).

Grant strictly construed.

A grant to a street railway of the right to construct and operate a street railroad is to be strictly construed against the company and in favor of the city. The company can claim only such rights and privileges as are conferred by express words or by necessary implications. Words of general description following words of particular description are to be restricted in meaning to objects of like kind and use with those specified. The words "other appliances" in an ordinance granting the right to construct a street railroad and "all necessary side-tracks, curves, and switches and other appliances for the proper and successful operation of the road," must be restricted in meaning to appliances of the kind and use as side-tracks, curves, and switches, and would not include a house in the middle of a street to be used as a shelter for passengers.—Hamilton, etc., Transit Co. v. Hamilton, 1 N. P. 366 (1894); s. c., 4 Dec. 10.

Acceptance of grant constitutes contract.

Under §§ 2501, 2502, 3438, and 3439, the acceptance of a grant made by a city council or by county commissioners constitutes a contract.—State ex rel. v. Cleveland, etc., Ry. Co., 15 O. C. C. 200 (1897); s. c., 8 C. D. 474.

Grant to trustee.

A grant is not rendered invalid by reason of the fact that the grantee is designated in the

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ordinance as a "trustee."—*Simmons v. Toledo*, 5 O. C. C. 124 (1889); s. e., 3 C. D. 64.

When part of route has not necessary consents, rights.

Where a portion of a street railway route fails for lack of proper consents, the city may make a new grant as to that portion of the route, when the necessary consents have been obtained; and such grant is valid under the original application, notice, and bids.—*Sanfleet v. Toledo*, 10 O. C. C. 460 (1893); s. e., 8 C. D. 711.

Grant of only part of application.

The grant by a city council of the right to construct and operate a street railway is not necessarily invalid by reason of its covering only a part of the route specified in the original application.—*Simmons v. Toledo*, 5 O. C. C. 124 (1889); s. e., 3 C. D. 64.

Grant of use of park for street railway purposes.

See *Mathers v. Cincinnati*, 3 W. L. B. 709 (1878); *Cleveland, etc., Ry. Co. v. Barriess*, 33 W. L. B. 314 (1895).

Effect of section on rights of county commissioners.

An ordinance passed by the council of a city only permits the company to extend its railway beyond the limits of the corporation, the control of the county commissioners over the state road is not affected thereby, nor the rights of abutting landowners extinguished; and such city ordinance is no defense to an action by the commissioners to recover damages for an injury to said road caused by the company.—*Commissioners v. Citizens, etc., Co.*, 9 O. C. C. 183 (1895); s. e., 6 C. D. 290; s. e., 31 W. L. B. 103.

Bridge in city built by county, right to use.

See *State ex rel. v. Cincinnati, etc., Ry. Co.*, 19 O. C. C. 79 (1899).

Joint use of tracks—power of council.

The council of a municipal corporation, in the exercise of its discretion, and acting in good faith, may grant to one street railway company the right to use, to a limited extent, the tracks of another company, on provision being made for the payment of reasonable compensation for such use. But the council possesses no power to take from one company a portion of its tracks, or railway system, and hand it over, absolutely to another company to the exclusion of the former.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 262 (1892); s. e., 3 C. D. 493.

Computation of one-eighth of track-age, interurban companies.

Where an interurban company obtains the right to use existing tracks in a city, the part of its railway outside of, as well as inside of,

the city should be considered in determining what amounts to one-eighth of its track-age.—*State ex rel. v. Cincinnati, etc., Ry. Co.*, 19 O. C. C. 79 (1899).

Power of court to order two companies to build tracks jointly.

Where two companies have franchises for the same street, a court in the exercise of its equity jurisdiction has no right to require the companies to unite in the building of two tracks, however reasonable and proper, and to the advantage of both companies it may seem to be. Such provisions can only be made by the municipal authorities at the proper time, and the courts can only protect and enforce the rights of parties under the grants made.—*Hamilton, etc., Ry. Co. v. Hamilton Transit Co.*, 5 O. C. C. 319 (1890); s. e., 3 C. D. 64.

One company cannot straddle the tracks of another.

See *Parrieh v. Hamilton, etc., Co.*, 23 O. C. C. 527 (1902).

One company may restrain another from injuring its tracks.

Where, before grants are made to two companies, the city had by ordinance granted to another street railroad company the right to place its tracks in the center of the street which had been done, the other companies will be restrained from occupying the center of said street with tracks to the injury of the company having possession.—*Hamilton, etc., Electric Co. v. Hamilton, etc., Transit Co.*, 5 O. C. C. 319 (1890); s. e., 3 C. D. 64.

Use of tracks of another company—rights of abutter.

An abutting owner will not be heard in an objection to a street railway company being granted the right to occupy and use street railway tracks laid by another company, that being a matter between the companies.—*Sanfleet v. Toledo*, 10 O. C. C. 460 (1893); s. e., 8 C. D. 711.

Invalid grant—rights of taxpayer.

Upon the refusal of the solicitor a taxpayer may maintain an action to enjoin the exercise of a franchise illegally granted.—*Haskins v. Cincinnati, etc., R. R. Co.*, 4 W. L. B. 1123 (1880).

Defective grant—rights of taxpayer.

If a grant is illegal for any reason other than that the abutting owners have not consented, it is the duty of the public officers to enjoin the execution of the same, and that if, upon the request of a taxpayer that they proceed to enjoin, they refuse so to do, the taxpayer himself has the right to proceed upon behalf of the city.—*Glidden v. Cincinnati*, 30 W. L. B. 213 (1893); *Knorr v. Miller*, 5 O. C. C. 609 (1891); s. e., 3 C. D. 297.

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Same subject.

Where an action is brought by a taxpayer, not living on or owning any property abutting on the line of a street railroad, to enjoin its use, on the ground that the grant is illegal and void, it is not error in the court to dismiss the case, the petition not averring, and the evidence not showing that expense will be put on him by taxation or otherwise, the petition having been filed after the road was completed and in operation.—See *Buning v. Cincinnati, etc., Ry. Co.*, 1 O. C. C. 323 (1886); s. c., 1 C. D. 178; *Sloan v. Peoples, etc., Ry. Co.*, 7 O. C. C. 84 (1891); s. c., 3 C. D. 674.

Rights of taxpayer when mere puppet.

When a taxpayer is not acting in his own interest, but has been indemnified against costs, and is a mere puppet, he cannot maintain an action.—*Gallagher v. Johnson*, 31 W. L. B. 24 (1893).

Defective grant—rights of abutting owner.

An abutting owner, as such, cannot complain of defects in a grant other than that of the absence of the required consents of abutting owners.—*Glidden v. Cincinnati, 30 W. L. B.* 213 (1893); *Barney v. Mt. Adams, etc., Ry. Co.*, 30 W. L. B. 286 (1893).

Percentage of earnings payable to city—construction of ordinance.

See *Cincinnati v. Mt. Auburn, etc., Ry. Co.*, 28 W. L. B. 276 (1892); *Cincinnati v. Cincinnati Ry. Co.*, 6 N. P. 140 (1899); s. c., 9 Dec. 235; s. c., 8 N. P. 80.

Repayment by company of assessments for improving street, who entitled thereto.

Where a franchise is granted on condition that the company repays to the landowners assessments paid by them for improvements, the landowner at the time of repayment is entitled to the money.—*Harkness v. Schiely*, 13 O. C. C. 177 (1896); s. c., 7 C. D. 108.

Assessments for paving—how paid.

It seems that a street-car company has the same right to pay paving assessments in installments as abutting owners of property.—*Editorial*, 35 W. L. B. 345 (1896).

License fee per car—construction of ordinance.

See *Cincinnati v. Mt. Auburn, etc., Ry. Co.*, 28 W. L. B. 276 (1892); *Cincinnati v. Cincinnati, etc., Ry. Co.*, 6 N. P. 140 (1899); s. c., 9 Dec. 235; s. c., 8 N. P. 80.

Abandonment of franchise.

The failure for over twenty years to operate a railway on certain streets included in a franchise granted, raises a presumption of an abandonment of the grant so far as concerns those streets.—*Louisville Trust Co. v. Cincinnati*, 76 Fed. 296 (1896); s. c., 10 O. F. D. 112.

Rescission of grant.

An ordinance passed repealing the granting ordinance can have no effect without the assent of the company.—*Cincinnati, etc., Ry. Co. v. Carthage*, 36 Oh. St. 631 (1881); *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385 (1899).

Estoppel of city—rescission.

Where a village, through its council, invited and induced a street railway company to enter its corporate limits and occupy its streets with tracks for the purpose of opening a street railway, and the company thereupon built and equipped a railway in its streets, and made large expenditures in so doing, the village cannot thereafter repudiate the action of its council on the ground their proceedings were irregular.—*Mill Creek, etc., Ry. Co. v. Carthage*, 18 O. C. C. 216 (1899); s. c., 9 C. D. 523.

Forfeiture—power of city to remove tracks.

Under certain circumstances amounting to a forfeiture, the city may cause the tracks and equipment to be removed from the street without any judicial determination as to the rights of the parties.—*Stewart v. Ashtabula*, 36 W. L. B. 46 (1896). See *Cleveland, etc., Ry. Co. v. Cleveland*, 4 N. P. 21 (1897); s. c., 6 Dec. 33; *Akron, etc., R. R. Co. v. Village*, 6 N. P. 276 (1899); s. c., 8 Dec. 142; *Mill Creek, etc., Ry. Co. v. Carthage*, 18 O. C. C. 216 (1899); s. c., 9 O. C. D. 833 (1899); *Stewart v. Ashtabula (U. S. C. C. A.)*, 46 W. L. B. 137 (1901).

Forfeiture—who may take advantage of.

The city authorities may waive the forfeiture of a franchise, and neither an abutting owner nor a competitive company can enjoin the exercise of the franchise, and thus prevent the city from exercising its right of waiver.—*Barney v. Mt. Adams, etc., Ry. Co.*, 30 W. L. B. 286 (1893); *Hamilton, etc., Electric Co. v. Hamilton, etc., Ry. Co.*, 5 O. C. C. 319 (1890); s. c., 3 C. D. 158.

Refusal to run cars, mandamus not the remedy.

Mandamus will not lie to compel a company to operate cars under a franchise accepted by it. The remedy is under § 1777.—*State ex rel. v. Cleveland, etc., Ry. Co.*, 15 O. C. C. 200 (1897); s. c., 8 C. D. 474.

Adverse possession of streets.

The right to operate a street railroad can be acquired by adverse possession for twenty years.—*Cincinnati v. Columbia, etc., Ry. Co.*, 17 W. L. B. 192 (1886).

Conditions—what invalid.

The council of a city may refuse permission to a street railway company to construct its road in its streets, but if it grants permission,

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it may not do so upon the condition that the company does not exercise one of its corporate powers, and, therefore, a condition or regulation that the company shall not carry freight is void.—*State ex rel. v. Dayton Traction Co.*, 18 O. C. C. 490 (1899); *s. c.*, 10 O. C. D. 212.

§ 3439. **WRITTEN CONSENT OF OWNERS OF MORE THAN ONE-HALF OF FEET FRONT NECESSARY.**—No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of sections two thousand five hundred and one and of two thousand five hundred and three to two thousand five hundred and five, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route; provided, that this act shall not apply to any county containing a city of the second grade of the second class. (April 18, 1883, 80 v. 173; R. S. 1880; April 29, 1868, 65 v. 112, § 3.)

Want of consents — injunction.

Where a franchise is granted without the consent of property-owners, the construction of the road may be enjoined at the suit of nonconsenting property-owners.—*Roberts v. Easton*, 19 Oh. St. 78 (1869).

Same subject.

Abutting owners of property upon one street are, as a general rule, restricted in their complaint as to the absence of consents to the street upon which their property abuts. If, however, the consents as to one street were given upon the condition that the required consents should be secured upon the other streets, *quare*.—*Glidden v. Cincinnati*, 30 W. L. B. 213 (1893). See *Simmons v. Toledo*, 5 O. C. C. 124 (1889); *s. c.*, 3 C. D. 64; *Harrison v. Mt. Auburn, etc., Ry. Co.*, 17 W. L. B. 265 (1887).

Rights of nonconsenting abutters.

Nonconsenting abutting owners cannot be heard to complain of the violations by the grantee of conditions imposed by those who consented when such consenting owners do not themselves complain of such violations.—*Barney v. Mt. Adams, etc., Ry. Co.*, 30 W. L. B. 286 (1893).

What is interference with access.

Tracks which leave a space of ten feet between the nearest track and the curb do not interfere with the access to abutting property.—See *Barney v. Mt. Adams, etc., Ry. Co.*, 30 W. L. B. 286, 288 (1893).

Same subject.

The construction of a double track street railway in the middle of a street so located that the space between the exterior and the sidewalk is not sufficient to permit wagons with teams attached to stand transversely between the curb lines and passing cars, is not per se a perversion of the street to private uses, or an unlawful infringement of street

Effect of ordinance requiring conductors not to allow certain passengers to alight when car in motion.

East Cleveland R. R. Co. v. Rosecrans, 24 W. L. B. 220 (1890).

easements appurtenant to abutting property.—*Sells v. Columbus, etc., Ry. Co.*, 28 W. L. B. 172 (1892). See *Schaaff v. Cleveland, etc., Ry. Co.*, 16 O. C. C. 252 (1898); *s. c.*, 8 C. D. 688; *Bellaire, etc., Ry. Co. v. Smith*, 41 W. L. B. 212 (1899); *Oviatt v. Akron, etc., R. R. Co.*, 2 N. P. 84 (1895); *s. c.*, 3 Dec. 252.

Same subject — trolley poles.

See *Mt. Adams, etc., Ry. Co. v. Winslow*, 3 O. C. C. 425 (1888); *s. c.*, 2 C. D. 240.

Interference with market, rights of abutter.

See *Sells v. Columbus, etc., Ry. Co.*, 28 W. L. B. 172 (1893).

Liability for injuries to access or to trees in street.

See *Keefe v. Cleveland City R. R. Co.*, 8 N. P. 466 (1901); *Akron, etc., R. R. Co. v. Keefe*, 23 O. C. C. 57 (1901).

Suit by abutting owners, joinder of parties.

One or more property-owners on a street may join on behalf of others situated on the same street, without alleging that at the time the action is brought each and every member of the class is actually participating in bringing and prosecuting the action. In such attack property-owners on one street do not belong to the same class as those on another street, and therefore they cannot unite in the same action.—*Glidden v. Cincinnati*, 30 W. L. B. 213 (1893).

Temporary interference with access.

The temporary interference with the access which results to abutting owners of property by the opening of a street for the construction of a line of street railway, is a necessary incident to the right to construct the railway, and cannot be complained of by such abutting owners.—*Glidden v. Cincinnati*, 30 W. L. B. 213 (1893).

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Contest as to consents — burden of proof.

A property owner may contest the question whether or not the council has the requisite number of consents to give it jurisdiction, but the presumption of law is in favor of the action of the council, and the burden of proof lies upon the plaintiff, the property owner, to show that sufficient consents were not given. — *Simmons v. Toledo*, 8 O. C. C. 535 (1890); s. c., 4 C. D. 69. See *Cincinnati College v. Nesmith*, 2 C. S. R. 24 (1870); *Roberts v. Easton*, 19 Oh. St. 78 (1869).

Absence of consents — rights of taxpayer.

A taxpayer, as such, cannot institute proceedings to have a street railway grant declared void because of the absence of the necessary consents of the abutting property owners. Such action can only be brought by an abutting owner. — *Glidden v. Cincinnati*, 30 Oh. St. 213 (1893); *Sommers v. Cincinnati*, 8 A. L. Rec. 612 (1880); *Harrison v. Mt. Auburn, etc., Ry. Co.*, 17 W. L. B. 265 (1887); *Hamilton v. C. & H., etc., R. R. Co.*, 5 N. P. 457 (1898); s. c., 8 Dec. 174.

Owner must consent.

Consents must be in writing signed by the owner of the property or his duly authorized agent. A signature and consent signed by the husband in his own name, where the wife owns the property and does not consent, is insufficient and should not be received or counted. — *Simmons v. Toledo*, 8 O. C. C. 535 (1890); s. c., 4 C. D. 69.

Consent and remainderman and life tenant.

The signature of the owner of the remainder in fee, without the signature of the party holding the life estate, is sufficient, and should be counted as a proper consent under certain circumstances. — *Simmons v. Toledo*, 8 O. C. C. 535 (1890); s. c., 4 C. D. 69.

Consent of co-tenants.

Less than the whole number of joint tenants in abutting lands cannot give consent to the construction of a street railway track in a street under § 2502. — *Ronnebaum v. Mt. Auburn, etc., Ry. Co.*, 29 W. L. B. 338 (1893).

Same subject.

A tenant in common, who may desire to vote adversely to his cotenants, has a right to have such vote counted, and will be allowed to vote the number of feet front which his undivided interest in the land proportionately represents. — *Simmons v. Toledo*, 8 O. C. C. 535 (1890); s. c., 4 C. D. 69.

Consents — entry on records.

It is not necessary that the consent of property owners be entered on the records of the council. It is sufficient if they are produced or furnished to the council. — *Sanfleet v. Toledo*, 10 O. C. C. 460 (1893); s. c., 8 C. D. 711.

Consents for each street must be obtained.

See *Mt. Auburn, etc., Ry. Co. v. Neare*, 54 Oh. St. 153 (1896); s. c., 29 W. L. B. 171; *Rapp v. Storrs, etc., R. R. Co.*, 12 W. L. B. 119 (1884).

Effect of § 2502 on this section.

See *Neare v. Mt. Auburn, etc., Ry. Co.*, 29 W. L. B. 171; s. c., 54 Oh. St. 153 (1896).

Consents as to mode of operation, etc.

It is not necessary that they stipulate the mode and manner of construction and operation. — *Sloane v. Peoples, etc., Ry. Co.*, 7 O. C. C. 84 (1891); s. c., 3 C. D. 674.

Additional switches.

A street railway company, having located and constructed its railway under the proper municipal authority, with all the switches or turnouts which were then deemed necessary by the company, cannot afterward construct additional switches or extend those already constructed, without first obtaining the written consent of a majority of the property holders, represented by the feet front, of the property abutting on that part of the street where such additional switches or extensions are proposed to be constructed, and obtaining the right to do so from the proper municipal authority. — *Harner v. Columbus, etc., Ry. Co.*, 29 W. L. B. 387 (1893).

Consent as to double track.

Where a single track street railroad has been lawfully constructed, the consent of any of the property owners cannot be counted as an assent to the construction of the second track. — *Roberts v. Easton*, 19 Oh. St. 78 (1869).

Road to run on tracks of another company — consents.

The consents of property owners must be had, notwithstanding the company does not intend to construct a new track, but to use the tracks already laid. — *Sanfleet v. Toledo*, 10 O. C. C. 460 (1893); s. c., 8 C. D. 711.

See *State ex rel. v. Cincinnati, etc., Ry. Co.*, 19 O. C. C. 79 (1899).

Consents as to county property.

The board of county commissioners is the proper source from which to obtain a consent as to county property, and the action of the board is valid although not entered on the journal, and may be proved by parol. — *Nearing v. Toledo, etc., Ry. Co.*, 9 O. C. C. 593 (1893); s. c., 6 C. D. 664.

Ratification of unauthorized consents.

A written consent given by an unauthorized person, a stranger to the title, and not purporting to be the consent of the real owner, afterward ratified by such owner and adopted as his own act, but not until after the passage of the ordinance granting permission to construct, cannot be counted as the written consent of the owner within the meaning of the

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statute.—*Sommers v. Cincinnati*, 8 A. L. Rec. 612 (1880).

Consents inure to benefit of lowest bidder.

The consents of abutting owners to the construction and operation of a street railroad route, by whomsoever obtained, inure to the benefit of the lowest bidder, to permit the abutting owners to dictate to which of the holders their consent shall inure, would be to permit them to absolutely control the award of the contract, which the statute (§ 2502) requires shall be settled by competition in rates of fare only.—*Knorr v. Miller*, 5 O. C. C. 609 (1891); s. c., 3 C. D. 297; s. c., 25 W. L. B. 128; *Mathers v. Cincinnati*, 3 W. L. B. 551; s. c., 3 W. L. B. 709 (1878); *State ex rel. v. Bell*, 34 Oh. St. 194 (1877).

Consents are condition precedent to grant.

Under the provisions of §§ 2501 and 2505, inclusive, and §§ 3437 to 3443, inclusive, the consent of a majority in number of the property owners upon the streets upon which such road is to pass, filed in writing, is a condition precedent to the power of the city council to make a grant.—*Sommers v. Cincinnati*, 8 A. L. Rec. 612 (1880).

Conditional consents.

A consent given upon the condition that the construction of the railway shall be commenced and completed within a certain time is a condition subsequent, and its effect lies as between the party who signed the paper and the party who built the road; so far as the city council is concerned, such condition should not preclude that body from acting upon the consent.—*Simmons v. Toledo*, 8 O. C. C. 535 (1890); s. c., 4 C. D. 69.

Conditional consents, nonperformance.

Where consents are conditioned upon the adoption of a specified motive power, even if the result is not a mere covenant, but a condition, its violation does not ipso facto render the consents void, but only voidable at the option of parties giving them.—*Barney v. Mt. Adams, etc., Ry. Co.*, 30 W. L. B. 286 (1893).

When consents should be obtained.

It is not necessary to the validity of a grant that the number of consents of abutting owners should have been obtained prior to the publication of the notice inviting bids.—*Sloane v. Peoples, etc., Ry. Co.*, 7 O. C. C. 84 (1891); s. c., 3 C. D. 674.

Consents — how long valid.

Consents of abutting owners for a street railway, and not withdrawn, may be counted for the railway at the time of obtaining a second ordinance grant, the first being invalid.—*Santlee v. Toledo*, 10 O. C. C. 460 (1893); s. c., 8 C. D. 711.

Withdrawal of consent.

A property-owner may withdraw his or her consent at any time before the council has acted upon it and passed the ordinance.—*Simmons v. Toledo*, 8 O. C. C. 535 (1890); s. c., 4 C. D. 69; *Parrish v. Hamilton, etc., Co.*, 23 O. C. C. 527 (1902).

Right to grant temporary use of streets without consents.

See *Mathers v. Cincinnati*, 3 W. L. B. 709 (1878); s. c., 3 W. L. B. 551.

Purchased consents are invalid.

The purpose of this section is to protect the owners of property from arbitrary action by city authorities, and each owner is entitled to an honest, fair, and unbiased expression from other owners, therefore consents obtained by money or other considerations inuring to one person are void and cannot be counted.—*Hamilton, etc., Transit Co. v. Hamilton, etc., Traction Co.*, 12 Dec. 1 (1901); *Parrish v. Hamilton, etc., Co.*, 23 O. C. C. 527 (1902).

Same subject.

A third party interested in defeating the proposed grant may buy and a landowner may for money or other consideration agree to withdraw or withhold his consent.—*Cleveland v. Cleveland City Ry. Co.*, 23 O. C. C. 373 (1902); s. c., 12 Dec. 624.

Estoppel cannot cure want of consents.

See *Parrish v. Hamilton, etc., Co.*, 23 O. C. C. 527 (1902).

§ 3439a. **WHEN CONSENTS CANNOT BE WITHDRAWN.**—Nothing contained in sections 2502 and 3439 shall permit any persons owning property abutting on any street along, in or over which a street railroad is about to be constructed, to withdraw his or their consent after an ordinance granting the right to construct and operate a street railroad shall have been read the second time; provided, a period of at least thirty days has elapsed since the first reading of said ordinance in the council or other body authorized to make the grant. And where an abutting property holder has been heretofore compensated for his consent, or has heretofore withdrawn his consent, notwithstanding thirty days has not elapsed since the first reading of the ordinance after an ordinance granting the right to construct and operate a street railroad has been read the second time in the council or other body authorized to make the grant

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and a grant has been made by the council or other public body to a company or individual, pursuant to such consents, the grant shall not be held invalid by reason thereof. (May 10, 1902, 95 v. 475.)

Purchased consents cannot be used.

As the policy of the law is to protect abutting owners from the exercise of arbitrary power by city authorities, consents unfairly

obtained, as by purchase, cannot be used.—Hamilton, etc., Transit Co. v. Hamilton, etc., Traction Co., 12 Dec. 1 (1901).

§ 3440. WHEN PROPERTY MAY BE APPROPRIATED FOR SUCH RAILWAYS; TOLEDO; CUYAHOGA COUNTY.—When the council or commissioners make such grant, the company or person to whom the grant is made may appropriate any property necessary therefor when the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway; and in any city of the third grade of the first class any person, persons or company which is authorized to construct and operate and has constructed and is operating a street railway, may appropriate any property necessary for the purpose of occupying and using under section 3438 any existing street railway track or tracks, subject to the limitations of said section, and for not more than one-eighth of the entire distance between the termini of the route as actually constructed, operated and run over, of the appropriating company or person at the time appropriation proceedings are begun, such appropriation to be made in the mode and manner provided for the appropriation of property in part third, title 2, chapter 8, of the Revised Statutes; and in counties containing a city of the second grade of the first class the power to appropriate may be exercised, as hereinbefore provided, for the purpose of constructing a street railway along a highway occupied by a turnpike or plank road company when the person, persons or company authorized to construct such street railway cannot agree with such turnpike or plank road company upon the terms and conditions upon which such highway may be occupied, and when such appropriation will not unnecessarily interfere with the reasonable use of such highway by such turnpike or plank road company; provided, nothing herein contained shall affect the rights of the property owners to give or withhold their consent concerning the right of way for street railroads upon any street or road. (April 16, 1892, 89 v. 349; April 11, 1890, 87 v. 178; March 27, 1866, 63 v. 55, § 4; March 24, 1864, 61 v. 53, § 1.)

Constitutionality.

The provisions contained in this section prior to the amendment of April 11, 1890, 87 v. 178, are constitutional; whether those added by that amendment are constitutional, quære? but if unconstitutional, they are distinct and separable from those of the original section, and do not affect their validity.—Street Ry. Co. v. Street Ry. Co., 50 Oh. St. 603 (1893).

Injunction by one company against another.

To entitle one street railway company to an injunction to prevent the operation of another company's cars over tracks in the street in which it has appropriated a right of use, it must appear not only that the plaintiff was not made a party to the proceedings, but that also it has a real interest in the tracks. It has no such interest when it has sold all its right of use.—Metropolitan, etc., Ry. Co. v. Toledo, etc., Ry. Co., 9 O. C. C. 664; s. c., 6 C. D. 733 (1893). See Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 7 N. P. 211 (1894); 1 Dec. 33.

Appropriation of existing tracks.

A street railway company, to which the council of a city has granted the right to occupy a part of the track of another company in accordance with § 3438, is authorized by this section, without the aid of the amendatory provisions of April 11, 1890, to appropriate the track according to the grant, when the companies are unable to agree upon the compensation, and the appropriation proceeding may be prosecuted under chapter 8 of title 2 of part third of the Revised Statutes.—Street Ry. Co. v. Street Ry. Co., 50 Oh. St. 603 (1893).

Tracks must be condemned.

Although a company may not have an exclusive right in a street, this does not conflict with its right of private property in the material of which its road is constructed. Such material in place is as strictly the private property of the corporation as it was before it was placed, save in this only, that having been placed in a public street, it was thereby dedicated to the ordinary use of the public; but as a railroad such material re-

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mains the private property of the company, and for such purpose it is subject to the use and control of the owner exclusively. When, therefore, a right of way for street railroad purposes is granted over the same route to another company by the municipal authorities, the private property of the former cannot be appropriated by the latter company until compensation is first made by the latter to the former company.—*Kinsman Street R. R. Co. v. Broadway Street R. R. Co.*, 36 Oh. St. 239 (1880).

Crossing of tracks.

A street track crossing is a burden incident to the right to operate a street railway in a public street, and cannot be enjoined pending appropriation.—*Metropolitan, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 9 O. C. C. 664; s. e., 6 C. D. 733 (1893).

Time use of property is required—pleading.

It is not necessary, in an appropriation proceeding, for the petition to state the length of time the use of the property sought to be appropriated will be required by the appropriating company.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 12 O. C. C. 367 (1893); s. e., 5 C. D. 643.

Necessity for use of tracks.

Where a city council has duly authorized the construction and operation of a line of street railway upon certain streets of the city, and the use by the grantee of such franchise of a portion of existing tracks of another company, the question of the necessity of such use cannot, except for the reason below stated, be inquired into in appropriation proceedings. In the absence of evidence impeaching the action of the council for fraud, the probate court is concluded thereby.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362 (1892); s. e., 3 C. D. 493.

Appropriation of part.

Where one company has appropriated the right to use a portion of the tracks of another company under the power conferred upon it by the legislature and city, it will not be precluded thereby from prosecuting another appropriation proceeding to condemn the right to use more of the tracks until it has obtained an additional grant from the city.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 12 O. C. C. 367 (1893); s. e., 5 C. D. 643.

Proof of application, notice, and consents.

In a proceeding to condemn tracks or property under this section, it is not necessary to prove that application to the council for the franchise was made, and notice thereof given, or that the consents of abutting property owners were obtained.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362 (1892); s. e., 3 C. D. 493.

Proceedings to appropriate tracks—proof.

See *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 26 W. L. B. 172 (1891); *Consolidated, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 N. P. 537; s. e., 8 Dec. 268 (1893); s. e., 12 O. C. C. 367; s. e., 5 C. D. 643.

How line must be constructed before condemnation of tracks can be had.

Under the terms of this section it is sufficient to show that at the time the proceedings to appropriate were commenced, the required proportion of railway had been constructed, and was being operated.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362 (1892); s. e., 3 C. D. 493; *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 12 O. C. C. 367 (1893); s. e., 5 C. D. 643.

Rights acquired by appropriation.

Where a street railway company has regularly appropriated, by proceedings under the statute, the right to run and operate its railway cars over and upon certain designated portions of the line of street railway of another company, it does not thereby acquire such an interest in the property of the latter company as to entitle it to demand from another company, which has subsequently acquired, by contract with the company owning the railway, the right to use its tracks, compensation for such use.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 10 O. C. C. 168 (1895); s. e., 6 C. D. 578.

When council may fix compensation.

When the council, in making a grant of a franchise, reserves the right to fix the compensation for property taken in case it grants the right to another company, the council may fix the compensation to be paid, and the courts will not interfere in the absence of fraud or unreasonableness.—*Kinsman Street R. R. Co. v. Broadway Street R. R. Co.*, 36 Oh. St. 239 (1880).

Measure of compensation.

The jury should take into consideration the value of so much of the railway structure and materials in place, of the defendant company, as is sought to be appropriated, including the cost of the paving constructed by the defendant in conformity with the city ordinances; also the damages, if any, which such structure will sustain in adapting it to the uses of the appropriating company. But the defendant company is not entitled to compensation for any supposed depreciation in value of its franchise to operate its line of railway in the streets of the city caused by the proposed joint use and occupancy of its tracks, nor for the loss of fares which may be occasioned thereby, nor for the inconvenience and interruptions to business which may be caused thereby, nor for the consequential diminution in value of other portions of the line forming part of its street railway system. The compensation should be limited to the value of

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the use of the tracks during the unexpired term of the franchise granted such company by the city council. Whether there should also be included a just proportion of the probable expense of future repairs and maintenance of the railway system and future taxes, or whether these expenses should be provided for by the respective companies as they accrue, quare.—Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 O. C. C. 362 (1892); s. c., 3 C. D. 493; Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 12 O. C. C. 367 (1893); s. c., 5 C. D. 643.

Agreement between companies — construction.

Where one company contracts with another whereby it permits the cars of such other company to run over its track, such other company cannot under such contract run the cars of the third company over the tracks of such

first company.—Toledo, etc., R. R. Co. v. Toledo Traction Co., 17 O. C. C. 22 (1898); s. c., 9 C. D. 828. See Toledo, etc., R. R. Co. v. Toledo Traction Co., 15 O. C. C. 190 (1897); s. c., 8 C. D. 204.

Appropriation of property — evidence.

See Lorain Street Ry. Co. v. Siinning, 17 O. C. C. 649 (1895); s. c., 6 C. D. 753.

Injunction to prevent entry on private property — estoppel.

See Detwiler v. Toledo, etc., Ry. Co., 6 N. P. 485 (1895); 8 Dec. 166.

Power to condemn county road.

See Citizens, etc., R. R. Co. v. Commissioners, 56 Oh. St. 1, 8 (1897).

Right of interurban roads to condemn.

See § 3443-10.

§ 3441. **THE AUTHORITY CONTROLLING THE PUBLIC ROAD MUST CONSENT.**—If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied. (February 19, 1870, 67 v. 10, § 1.)

State and county roads included.

Citizens, etc., R. R. Co. v. Commissioners, 56 Oh. St. 1, 7 (1897).

"Officer," meaning.

The term "officer" includes a board of county

commissioners.—Citizens, etc., R. R. Co. v. Commissioners, 56 Oh. St. 1, 7 (1897).

Section cited.

State ex rel. v. Taylor, 55 Oh. St. 61, 66 (1896).

§ 3442. **FORM OF OATH IN APPROPRIATION PROCEEDINGS.**—In case of appropriation of property for such purpose, the oath to be administered to the jury shall be as follows: "You and each of you do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation which is due to (here name the owner or owners), by reason of the appropriation of the street or avenue (as in the statement described), irrespective of any benefit from any improvement proposed by said (here name the company, individual, or company of individuals), and that you will in assessing any damages that may accrue to (here name the owner or owners), by reason of the appropriation, other than the compensation, further ascertain how much less valuable the lot or lots of said (here name the owner or owners), will be in consequence of such appropriation." And the jury, in ascertaining such compensation or damages, shall determine the amount thereof without reference to the distinction between a public and a private nuisance, and the effect of such distinction upon the right of such owner or owners to claim compensation or damages, and the court shall, if requested, so direct the jury. (March 27, 1866, 63 v. 55, § 5.)

§ 3443. **COUNCIL, ETC., MAY FIX TERMS AND CONDITIONS.**—Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated. (February 19, 1870, 67 v. 10, § 1; May 7, 1869, 66 v. 140, § 1.)

See §§ 2502, 3438.

Regulations as to, §§ 3443a-3443-3.

§ 3443a. **WATCHMEN AT STREET CROSSINGS, INTERSECTIONS AND CORNERS.**—Whenever any street railways are operated by electricity, cable, compressed air, or any motive power other than horses or mules, in any municipality, the board of legislation or council of such municipalities shall have the power by ordinance to require the owners or operators of any such street railways to place watchmen at any street crossings, intersections or corners which such board of legislation or council may deem dangerous; and to provide for the proper enforcement of such ordinances by penalties in the way of fine or imprisonment, or both, which may be imposed upon the owner, officer, or operator of such street railways or by a penalty of not exceeding \$100 per day, which may be recovered by such municipalities in a civil suit against the owners or operators of any such street railway failing to place such watchman as may be required. (April 16, 1892, 89 v. 346.)

§ 3443-1. **STREET RAILROAD ROUTE IN CINCINNATI MADE VALID.**—That in all cases where in cities of the first grade of the first class the council has heretofore, by ordinance, established any street railroad route and declared the conditions upon which a street railroad should be constructed and operated upon and along such route, and due publication of a notice has been made calling for proposals to construct and operate such street railroad to be awarded to the corporation, individual or individuals that should agree to carry passengers thereon at the lowest rates of fare, and the proposal of a bidder who obtained and filed the written consents of the owners of the majority of the feet front of property on each street on the line of the route has been accepted thereon, and an ordinance passed granting to such bidder the franchise to construct and operate such street railroad, and such bidder has accepted the same and entered into a written contract with such municipal corporation to construct and operate such street railroad, such ordinance, grant, contract and franchise shall be deemed and held, in all respects, to be valid and binding, notwithstanding the submission of another bid at such letting by a bidder proposing to carry passengers on such route at a lower rate of fare, who failed and neglected to obtain and file the written consent of any of the property owners on the line of said route. (April 10, 1891, 88 v. 303.)

Constitutionality.

See *Knorr v. Miller*, 5 O. C. C. 609, 623 (1891); s. c., 3 C. D. 297; *Cincinnati v. Cincinnati*, etc., Ry. Co., 31 W. L. B. 308 (1894).

§ 3443-2. **AUTHORIZING MUNICIPAL AUTHORITIES TO GRANT PERMISSION TO EXTEND TRACKS, ETC.; FARE MUST NOT BE INCREASED.**—In cities of the first grade of the first class the board of city affairs or board of public improvements, or their successors in office, may, by resolution, grant permission to any corporation, individual or company owning or having the right to construct any street railroad, to extend their tracks and route subject to such provisions of sections 3437, 3438, 3439, 3440, 3441, 3442 and 3443 of the Revised Statutes as are applicable and not in conflict herewith, on any street or streets when such board may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads by consolidation under existing laws, shall not be increased by reason of such extension or consolidation. (April 10, 1891, 88 v. 303.)

Constitutionality.

See *Cincinnati v. Cincinnati*, etc., Ry. Co., 31 W. L. B. 308 (1894). See generally as to extensions, § 2505, notes.

§ 3443-3. **SCREENS FOR MOTORMEN.**—Every electric street car other than trail cars which are attached to motor cars, shall be provided during the months of November, December, January, February and March of each year, at the forward end

 Railroad Crossings, etc.—Regulations as to, §§ 3443-4 3443-6.

with a screen constructed of glass or other material, which shall fully and completely protect the driver, or motorman, or gripman, or other person stationed on such forward end and guiding and directing the motor power by which they are propelled, from wind and storm. (April 20, 1893, 90 v. 220.)

§ 3443-4. **PENALTY; DUTY OF PROSECUTING ATTORNEY.**—Any person, agent or officer of any association or corporation violating the provisions of this act shall, upon conviction, be fined in any sum not less than \$25 nor more than \$100 for each day each car belonging to and used by any such person, association or corporation is directed or permitted to remain unprovided with the screen required in section one (§ 3443-3) of this act; and it is hereby made the duty of the prosecuting attorney of each county in this state to institute the necessary proceedings to enforce the provisions of this act. (April 20, 1893, 90 v. 220.)

Constitutionality.

This act is not in conflict with either the Ohio or United States Constitutions.—State v. Nelson, 52 Oh. St. 88 (1894).

§ 3443-5. **REPAIR OF CROSSINGS AT INTERSECTING STREET RAILROADS; STOPPING OF CARS AT CROSSING.**—Where the tracks of two street railroads cross each other or in any way connect at a common grade, when one or both such street railroads use other than horse power for propelling their street cars, the crossings shall be made and kept in repair at the joint expense of the companies owning the tracks, and all such cars used on said street railroads shall come to a full stop, not nearer than ten feet nor further than fifty feet from the crossing, and shall not cross until the way is clear; and when two or more cars approach the crossing at the same time the car or cars on the road first built shall have precedence. (May 4, 1891, 88 v. 581.)

§ 3443-6. **FULL STOP WHEN APPROACHING INTERSECTING STEAM RAILWAY, ETC.**—That whenever the tracks of any street railroads in this state cross the tracks of any steam railway at grade, the street railway company operating said line of cars shall cause their street-cars to come to a full stop not nearer than ten feet nor further than fifty feet from the crossing, and before proceeding to cross said steam railway tracks, shall cause some person in their employ to go ahead of said car or cars and ascertain if the way is clear and free from danger for the passage of said street-cars, and said street railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks. (May 4, 1891, 88 v. 581.)

Joint liability.

Where the car is not stopped and the gate-keeper is negligent, the railroad company and the street-car company are both liable.—Toledo, etc., Ry. Co. v. Fuller, 17 O. C. C. 562 (1894); s. c., 8 C. D. 134.

Horses and car considered as one.

Under this act the car and the horses attached to it are to be considered as one in calculating the distance from the railroad track at which the street car is required to stop.—Toledo, etc., Ry. Co. v. Fuller, 17 O. C. C. 562 (1894); s. c., 8 C. D. 134.

Collision—prima facie case.

The fact of a collision puts the company prima facie in the wrong, and the burden is on it to show that the injury was the result

of an accident, and that it could not have been prevented by the exercise of reasonable care.—Toledo, etc., Ry. Co. v. Fuller, 17 O. C. C. 562 (1894); s. c., 8 C. D. 134.

Duty to look out for persons getting off or on car at such stop.

Where a car is stopped in compliance with this section, the operators of the car are not required as a matter of law to look before the car is started to see whether any one is getting off or on the car.—Packard v. Toledo Traction Co., 22 O. C. C. 587 (1901).

Failure to lower gates.

Failure of the steam railway to lower the safety gates does not relieve the street railway company from the duty of sending a man ahead to see if the crossing can be safely made.

Railways Outside of Municipalities, etc., §§ 3443-7 3443-10.

— Cincinnati, etc., Ry. Co. v. Murray, 9 O. C. C. 291 (1895); s. c., 6 C. D. 413; s. c., 53 Oh. St. 570 (1895).

Proximate cause.

The injury must have been directly caused by the negligence.—Cincinnati, etc., Ry. Co. v. Murray, 53 Oh. St. 570 (1895).

Questions for court and jury.

See Cincinnati, etc., Ry. Co. v. Murray, 53 Oh. St. 570 (1895).

Duty when only one man on car.

See Cincinnati, etc., Ry. Co. v. Murray, 53 Oh. St. 570 (1895).

§ 3443-7. **PENALTIES.**—Every person in charge of any street-car or cars who willfully fails to comply with the provisions of this act, and fails to bring said car or cars which he has in charge to a full stop, or causes the same before the way is clear, or signaled so to do to cross said steam railroad tracks, shall be personally liable to any person injured by reason of such failure as aforesaid, to a penalty of one hundred dollars, to be recovered by civil action at the suit of the state of Ohio, in the court of common pleas of any county wherein such crossing or connection is, and the company in whose employ such person having charge of said car or cars is, as well as the person himself shall be liable in damages to any person or persons injured in person or property (having charge of such car or cars) as aforesaid. (May 4, 1891, 88 v. 581.)

§ 3443-8. **CONSTRUCTION, ETC., OF STREET RAILROADS OUTSIDE OF MUNICIPALITIES.**—Companies incorporated under section 3236 of the Revised Statutes of Ohio for such purpose may construct, maintain and operate electric street railroads or street railroads using other than animal power as a motive power for the transportation of passengers, packages, express matter, United States mail, baggage and freight upon the highways in the state outside of municipalities or upon private rights of way. (May 10, 1902, 95 v. 539; May 17, 1894, 91 v. 285.)

Right to run in city.

This section does not modify, limit or repeal §§ 3437 and 3438, nor define a different kind of street railroad. A street railroad corporation having a charter to construct a street railroad within and without a city or village may, under a grant from the city or village, build its line in and through the city or vil-

lage.—Hamilton v. C. & H., etc., Ry. Co., 5 N. P. 457 (1898); s. c., 8 Dec. 174.

Constitutionality.

See Dietz v. C. & M. Traction Co., 4 N. P. 399 (1897); s. c., 6 Dec. 513.

Construction of section.

See opinion of Attorney-General, 39 W. L. B. 113.

§ 3443-9. **OCCUPANCY AND USE OF PUBLIC HIGHWAYS.**—All such companies shall have power to occupy and use for their tracks, cars and necessary fixtures and appliances, the public highways outside of cities and villages with the consent of the public authorities in charge of or controlling such highways, and with the written consent of a majority, measured by the front foot, of the property holders abutting on each of such highways. (May 17, 1894, 91 v. 285.)

Turnpike company cannot consent.

See McMaken v. C. & H. R. B. Co., 5 N. P. 367 (1898); s. c., 5 Dec. 358.

When railroad is additional servitude.

The construction of an interurban railroad of T rails on one side of a highway creates an additional burden similar to that created

by a steam road, and an abutting owner is entitled to an injunction pending appropriation.—Schaaf v. Cleveland, etc., Ry. Co., 66 Oh. St. 215 (1902). See Akron, etc., R. R. Co. v. Keck, 23 O. C. C. 57 (1901); Dietz v. C. & M. Traction Co., 4 N. P. 399 (1897); s. c., 6 Dec. 513; McMaken v. C. & H. Ry. Co., 5 N. P. 367 (1899); s. c., 5 Dec. 358.

§ 3443-10. **INTERURBAN RAILROADS GIVEN RIGHT OF EMINENT DOMAIN.**—All companies organized for the construction and operation of interurban railroads, using any motive power other than animal power, shall, when necessary to enter upon and use private property in such construction and operation outside of municipalities, have the same power and right of eminent domain as is

Consolidation — Inclined Plane Companies, etc., §§ 3443-11-3445.

now possessed by steam railroad companies. (May 10, 1902, 95 v. 538; May 17, 1894, 91 v. 285.)

Note.—Prior to the passage of this act it was held in several probate courts that these companies could not appropriate private lands, except where it was impossible to use a highway.—Columbus, etc., Ry. Co. v. Cole, 47 W. L. B. 547 (1902); Columbus, etc., Ry. Co. v. Marriott, 47 W. L. B. 357 (1902); Toledo, etc., Ry. Co. v. Grillin (Lucas Co. Probate Court) (1902).

Extent of power.

This section does not confer unlimited power on street railroad companies.—See Columbus, etc., Ry. Co. v. Cole, 47 W. L. B. 66 (1902).

Pleading and proof.

See Columbus, etc., Ry. Co. v. Cole, 47 W. L. B. 66 (1902).

§ 3443-11. **LEASES, PURCHASES AND TRAFFIC ARRANGEMENTS.**—Such companies shall have power to lease, purchase or make traffic arrangements with any other street railroad company as to so much of its tracks and other property as may be necessary or desirable to enable them to enter or pass through any city or village, upon the same terms and conditions applicable to other street railroads. And any existing street railroad company owning or operating a street railroad shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public. (May 17, 1894, 91 v. 285.)

Right to appropriate trackage.

A company operating under this act has the right to appropriate trackage under § 3440.—

State ex rel. v. Cincinnati, etc., Ry. Co., 19 O. C. C. 79 (1899).

§ 3443-12. **CONSOLIDATION.**—Such street railroad companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies; provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation. (May 17, 1894, 91 v. 285.)

§ 3443-13. **REGULATIONS AND POWERS.**—Such companies shall be subject to the same regulations now provided for street railroads, in so far as the same are applicable, and shall have all the powers, in so far as they are applicable, that other street railroad companies have. (May 17, 1894, 91 v. 285.)

§ 3443-14. **STREET RAILROAD IN MANSFIELD MAY OPERATE A LIGHT AND POWER PLANT.**—The council of any city which at the last federal census had or which at any subsequent federal census may have a population of not less than 13,400 nor more than 13,600 may grant permission to any corporation, individual or individuals to construct and operate an electric power and light plant in connection with any street railroad operated by them, and may prescribe the terms of constructing and operating the same, and such cities may renew any such grants at their expiration upon such conditions as may be considered conducive to the public interests. (April 29, 1891, 88 v. 447.)

§ 3444. **POWERS OF INCLINED PLANE RAILWAY COMPANIES.**—An inclined plane railway company may construct, operate, and maintain an inclined plane railway, for the conveyance of passengers and freight, or either, with such offices, depots, and other buildings as it may deem necessary, and may establish and maintain a park or pleasure-grounds, and for such purpose may acquire and hold real estate. (April 12, 1876, 73 v. 229, § 2.)

Acts construed.

Cincinnati v. Cincinnati, etc., Ry. Co., 30 W. L. B. 321 (1893); Louisville Trust Co. v.

Cincinnati, 73 Fed. 716 (1896); s. c., 8 O. F. D. 704; Louisville Trust Co. v. Cincinnati, 76 Fed. 296 (1896); s. c., 10 O. F. D. 112.

§ 3445. **HOW STREET CROSSINGS TO BE MADE.**—When the part of the railway of such company which is operated by steam power crosses a public street or highway, it must pass either over or under such street or highway, and shall be constructed in such manner, and at such distance above or below the same as not to obstruct the ordinary use of such street or highway. (April 12, 1876, 73 v. 229, § 10.)

PART VI.

SHIP CANAL CORPORATIONS.

- § 3445-1. Power to construct, etc., and operate ship canal.
- § 3445-2. Change of line, etc., into or through adjoining state.
- § 3445-3. Rights of companies.
- § 3445-4. Occupancy and use of stream; appropriation of necessary lands.
- § 3445-5. Occupancy and use of public way or public grounds.
- § 3445-6. Compensation for land taken.
- § 3445-7. Issuing of bonds.
- § 3445-8. Borrowing money.
- § 3445-9. Mortgage or pledge securing loans.
- § 3445-10. Increase of capital stock; limit.
- § 3445-11. Principal office.
- § 3445-12. Securities sold to, and liability of directors.
- § 3445-13. Consolidations.
- § 3445-14. Provisions governing consolidations.
- § 3445-15. Application of laws for protection of property, and relation to officers, agents, employees, and police.

§ 3445-1. **Sec. 1. POWER TO CONSTRUCT, ETC., AND OPERATE SHIP-CANAL AND NECESSARY APPURTENANCES.**—A ship-canal company, now existing or hereafter created, may lay out, construct, maintain, and operate with any kind of motive power a ship-canal, together with all such locks, dams, tow-paths, branches, basins, tunnels, aqueducts, feeders to supply water from any lakes or rivers, reservoirs, cuttings, apparatus, appliances, and machinery as it may deem necessary, between the points named in the articles of incorporation, and when a terminus named in the articles of incorporation is upon the boundary line of the state, section 3271 of the Revised Statutes shall apply to said company. (April 27, 1896, 92 v. 410.)

§ 3445-2. **Sec. 2. CHANGE OF LINE, ETC., INTO AND THROUGH ADJOINING STATE.**—Any such company may change the line or grade of its canal and branches thereof, and either of the proposed termini of such canal and branches, in the manner and subject to the provisions, conditions and limitations contained in sections 3272, 3273, 3274, 3275, 3276, 3277, and 3278 of the Revised Statutes, which said sections are hereby made applicable to ship-canal companies, and may extend its canal and branches thereof into and through any adjoining state, under the regulations which may be prescribed by such adjoining state; and the rights, powers and privileges of such company over such extension, in the construction and use of such canal and branches, and in controlling the property and applying the money and assets thereon, shall be the same as if such canal and branches were built wholly in this state. (April 27, 1896, 92 v. 410.)

§ 3445-3. **Sec. 3. RIGHTS OF COMPANY.**—Any such company shall have the right to enter upon any land for the purpose of examining and surveying the lines of its canal and branches; to acquire — by purchase, appropriation, or otherwise, all such lands as are necessary and proper for the making, preserving, maintaining, operating and using the canals, and other works and appliances of the company; to make, maintain and alter any places or passages over, under, or through, the said canal or any of its branches and connections; to relocate, alter, move, divert, rebuild, or change the grade of any bridge, street, highway, turnpike, road, tramway, rail-

Ship Canal Companies, § 3445-3.

road, pipe line, conduit, or other avenue of transportation, either public or private; or any electric telegraph or telephone line, or electric wire, main, or conduit, or any water, gas, or steam-pipe, or sewer, drain, culvert, or tunnel, the present location of which may be or lie in, upon, across, under, or contiguous to the company's intended canal or works, and which may obstruct, prevent or interfere with the proper construction, maintenance, and operation thereof; to acquire, by purchase, appropriation, or otherwise, any and all lands necessary for relocating and moving any of the structures aforesaid; to obtain by purchase, appropriation, or otherwise, and use, during the construction and operation of said canal and its branches, from the rivers, lakes, brooks, streams, watercourses, reservoirs, and other sources of water-supply, adjacent or near to any such canal, or its branches, water sufficient for the purpose of constructing, maintaining, operating and using such canal and its branches and works, and sufficient to establish and maintain a current at the average rate of three miles per hour throughout the navigable channels of such canal; to control and regulate the fluctuations of the lakes, rivers, and creeks by regulating and overflow dams and weirs; to raise and lower the water-surface in the lakes and rivers; to control and regulate the flood-waters of rivers and creeks adjacent to such canal or its branches, by directing or impounding them as may be necessary; to divert or alter, either temporarily or permanently, the course of any river, stream, creek, brook, or water-course where the same is necessary to the making, maintaining, and operating of such canal and its branches; to erect, maintain and operate dams, regulating dams, weirs, conduits, channels, diversion channels, cuttings, ditches, trenches, tunnels, reservoirs, basins, aqueducts, and other works necessary to the purposes of such company; to condemn, appropriate, purchase, acquire, and remove any dam, pier, wharf, bridge, causeway, trestle, wall, embankment, or other artificial work or natural obstacle which obstructs, interferes with, or threatens the free navigation, or use and operation and maintenance of such company's canal and branches, and the safe and easy entrance and exit of vessels to and from the same; to construct, maintain and operate, use, lease or otherwise dispose of terminals, harbors, wharves, piers, docks, elevators and warehouses upon said canal, or upon lakes, adjoining or near the same or connected therewith by waterways, natural or artificial; to lay out and lease, or otherwise dispose of water-lots, and use, lease, sell or otherwise dispose of water brought by or for the said canal, and produce, lease, and supply, or otherwise dispose of hydraulic, electric, or other kinds of power in connection with the works of such company; to acquire and use and dispose of steamers, tugs, boats, barges, and other vessels for the purposes of said canal, and propel vessels of all kinds, in and through the said canal by any kind of power and force; to erect, maintain and operate such structures, machinery and appliances as are necessary to produce the force and power required to operate such canal and branches; to open, cut and erect such ponds and basins for the laying up and turning of vessels, boats, or rafts using the canal, and at such portions thereof as they may deem expedient; to build and erect such dry-docks, slips and machinery therewith for the hauling out and repairing of such vessels as they think proper, and make and provide apparatus and appliances for the raising and clearing away of wrecked or sunken vessels and for the floating of sunken and grounded vessels, and lease and hire the same on such terms as they deem expedient, or operate the same by their servants and agents; to construct, or acquire and maintain and operate electric telegraph and telephone lines, and electric light poles, wires, machinery and apparatus for the purpose of the economic and convenient construction and operation of such canal and branches; to acquire, by license, purchase, or otherwise, the right to use any patented invention for the purpose of constructing and operating such canal and branches, and to again dispose of the same; to construct, make and do all such matters and things necessary or proper for the making, completing and properly maintaining and operating such canal and branches, and carrying out in other respects the objects of such company. Provided, that whenever such company shall find it necessary to relocate, alter, move, divert, rebuild or in any manner change any bridge, street, highway, turnpike, or other avenue of travel or

Ship Canal Companies, §§ 3445-4-3445-8.

transportation, either public or private; or of any electric telegraph or telephone line, or electric wire, main, or conduit, or any water, gas, or steam-pipe, or sewer, drain, culvert or tunnel it shall cause the same to be properly reconstructed forthwith, at its own expense, and on the most favorable location procurable, and with the least possible interruption to the convenient use of such structure. (April 27, 1896, 92 v. 410.)

Power of appropriation.

A company incorporated to construct a line of canal is engaged in making a public work, for which private property may be taken as in the case of other public uses. — *Willyard v. Hamilton*, 7 Ohio (2nd part) 112 (1835).

Authorizing abandonment of corporate power, constitutional.

A special act, authorizing a canal company to abandon a portion of its canal, is permission to surrender corporate power, not an at-

tempt by special legislation to confer corporate power, and is therefore not in conflict with section 1, article 13, of the constitution. — *Penna. Canal Co. v. Commissioners*, 27 Oh. St. 14 (1875).

Abandonment releases from liability.

Under its charter, it was the duty of the company to repair over highways. Held, that after such abandonment it was released from this liability. — *Penna. Canal Co. v. Commissioners*, 27 Oh. St. 14 (1875).

§ 3445-4. Sec. 4. OCCUPANCY AND USE OF STREAM; APPROPRIATION OF NECESSARY LANDS. — Such company may enter upon and into and occupy and use any part or all of any river, creek or stream upon and along the route of its canal and branches, and may enter upon lands on the route adjoining or in the neighborhood of its canal and branches, and appropriate so much thereof as may be deemed necessary for such canal and branches, including all buildings and improvements mentioned in section 3 (§ 3445-3) of this act, materials for construction, and rights of way sufficient to enable it to construct and repair its canal and branches. (April 27, 1896, 92 v. 410.)

§ 3445-5. Sec. 5. OCCUPANCY AND USE OF PUBLIC WAY OR PUBLIC GROUND. — If it be necessary in the location of a canal, or branches thereof, to occupy any public road, street, alley way or public ground of any kind or any part thereof, the right to occupy and use the same may be acquired in the manner and under the conditions and subject to the restrictions and obligations provided and contained in section 3283 of the Revised Statutes, which is hereby made applicable to ship-canal companies. (April 27, 1896, 92 v. 410.)

§ 3445-6. Sec. 6. COMPENSATION FOR LAND TAKEN, ETC. — No appropriation of property to the use of such company shall be made until full compensation therefor is made in money, or secured by deposit of money, to the owner, to be assessed by a jury without deduction for benefits to any property-owner, as prescribed by law. Such appropriation of property shall be made according to the provisions of title two (2) chapter eight (8) of the Revised Statutes, and the acts amendatory thereof and supplementary thereto. (April 27, 1896, 92 v. 410.)

§ 3445-7. Sec. 7. ISSUING OF BONDS. — A company may issue bonds, convertible or otherwise, bearing a rate of interest not exceeding seven per centum per annum, to an amount not exceeding the amount of its capital stock actually subscribed, for one or more of the following purposes: Completing or extending its canal, constructing branch canals, constructing necessary buildings or improvements, enlarging or deepening its canal or branches, paying its unfunded debts, or redeeming its bonds; and it may secure the bonds issued for such purposes by mortgage on its property, or otherwise, by complying with the provisions of section 3286 of the Revised Statutes, which is hereby made applicable to ship-canal companies and to ship-canals. (April 27, 1896, 92 v. 410.)

§ 3445-8. Sec. 8. BORROWING MONEY. — A company may borrow money on terms, for the purposes and subject to the conditions and restrictions contained in section 3287 of the Revised Statutes. (April 27, 1896, 92 v. 410.)

Ship Canal Companies, §§ 3445-9-3445-15.

§ 3445-9. Sec. 9. **MORTGAGE OR PLEDGE SECURING LOANS.**—Such mortgage or pledge may be made in the manner provided by section 3288 of the Revised Statutes, and when made may be recorded as provided in section 3289 of the Revised Statutes, and when so recorded shall constitute a lien as in said section 3289 provided. (April 27, 1896, 92 v. 410.)

§ 3445-10. Sec. 10. **INCREASE OF CAPITAL STOCK; LIMIT.**—A company may increase its capital stock whenever in the opinion of the directors such increase is desirable and necessary to the purposes of the company, by complying with the provisions of section 3308 of the Revised Statutes, and such increased stock may be "common" or "preferred," as provided by and under the conditions and restrictions named and contained in sections 3309 and 3309b of the Revised Statutes. Provided, that the aggregate amount of the capital stock and bonded indebtedness of the company shall never exceed the sum of six hundred thousand dollars per mile of its main and branch canals. (April 27, 1896, 92 v. 410.)

§ 3445-11. Sec. 11. **PRINCIPAL OFFICE.**—Each company shall, as soon as convenient after its organization, establish a principal or general office on (at) some point on the line of its canal, and may change the same at pleasure, and shall give public notice of such establishment or change, in some newspaper published on its line, within this state; and the office of the president, secretary and treasurer of the company shall be kept at such principal or general office, or at some other point on the line of the canal within the state, and a record kept there of all the proceedings of the company, to be open at reasonable hours to the inspection of any stockholders of the company. (April 27, 1896, 92 v. 410.)

§ 3445-12. Sec. 12. **SECURITIES SOLD TO, AND LIABILITY OF, DIRECTORS.**—The provisions of sections 3313 and 3314 of the Revised Statutes shall apply to ship-canal companies. (April 27, 1896, 92 v. 410.)

§ 3445-13. Sec. 13. **CONSOLIDATIONS.**—When the canals of any ship-canal companies in this state are so constructed as to permit the passage of ships, boats or vessels into and through any two or more of such canals continuously, without break or interruption, such companies may consolidate themselves into a single company; and any company organized in this state for the purpose of constructing, owning, maintaining and operating a ship-canal to the boundary line of the state, or to any point either in or out of the state, may consolidate its capital stock with the capital stock of any company in an adjoining state, organized for a like purpose, and whose canal has been projected to the same point, where the several canals when constructed will form a continuous canal. (April 27, 1896, 92 v. 410.)

§ 3445-14. Sec. 14. **PROVISIONS GOVERNING CONSOLIDATIONS.**—The consolidations shall be made in accordance with the provisions of sections 3331, 3382 and 3383 of the Revised Statutes, and the consolidated companies shall be entitled to all the rights and benefits, and be subject to all the requirements and restrictions imposed by sections 3384, 3385, 3386, 3388, 3388a, 3390, 3391, and 3392 of the Revised Statutes, all the above sections are hereby made applicable to ship-canal companies. (April 27, 1896, 92 v. 410.)

§ 3445-15. Sec. 15. **APPLICABILITY OF LAWS FOR PROTECTION OF PROPERTY, AND RELATING TO OFFICERS, AGENTS, EMPLOYEES AND POLICE.**—All laws for the protection of railroads and their property, and relating to or enforcing the duties and obligations of officers, agents and employees of railroad companies, and relating to the appointment, powers and duties of railroad police, shall be applicable to the canals, property, officers, agents and employees of ship-canal companies. (April 27, 1896, 92 v. 410.)

PART VII.

UNION DEPOT CORPORATIONS.

- § 3446. Who may file articles of incorporation.
- § 3447. The articles of incorporation.
- § 3448. Stock owned in equal proportion; powers.
- § 3449. Who to be directors of the company.
- § 3450. By-laws, rules, and regulations.
- § 3451. Liability of the several companies.
- § 3452. Certain laws applicable to such companies.
- § 3453. Power to borrow money and issue, secure, and sell notes or bonds.

§ 3446. **WHO MAY FILE ARTICLES OF INCORPORATION.** — The presidents of two or more railroad companies running railroads to the same city, town, or village, may, by the consent and under the direction of their respective boards of directors, file articles of incorporation in the office of the secretary of state, for the purpose of purchasing depot grounds, and locating, constructing, and maintaining a common or union station-house and passenger depot, and a union railroad by two or more tracks connecting the railroads of such companies for business purposes. (April 3, 1868, 65 v. 63, § 1; S. & S. 122.)

§ 3447. **THE ARTICLES OF INCORPORATION.** — The articles of incorporation shall specify —

1. The name assumed by such company.
2. The names of the companies, and the city, village, or town where such depot and connection tracks are proposed to be constructed.
3. The amount of capital stock necessary to obtain a site and construct and maintain such depot and tracks.

The articles, signed by the presidents in behalf of the companies, with the corporate seals of the companies annexed thereto, shall be forwarded to the secretary of state, who shall record and preserve the same in his office; a copy thereof, duly certified by the secretary of state, shall be evidence of the existence of such company; and thereafter such company may contract and be contracted with, sue and be sued, locate and take releases of right of way and depot grounds, and appropriate so much land as may be necessary for such depot and tracks. (April 3, 1868, 65 v. 63, § 1; S. & S. 122.)

§ 3448. **STOCK OWNED IN EQUAL PROPORTION; POWERS.** — The companies whose boards of directors authorize the filing of the articles of incorporation, or assent thereto, shall each be held to own and be liable to pay an equal proportion of the capital stock; and the provisions of section three thousand two hundred and eighty-one, shall be applicable to such company. (April 3, 1868, 65 v. 63, § 2; S. & S. 122.)

§ 3449. **WHO TO BE DIRECTORS OF THE COMPANY.** — The president of each company which enters into such arrangement shall, ex officio, be a director in the union company, unless the board of directors of such company appoint some other person as director; all questions which affect pecuniary liabilities and expenditures shall require the concurrence of two-thirds of all the directors; all officers, agents, and employes of the union company shall be appointed by the concurrence of all the members of the board, and may be discharged by any two members thereof, and the

Union Depot Companies, §§ 3450-3453.

board shall keep a record of its proceedings, which shall be open to the inspection of the stockholders and directors of the companies. (April 3, 1868, 65 v. 63, § 3; S. & S. 122.)

§ 3450. **BY-LAWS, RULES, AND REGULATIONS.** — The board may pass by-laws, rules, and regulations, not inconsistent with the charters of the companies, for its government, and for the regulation of the depot, depot grounds, and the business thereof, and shall appoint such officers and agents as may be necessary; it shall adopt, and post conspicuously in the passenger house, such rules and regulations as will control the conduct of all runners, solicitors, hackmen, and drivers of vehicles; and the officers and agents of the company shall have the same authority to arrest and bring to justice pickpockets, thieves, and persons who violate the public peace, and persons who violate any such rules and regulations so posted, and persons who commit crimes and misdemeanors while on the depot grounds, as constables have by law within their respective townships. (April 3, 1868, 65 v. 63, § 3; S. & S. 122.)

May grant exclusive right to transfer company.

A union depot company may grant to a transfer company the exclusive privilege of standing its vehicles upon its depot grounds and soliciting customers thereon; and a regulation excluding therefrom all others engaged in a similar business, excepting only for the purpose of delivering passengers or of calling for persons that have previously engaged them, is reasonable. — *Snyder v. Union Depot Co.*, 19 C. C. 369 (1899); s. c., 10 C. D. 645; reversing 7 N. P. 64, where all the cases are

reviewed; dismissed in Supreme Court, 42 Bull. 310 (1899).

Ordinance prohibiting soliciting at depot.

A city ordinance prohibiting hackmen from soliciting patronage on any railroad platform or railroad ground is a reasonable and proper regulation. — *Moerder v. Fremont*, 19 C. C. 394 (1899); s. c., 10 C. D. 501.

See also *State v. Brown*, 7 N. P. 133 (1899); s. c., 10 Dec. 28.

§ 3451. **LIABILITY OF THE SEVERAL COMPANIES.** — The several companies represented by the union company shall be jointly liable to the public, and all persons who contract with the union company, for all contracts made and damages caused by the union company; and, as between themselves, shall be liable to each other in the proportion of the interest of each in the union property, and for all damages, costs and expenses which arise from the fault or neglect of their respective officers and employees. (April 3, 1868, 65 v. 63, § 4; S. & S. 123.)

§ 3452. **CERTAIN LAWS APPLICABLE TO SUCH COMPANIES.** — All laws for the protection of railroads and their property, and relating to or enforcing the duties and obligations of officers, agents, and employes of railroad companies to the public and to railroad companies, or to either, shall be applicable to the railroad tracks, property, officers, agents, and employes of such union company. (April 3, 1868, 65 v. 63, § 5; S. & S. 123.)

§ 3453. **POWER TO BORROW MONEY AND ISSUE, SECURE AND SELL NOTES OR BONDS.** — Any such company shall have power to borrow money for the purpose of raising means to carry out the powers conferred by the act authorizing the incorporation of union depots without reference to the amount of stock of such company, and may issue coupon or other bonds payable to bearer, bearing interest not exceeding the highest contract rate of interest which may be allowable in this state, at the time; such interest to be payable semi-annually, and such company may also mortgage its franchises, property and revenues of every kind, then owned or subsequently to be acquired, to secure the payment of such loan and interest, or of such bonds and interest; and the stockholders of such company may guarantee the payment of any notes or bonds the company lawfully issues, and it may dispose of the same at such rate of premium or discount, as the directors may deem best for its interests. (April 3, 1896, 92 v. 118; May 13, 1868, 65 v. 191, § 1; S. & S. 123.)

PART VIII.

TELEGRAPH AND TELEPHONE CORPORATIONS.

- § 3454. Powers of companies.
- § 3455. Power of telegraph companies; unlawful to contract for exclusive right of way.
- § 3456. May enter upon any appropriate land.
- § 3457. Limitation upon such authority.
- § 3458. When the land to be appropriated is held by a corporation.
- § 3459. When such land is held by a railroad company.
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- § 3461. How right to use public ground acquired.
- § 3461-1. Lines of electric telegraphs may be constructed any place so they do not incommode the public.
- § 3461-2. County commissioners to appoint three appraisers for damages.
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- § 3462. Must receive and transmit dispatches for other lines.
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- § 3467a. Penalty for unlawfully interfering, etc., with telegraphic or telephonic messages or with electric light of electric street railway property.
- § 3468. When and how telegraph structures may be removed.
- § 3469. How and when repair of structures enforced.
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- § 3471-5. Validity of prior contracts.
- § 3471-6. Subways and conduits for electric wires, etc., in Cincinnati.
- § 3471-7. Permission for construction of, etc., by whom granted and rules governing construction.
- § 3471-8. Bond for restoration of streets, etc., board of improvements to fix rental.

§ 3454. **POWERS OF COMPANIES.**—A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road. (May 1, 1852, 50 v. 274, § 47; S. & S. 299.)

No injunction against additional wires.
A pole and eight wires had been continuously used by a telegraph company for a period of nine years in front of plaintiff's premises. Held, that an injunction would

not be granted restraining the company from stringing additional wires, but plaintiff must resort to his remedy for damages.—*Wirth v. Postal Tel. Co.*, 7 C. C. 290 (1893); s. c., 4 C. D. 601.

Powers — Exclusive Right of Way, § 3455.

Grant to string unlimited number of wires gives right to license others to use poles.

A grant to a corporation to erect poles and string an unlimited number of wires carries with it the right to license an individual to string wires on such poles, and the wires strung by such individual are not such an obstruction as will constitute a nuisance.—*Newman v. Avondale*, 31 W. L. B. 123.

But see *Tel. Co. v. Toledo*, 44 W. L. B. 238 (1900).

Condition of road, etc., to be observed — liability for negligence.

Monahan v. Telephone Co., 7 N. P. 95 (1898); s. c., 9 Dec. 532.

Telephone poles in city not additional servitude.

Reasonable use of streets of a city for telephone poles and wires is not a new burden, entitling the abutting owner to compensation.—*Auerbach v. Telephone Co.*, 7 N. P. 633 (1900); s. c., 9 Dec. 389; reviewing decisions and modifying *Smith v. Teleg. Co.*, 2 C. C. 259 (1886); s. c., 1 C. D. 457; *McLean v. El. Light Co.*, 9 W. L. B. 65 (1883).

Poles and wires create additional servitude.

See *Callen v. Columbus, etc., Co.*, 66 Oh. St. 166 (1902); *Schaaf v. Cleveland, etc., Ry. Co.*, 66 Oh. St. 215 (1902).

As to compensation to municipality.

See *Zanesville Telegraph & Tel. Co. v. Zanesville*, 45 W. L. B. 59 (1901).

Telephone poles on highway, additional servitude.

The construction of a telegraph or telephone line upon a highway is a new and additional servitude, entitling the owner to compensation.—*Smith v. Tel. Co.*, 2 C. C. 259 (1886); s. c., 1 C. D. 457; *Denver v. Telephone Co.*, 10 Dec. 273 (1900). See, also, *McLean v. El. Light Co.*, 9 W. L. B. 65 (1883).

Poles unlawfully erected to be removed.

When a company constructs a line during the pendency of an action to enjoin them from so doing, against the objection of the owner, a court of equity will order the same to be removed.—*Smith v. Tel. Co.*, 2 C. C. 259 (1886); s. c., 1 C. D. 457; *Denver v. Tel. Co.*, 10 Dec. 273 (1900).

Instruction to servants admissible in mitigation of damages.

In an action for wrongful cutting of shade trees on a highway which passes through a

farm, an oral license from a tenant, though unauthorized, and the instructions of the company to its servants with respect to the manner of trimming trees along its line, are competent to defeat exemplary damages, though incompetent to prevent recovery of full compensation.—*Western Union Tel. Co. v. Smith*, 45 W. L. B. 60 (1900).

Conflicting rights of telephone and street-car companies.

The dominant purpose for which streets in a municipality are dedicated is to facilitate public travel and transportation, and a franchise granted to a telephone company to operate its lines along such street is subordinate to the rights of the public for the purposes of travel and transportation.—*Railway Co. v. Telegraph Ass'n*, 48 Oh. St. 390 (1891).

Rights of telephone company subordinate.

The facts that a telephone company operated its lines upon certain streets, prior to the operation of an electric street railway thereon, will not give the telephone company a right paramount to that of the public to adopt and use the most approved mode of travel thereon; and if the operation of the electric railway disturbs the working of the telephone system, the remedy of the latter will be to readjust its methods so as to meet the conditions created by the operation of such electric railway.—*Railway Co. v. Telegraph Ass'n*, 48 Oh. St. 390 (1891).

Right to string wires includes right to trim trees.

The right of a telephone company to string wires in a highway includes the right to do the necessary trimming of trees in the highway, in a proper manner, without first giving the landowner an opportunity to do it.—*Wyant v. Tel. Co.*, 44 W. L. B. 110 (1900).

Company cannot confer use of streets upon another company.

A company having a permit to use streets and alleys cannot, under cover of its franchise, confer the right to use such streets and alleys upon a separate company without consent of the city.—*Tel. Co. v. Toledo*, 44 W. L. B. 238 (1900).

But see *Newman v. Avondale*, 31 W. L. B. 123 (1893).

As to cutting trees within the highway but owned by abutting owner.

Daily et al. v. State, 51 Oh. St. 348 (1894). See note to *State ex rel. v. Telephone Co.*, 36 Oh. St. 297, under § 3471.

See note under § 3456.

§ 3455. **POWERS OF TELEGRAPH COMPANIES; UNLAWFUL TO CONTRACT FOR EXCLUSIVE RIGHT OF WAY.**—Any such company may construct, own, use and maintain any line or lines of magnetic telegraph whether described in its original articles of incorporation or not, and whether such line or lines are wholly within or

Appropriation of Property, §§ 3456-3459.

partly beyond the limits of this state, and may join with any other company or association in conducting, leasing, owning, using or maintaining such line or lines upon such terms as may be agreed upon between the directors or managers of the respective companies; and such companies may own and hold any interest in any such line or lines or may become lessees of such line or lines, upon such terms as may be agreed upon; but it shall be unlawful for any such company or companies, and the owner or owners of rights of way to contract for the exclusive use thereof for telegraphic purposes. (April 15, 1880, 77 v. 264; R. S. 1880; March 31, 1865, 62 v. 72, § 6; S. & S. 154.)

§ 3456. **MAY ENTER UPON ANY APPROPRIATE LAND.**—Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right of way over such lands and adjacent lands sufficient to enable it to construct and repair its lines (March 31, 1865, 62 v. 72, § 1; S. & S. 153.)

See *Smith v. Cent. Dist. Tel. Co.*, 2 C. C. 259 (1886); s. c., 1 C. D. 475.

C. & St. L. R. R. Co. et al., 8 N. P. 121 (1900).

See § 6881-1.

Appropriation along right of way of railroad; damages.

Nominal damages only will be allowed for the condemnation of a right to erect poles and wires along the right of way of a railroad company.—*Ohio Postal Tel. Co. et al. v. C. C.*

Proceedings in error, time for taking, etc.

See *C. C. & St. L. Ry. Co. v. Postal Tel. Co.*, 22 O. C. C. 555 (1901).

§ 3457. **LIMITATION UPON SUCH AUTHORITY.**—No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or inclosure within which an edifice is situate, nor, in cases not provided for in section three thousand four hundred and sixty-one, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental tree. (March 31, 1865, 62 v. 72, § 1; S. & S. 153.)

See *Smith v. Cent. Dist. Tel. Co.*, 2 C. C. 259 (1886); s. c., 1 C. D. 475. See § 6881-1.

§ 3458. **WHEN THE LAND TO BE APPROPRIATED IS HELD BY A CORPORATION.**—When lands sought to be appropriated for lines of magnetic telegraph are held by a corporation incorporated under any law of this state, whether held by purchase or in virtue of any appropriation authorized by its charter or by any law of this state, the right of the company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which the company is authorized to put such lands under its charter; and no such company shall erect poles, piers, abutments, wires, or other necessary fixtures, in such close proximity to any other line of magnetic telegraph authorized by law to be constructed as to interfere mechanically with the practical working of such telegraph. (March 31, 1865, 62 v. 72, § 2; S. & S. 153.)

Cited, *Ohio Postal Tel. Co. et al. v. C. C. C. & St. L. R. R. Co. et al.*, 8 N. P. 121 (1900).

§ 3459. **WHEN SUCH LAND IS HELD BY A RAILROAD COMPANY.**—The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to the land which lies within five feet

Appropriation of Property, §§ 3460, 3461.

of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when the company seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts showing that it is impracticable to erect such line within said limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line; the probate court shall, in all instances, determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated will, in any material degree, interfere with the practical uses to which such railroad company is authorized to put such land; and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places as the court shall direct; but nothing in this chapter shall be so construed as to authorize any company to appropriate the use of the track or rolling-stock of any railroad company for the purpose of transporting poles, materials, or the employes of such telegraph company, or for any other purpose whatever. (March 31, 1865, 62 v. 72, § 3; S. & S. 154.)

§ 3460. **WHEN THE LANDS LIE IN MORE THAN ONE COUNTY.**—Proceedings to appropriate lands to the use of a company, against a defendant whose adjoining or continuous lands lie in more than one county, may be instituted in any county in which any part of such lands lie, and the damages shall be assessed, in one proceeding, in respect of all such lands of the defendant sought to be appropriated, whether lying in the county wherein the court is sitting, or in other counties. (March 31, 1865, 62 v. 72, § 4; S. & S. 154.)

Cited, *Ohio Postal Tel. Co. et al. v. C. C. C. & St. L. R. R. Co. et al.*, 8 N. P. 121 (1900).

§ 3461. **HOW RIGHT TO USE PUBLIC GROUND ACQUIRED.**—When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (March 31, 1865, 62 v. 72, § 5; S. & S. 154.)

Not applicable to electric-light companies.

Brush v. Jones Bros. Co., 5 C. C. 340, 345 (1891); s. c., 3 C. D. 168.

Right of occupation ceases on expiration of agreement.

The right to occupy the streets of a city by a telephone company is conditional upon its agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the probate court as to the mode of use, in a proceeding instituted for that purpose; and such agreement or direction is inseparable from such right, and such right terminates with such agreement or direction. —*State ex rel. v. Telephone Co.*, 11 C. C. 55 (1895); s. c., 5 C. D. 311.

Constitutional.

Zanesville Telegraph Co. v. Zanesville, 64 Oh. St. 67 (1901). See also *Fitzsimmons v. Cincinnati*, 47 W. L. B. 171 (1901).

Municipality not entitled to compensation exceeding cost of repair, etc.

Municipality, though holding fee in its streets, has no proprietary interests in them, which entitle it to compensation, when subjected to an authorized additional burden by the erection of a telephone line. But it is entitled to compensation sufficient to make repairs rendered necessary by such additional burden. —*Zanesville Telegraph & Tel. Co. v. Zanesville*, 64 Oh. St. 67 (1901).

Power of court to enter a transfer of franchise.

See *Fitzsimmons v. Cincinnati*, 47 W. L. B. 171 (1901).

Lines of — Damages from, etc., §§ 3461-1-3461-5.

No ouster until failure to agree.

Where an agreement between the city and a telephone company as to the mode of use of its streets has expired by limitation, the city cannot oust the company from the occupancy of the streets until it is made to appear that no agreement can be made, and that the company, after such failure to agree, delays unreasonably to apply to the probate court to fix the mode of use of such streets.—*State ex rel. v. Central Union Tel. Co.*, 14 C. C. 273 (1897); s. c., 7 C. D. 536.

City cannot fix rentals.

A city cannot, in making an agreement as to such use of its streets, fix the rentals to be charged the patrons of the company for its instruments; a refusal of the company to assent to such agreement is justifiable and its refusal is not a failure to agree within the meaning of the statute.—*State ex rel. v. Central Union Tel. Co.*, 14 C. C. 273 (1897); s. c., 7 C. D. 536.

Cited, *Smith v. Cent. Dt. Tel. Co.*, 2 C. C. 259, 262 (1886); s. c., 1 C. D. 475.

§ 3461-1. Sec. 1. LINES OF ELECTRIC TELEGRAPHS MAY BE CONSTRUCTED IN ANY PLACE SO THEY DO NOT INCOMMODE THE PUBLIC.—Any person or persons may be and are hereby authorized to construct lines of electric telegraphs, from point to point, upon and along any of the public roads and highways, and across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines; provided, that the same shall not in any instance be so constructed as to incommode the public in the use of said roads or highways, or endanger or injuriously interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this state. (February 8, 1847, 45 v. 34.)

§ 3461-2. Sec. 2. COUNTY COMMISSIONERS TO APPOINT THREE APPRAISERS FOR DAMAGES.—If any person over whose land said lines shall pass, upon which such posts, piers, or abutments shall be placed, shall consider himself aggrieved or damaged thereby it shall be the duty of the county commissioners of the county in which such lands are, on application of such person, to be made within three months after the erection of such posts, piers, or abutments on his lands, to appoint three discreet, disinterested persons as appraisers, who shall, before they enter upon the duties of their appointment, severally take an oath or affirmation, before some person authorized to administer oaths, faithfully and impartially to perform the trust and duties required of them by this act; and it shall be the duty of said appraisers, or a majority of them, on view, to make a just and equitable appraisal of all the loss or damage sustained by the applicant, by reason of said lines, piers, posts, and abutments; duplicates of which appraisal shall be reduced to writing and signed by said appraisers, or a majority of them, one copy of which shall be delivered to the applicant, and the other to the owners or agent of said electric telegraph lines, on demand. And in case said appraisers shall assess any damages to said applicant, the said owners shall pay to said applicant the amount thereof, together with the costs of said appraisers; but if said appraisers shall award that said applicant has sustained no damages or loss, the said applicant shall pay the costs of said appraisers. (February 8, 1847, 45 v. 34.)

§ 3461-3. Sec. 3. PAY OF APPRAISERS.—The appraisers aforesaid shall each be entitled to have and receive, for their services, two dollars for each and every day when so actually employed. (February 8, 1847, 45 v. 34.)

§ 3461-4. Sec. 4. FINE AND PUNISHMENT FOR INJURING THE LINES.—Any person who shall unlawfully and intentionally injure, molest, and destroy any of said lines, posts, abutments, or the materials or property belonging thereto, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment in the penitentiary not exceeding one year, or both, at the discretion of the court having cognizance thereof. (February 8, 1847, 45 v. 34.)

§ 3461-5. Sec. 5. MODE OF PROSECUTION.—Prosecutions, under the proceeding section, shall be by indictment in the court of common pleas. (February 8, 1847, 45 v. 34.)

Messages, Regulations as to, §§ 3461-6-3463.

§ 3461-6. Sec. 6. **LEGISLATURE MAY ALTER ACT; TAXATION.**—The legislature may at any time alter, modify, or repeal this act, and the stock or value invested in said lines of electric telegraph shall be subject to taxation, like other property in this state. (February 8, 1847, 45 v. 34.)

§ 3462. **MUST RECEIVE AND TRANSMIT DISPATCHES FOR OTHER LINES.**—Every company, incorporated or unincorporated, operating a telegraph line in this state, shall receive dispatches from and for other telegraph lines; and from or for any individual; and on payment of its usual charges for transmitting dispatches as established by the rules and regulations of the company, shall transmit the same with impartiality and good faith, under a penalty of one hundred dollars for each case of neglect or refusal so to do, to be recovered with cost of suit, by civil action in the name and for the benefit of the person or company sending or forwarding or desiring to send or forward the dispatch. (April 15, 1830, 77 v. 264; R. S. 1880; March 31, 1865, 62 v. 72, § 8; S. & S. 155.)

As to telephones, see note to § 3471.

Cannot provide against damages resulting from negligence.

While a telegraph company may, by special agreement or by reasonable rules and regulations, limit its liability to damages for errors or mistakes in the transmission and delivery of messages, it cannot stipulate or provide for immunity from liability, where the error results from its own negligence; such a stipulation is contrary to public policy and void.—*Telegraph Co. v. Griswold*, 37 Oh. St. 301 (1881); *Hord v. Telegraph Co.*, 3 W. L. B. 147 (1878).

Burden on company to show absence of negligence.

Where, in an action against the company for damages resulting from an inaccurate transmission of a message, such inaccuracy is made to appear, the burden of proof is upon the company to show that the mistake resulted without fault or negligence on its part.—*Telephone Co. v. Griswold*, 37 Oh. St. 301 (1881).

Liability to addressee for nondelivery of damages.

See *Barrack v. Postal Tel. Co.*, 12 Dec. 78 (1899).

§ 3463. **WHEN TO FORWARD MESSAGES.**—When the person who sends a dispatch desires to have it forwarded over the lines of other telegraph companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination, and tenders to the first company the amount of the usual charges for the dispatch to the place of final delivery, the company shall receive the same, and, without delaying the dispatch, shall pay to the succeeding line the necessary charges for the remaining distance; and the succeeding line shall accept the same, and forward the dispatch in the same manner as if the sender had applied to it in person, and paid the usual charges, and for the omission so to do it shall be liable to a like penalty, as provided in the last section. (March 31, 1865, 62 v. 72, § 8; S. & S. 155.)

See note to preceding section.

Sections 3462 and 3463 construed.

Sections 3462 and 3463 are penal, and must be strictly construed. The sender is the person whose name is signed to the message; the one desiring to send is the one presenting the same for transmission; the one forwarding has reference to the telegraph company who forwards it upon its delivery from another company.—*Kester v. Telegraph Co.*, 8 C. C. 236 (1894); s. c., 4 C. D. 410.

No damages for mental suffering alone.

Damages cannot be recovered for mental pain and suffering, because of negligence in failing to transmit a message, unless accompanied with pecuniary loss or physical injury.—*Kline v. Tel. Co.*, 3 N. P. 143 (1896); s. c., 4 Dec. 224; *Morton v. Tel. Co.*, 53 Oh. St. 431 (1895); *Kester v. Tel. Co.*, 8 C. C. 236 (1894). See, also, decision by Taft, J., U. S. C. C. 29 W. L. B. 259 (1893); s. c., 55 Fed. 603; 70 F. D. 545, to the same effect.

See note to § 3465.

Mere delay not within this section.

A recovery for mere delay is not authorized by this section or § 3265 providing for transmission of messages with impartiality and good faith and in the order in which they are received.—*Hearn v. Western Union Tel. Co.*, 73 N. Y. Supp. 1077 (1901).

Messages, Regulations as to, §§ 3464-3466.

§ 3464. **AGENT MUST INDORSE DISPATCH, WHEN.**—When application is made to any such company to send a dispatch, the officer, agent, clerk, or servant appointed by the company to receive dispatches at that station shall inform the applicant, and, if required by him, write upon the dispatch, that the line is not in working order, or that the dispatches on hand for transmission will occupy the time so that the dispatch offered can not be transmitted within the time required, if the facts are so; and for an omission so to do, or for intentionally giving false information to the applicant in relation to the time within which the dispatch offered may be sent, such officer, agent, clerk, or servant, and the company by which he is employed, shall incur the penalty provided in section thirty-four hundred and sixty-two. (March 31, 1865, 62 v. 72, § 8; S. & S. 155.)

§ 3465. **PENALTIES FOR NOT TRANSMITTING OR DELIVERING MESSAGE.**—Every telegraph company, incorporated or unincorporated, operating any telegraph line in this state, shall transmit and deliver all dispatches in the order in which they are received for transmission or delivery, under the like penalty of one hundred dollars, as provided in section thirty-four hundred and sixty-two; but arrangements may be made with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its regular order, and dispatches by officers of the state or the United States, on public business, may have preference over all private business, when the public interest requires such preference; no company shall be required to deliver dispatches at a greater distance from the station at which they are received than its published regulations require; and if an applicant direct a dispatch to be mailed at the place of delivery, and offer to pay the necessary postage thereon, the company shall affix the necessary postage stamp, and mail the dispatch in time for the first mail that departs after such dispatch is received at the office of delivery, and for the omission so to do the company shall be liable to a like penalty as provided in section thirty-four hundred and sixty-two. (March 31, 1865, 62 v. 72, § 9; S. & S. 155.)

Failure to deliver—measure of damages.

In case of failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties at the time the contract was made.—*Bank v. Tel. Co.*, 30 Oh. St. 555 (1876); *Elden v. Tel. Co.*, 10 W. L. B. 28 (1883).

Proximate cause.

If the company is in default, but its default is made mischievous to a plaintiff only by the operation of some other intervening cause, such as the dishonesty of a third person, the rule, "*causa proxima non remota spectatur*," applies, and the company cannot be made re-

sponsible for the loss occasioned by the act of such third party.—*Bank v. Tel. Co.*, 30 Oh. St. 555 (1876).

Company is liable where message indicates on its face importance of prompt delivery.

Western Union Tel. Co. v. Porter, 33 W. L. B. 300 (1895).

See 26 W. L. B. 138, where authorities on subject are collected.

Must transmit, without preference.

Messages must be transmitted in the order of time they are received, and where messages are willfully delayed, and preference given to another, liberal damages will be allowed.—*Davis v. Tel. Co.*, 1 Cin. Sup. Ct. 100 (1870).

See note to § 3462.

§ 3466. **PENALTIES AGAINST PERSONS CONNECTED WITH COMPANIES.**

—Any person connected with a telegraph or messenger company, incorporated or unincorporated, operating a line of telegraph, or engaged in the business of receiving and delivering messages in this state, in any capacity, who wilfully divulges the contents, or the nature of the contents of a private communication entrusted to him for transmission or delivery, or who wilfully refuses or neglects to transmit or deliver the same, or wilfully delays the transmission or delivery of the same, or who wilfully forges the name of the intended receiver to any receipt for any such message or communication, or article of value entrusted to him by said company with a view to injure, deceive or defraud the sender or intended receiver thereof, or any such tele-

Messages — Electric Wires, Disturbing, etc., §§ 3467, 3467a.

graph or messenger company, or to benefit himself or any other person, shall be imprisoned in the county jail not exceeding three months, or fined not exceeding five hundred dollars, at the discretion of the court. (April 14, 1900, 94 v. 209; March 31, 1865, 62 v. 72, § 10; S. & S. 156.)

§ 3467. PENALTIES FOR KNOWINGLY TRANSMITTING DISPATCHES FORGED, ETC.—A person who knowingly transmits by a telegraph line any false communication or intelligence, with intent to injure any person, or to speculate in any article of merchandise, commerce, or trade, or with intent that another may do so, or knowingly sends or delivers a dispatch that is forged, or not authorized by the person whose name purports to be signed thereto, shall be liable to the same penalty as is provided in section thirty-four hundred and sixty-two. (March 31, 1865, 62 v. 72, § 11; S. & S. 156.)

§ 3467a. PENALTY FOR UNLAWFULLY INTERFERING, ETC., WITH TELEGRAPHIC OR TELEPHONIC MESSAGES OR WITH ELECTRIC LIGHT OR ELECTRIC STREET RAILWAY PROPERTY.—Whoever shall wilfully and maliciously cut, break, tap, or make any connection with, or read, or copy by the use of telegraph or telephone instruments or otherwise in any unauthorized manner, any telegraphic message or communication from any telegraph or telephone line, wire or cable, so unlawfully cut or tapped in this state, or make unauthorized use of the same, or who shall wilfully and maliciously prevent, obstruct, or delay, by any means or contrivance whatsoever the sending, conveyance, or delivery, in this state, of any unauthorized telegraphic message or communication by or through any telegraph or telephone line, cable or wire under the control of any telegraph or telephone company doing business in this state; or who shall wilfully or maliciously injure or destroy or intentionally permit to be injured or destroyed, or disconnect, displace, cut, break, tap, ground or make any connection with or in any way wilfully and maliciously interfere with any of the poles, cable or wires legally erected, put or strung, electrical apparatus, appliance or machinery of any kind, used in the construction of or in the operating of any electrical street railway, or electric light plant, or plant used in the producing or generating electric power in this state; or who shall wilfully or maliciously injure or destroy or intentionally permit to be injured or destroyed any meter, pipe, conduit, wire, line, post, lamp, burner, heater, machine, motor or other appliance or apparatus whatsoever belonging to a company engaged in the manufacture or sale of electricity for light, heat, power or other purposes, or who shall wilfully or maliciously prevent by any means or device whatsoever, any electric meter belonging to any corporation furnishing electric current for light, heat, power or other purposes from duly registering the quantity of electricity supplied by said company or in any way interferes with the proper action or just registration by said meter in registering the quantity of electricity passing through said meter or alter the index in such meter or, without the consent of such company, wilfully or maliciously divert any electric current from any wire of such company, or otherwise wilfully or maliciously uses or causes to be used without the consent of such company any electricity manufactured or distributed by such company; or whoever, being a customer of said electric light company and having in his possession or under his control, a meter belonging to said company, wilfully permits any other person, unlawfully and without consent of said company, to disconnect, change, alter or interfere with the wires running into said meter, so as to divert the electric current and prevent said meter from duly registering the quantity of electricity supplied by said company; or who shall wilfully or maliciously aid, agree with, employ or conspire with any other person or persons to do any of the aforementioned unlawful acts shall be deemed guilty of felony and shall be punishable by a fine of no more than \$1,000 nor less than \$50, or by an imprisonment in the penitentiary for a period of not less than one year nor more than three years, or by both fine and imprisonment within the limits hereinbefore specified, at the discretion of the court. Prosecutions under this act shall

Repairs — Consolidation — Other Electric Companies, §§ 3468-3471a.

be by indictment in any court having criminal jurisdiction. (April 4, 1902, 95 v. 101; April 27, 1893, 90 v. 346; March 15, 1892, 89 v. 100, 52.)

§ 3468. **WHEN AND HOW TELEGRAPH STRUCTURES MAY BE REMOVED.**—If, at any time after the erection of a line of magnetic telegraph upon lands held by a corporation, the corporation have occasion to use the land upon which a telegraph pole, pier, abutment, or other fixture has been erected, for any of the purposes authorized by its charter, the company shall remove such pole, pier, abutment, or fixture, to such convenient place as may be designated by the corporation requiring the use of the ground, upon reasonable notice, given in writing, and erect the same in such new place, so as not to interfere with the practical uses to which the corporation is authorized to put such land; and if it is impracticable to erect a line of magnetic telegraph upon the lands of such corporation, in consequence of the uses to which the corporation put the lands, the telegraph company may appropriate adjoining lands, by a separate proceeding for that purpose. (March 31, 1865, 62 v. 72, § 12; S. & S. 156.)

Cited, *Ohio Postal Tel. Co. et al. v. C. C. C. & St. L. Ry. Co. et al.*, 8 N. P. 121 (1900).

§ 3469. **HOW AND WHEN REPAIR OF STRUCTURES ENFORCED.**—If, at any time after the erection of such telegraph line on the lands of a corporation, the corporation apprehend danger, or risk of danger, to its works or practical operations, in consequence of decay or defect in the mode of structure of any of the works of the telegraph company, it may require the company, upon five days' notice, in writing, to repair such decayed or defective works; or if the danger is imminent, so as not to admit of delay, the corporation may, without notice, repair the defect, and recover the reasonable expense thereof, with costs of suit, before any court of competent jurisdiction. (March 31, 1865, 62 v. 72, § 13; S. & S. 157.)

§ 3470. **HOW AND WHEN TELEGRAPH COMPANIES MAY CONSOLIDATE.**—Where two or more telegraph companies whose several lines are not parallel or in competition with each other and when so united will form a continuous line for receiving and transmitting dispatches, desire to consolidate into a single corporation, they may do so in the manner, and subject to the rules provided in chapter two for the consolidation of railroad companies. (February 4, 1881, 78 v. 26; R. S. 1880; May 1, 1852, 50 v. 274, § 48; S. & C. 299.)

§ 3471. **CHAPTER APPLIES TO TELEPHONE COMPANIES.**—The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. (R. S. 1880.)

Contract showing discrimination, void.

A telephone company is required to receive dispatches without discrimination, and a contract favoring one telegraph company as against another is void on grounds of public policy.—*State ex rel. v. Tel. Co.*, 36 Oh. St. 296 (1880).

Patented article subject to regulation.

The use of patented property, when devoted to public use, is subject to state control, whenever the public welfare requires it.—*State ex rel. v. Tel. Co.*, 36 Oh. St. 296 (1880).

Telegraph includes telephone.

The term "telegraph" is sufficiently comprehensive to embrace the telephone.—*Railway v. Tel. Ass'n*, 48 Oh. St. 390, 423 (1891); and see note thereto under § 3454.

Remedy to secure telephone service.

Mandamus is the proper remedy to compel a company to furnish the proper instruments and service.—*State v. Telephone Co.*, 36 Oh. St. 296 (1880); *State v. Telephone Co.*, 13 W. L. B. (Neb.) 185 (1884). See note to *Smith v. Tel. Co.*, 2 C. C. 259; s. e., 1 C. D. 475, under § 3454.

§ 3471a. **ELECTRIC LIGHT COMPANIES, AND POWER AND AUTOMATIC PACKAGE CARRIER COMPANIES; CONSENT OF MUNICIPALITY, ETC.**—The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for

Subways—Electric Light, etc., Companies, §§ 3471-1-3471-3.

the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; and this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal, in any circuit court of the state. (April 21, 1896, 92 v. 204; January 26, 1887, 84 v. 7.)

Additional servitude.

Consent of abutting property owner necessary for erection of poles.—*McLean v. El. Light Co.*, 9 W. L. B. 65 (1886); but see *Auer-*

bach v. Tel. Co., 7 N. P. 633; s. c., 9 Dec. 389, under § 3454; *Schaaf v. Cleveland, etc., Ry. Co.*, 66 Oh. St. 215 (1902); *Callen v. Electric Light Co.*, 66 Oh. St. 166 (1902).

§ 3471-1. Sec. 1. SUBWAYS FOR TELEPHONE AND TELEGRAPH WIRES IN CITIES; ERECTION OF POLES; PENALTY.—Any company organized under the laws of this or any other state, and owning and operating a telephone exchange, or doing a telegraph business, in any city in this state, may construct and maintain underground wires and pipes, or conduits and other fixtures for containing, protecting and operating such wires in the streets and public ways of said city, when the consent of such city has been obtained therefor, and it shall be unlawful for any corporation, company or individual to erect any telephone or telegraph pole or poles within that portion of any city in this state where subways have been constructed, except such poles as may be required for the purpose of distributing wires from said subways to subscribers, stations, and all such poles shall, so far as possible, be located in alleys; provided that this section shall not apply to existing telegraph companies until such companies shall have authority and sufficient time to construct subways; and whoever violates any of the provisions of this section, shall be punished by a fine of not more than two hundred and not less than fifty dollars. (May 8, 1894, 91 v. 205; April 8, 1891, 88 v. 296.)

For an act authorizing the construction of subways, etc., in cities of the first grade, first class, see 94 v. 664.

§ 3471-2. Sec. 2. BY WHOM CONSENT GIVEN.—Such consent shall be given by the board of city commissioners, board of public improvements, board of public works, or board of administration of such city, or their respective successors in office, or by the city council in cities where no such board exists. (April 8, 1891, 88 v. 296.)

§ 3471-3. Sec. 1. POWERS OF ELECTRIC LIGHT AND POWER COMPANIES.—A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting

Subways for Electric Wires, etc., §§ 3471-5 3471-7.

electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires. (May 12, 1886, 83 v. 143.)

City's right to regulate poles, etc.

See *Brush Co. v. Jones et al.*, 5 C. C. 340 (1891); *s. c.*, 3 C. D. 168; *El. St. Ry. Co. v. Electric Co.*, 10 C. C. 531 (1895); *s. c.*, 4 C. D. 43; *Hauss El. Co. v. Electric Co.*, 23 W. L. B. 137 (1889).

§ 3471-5. Sec. 3. VALIDITY OF PRIOR CONTRACTS.—That in all cases where contracts such as are provided for in section 2 of this act have been entered into prior to its passage and there may have been any omission or error arising out of a want of conformity to the statutes of this state but which contracts have been made as required by this act and where it is just and equitable by reason of the expenditure of money or labor in the performance of said contracts or on any other account to fully execute said contracts, then and in all such cases the courts of this state are hereby authorized and empowered to uphold such contracts as valid and binding on all parties to the same and to enforce and carry them into effect in all respects as though no such defect, omission or error existed, any law of this state to the contrary notwithstanding. (April 22, 1896, 92 v. 290.)

§ 3471-6. Sec. 1. SUBWAYS AND CONDUITS FOR ELECTRIC WIRES, ETC., IN CINCINNATI.—Any company organized for the purpose of constructing subways, laying pipes and operating underground conduits in any city of the first grade of the first class, in which to place and maintain electric cables, wires and other conductors for conveying electric currents for any purpose, may construct such subways and under-ground conduits through the streets, avenues, sidewalks, alleys, lanes, lands, squares and public places of such city, and maintain such subways and conduits, together with necessary man-holes, junction boxes, connection-boxes, feeders, pipes and connections to and from such subways and conduits, and all such other necessary fixtures and appliances for placing and safely carrying electricity or electrical conductors beneath the surface of the streets, avenues, sidewalks, alleys, lanes, lands, squares and public places of any such city. (April 25, 1891, 88 v. 390.)

§ 3471-7. Sec. 2. PERMISSION FOR CONSTRUCTION OF, ETC.; BY WHOM GRANTED, AND RULES GOVERNING CONSTRUCTION.—In cities of the first grade of the first class, the board of public improvements and their successors in office of any such city shall have authority in case such city should not construct its own system of subways (and in the event it does, the board of public improvements or their successors in office shall have power to contract for the construction of the same), to grant to any person, company or corporation organized for the purpose of constructing subways, laying pipes and operating under-ground conduits in which to place and maintain electric cables, wires and other necessary appliances for conveying electric currents, permission and authority to construct and operate such subways and under-ground conduits through the streets, avenues, sidewalks, alleys, lands, squares and public places of such city, with the necessary man-holes, junction-boxes, connecting-boxes, feeders, pipes and other connections and appliances; and it shall be unlawful for any such company to enter upon the construction of any such work, or to open or take up the pavements of the streets, or to make any excavations in any of said streets, avenues, sidewalks or other public ways of said city until it has first obtained authority so to do from the board of public improvements or their successors in office in cities of the first grade of the first class; and any such person,

Subways for Electric Wires, § 3471-8.

company or corporation operating or maintaining the same shall be subject to such reasonable regulations as the board of public improvements or their successors in office in cities of the first grade of the first class shall make concerning the construction and use of said subways and conduits, and the time, manner and mode of placing wires, cables and other electrical conductors therein. And it is hereby made the duty of the board of public improvements or their successors in office to adopt and enforce such rules and regulations so as to secure the construction of said subways and under-ground conduits in the most approved manner, for the safety of persons and property adjacent to and connected with said subways and under-ground conduits;) such construction shall be under the control and subject to the approval of the chief engineer of the board of public improvements or their successors in office and the fact that such approved and safe construction has actually taken place, shall be certified to in writing by the said engineer before any use shall be made of the same. Provided, however, that no such permission and authority hereinbefore referred (to) shall be granted by said board of city affairs to any such company until said board shall have advertised in some paper of general circulation in such city on at least one day of each week, for four consecutive weeks, for bids for the grant of such permission and authority, and no such grant shall be made except to the highest bidder, nor for a less compensation to the city than the annual sum of one per cent. of the gross proceeds resulting from the operation of said subways, to be paid for such grant and for the purpose of keeping in repair the streets, sidewalks and other places wherein such subways are constructed and operated; and but one such company shall be authorized, in any case to open up the streets for such purpose or to construct, own and operate subways in which to place electric wires, and all such wires except telegraph and telephone wires shall be required to be laid in one general subway constructed for the purpose; and said board shall have the right to reject any and all bids. Provided, that nothing in this act contained shall be construed (construed) so as to authorize or require the placing of telegraph or telephone wires or conductors in the same conduit or conduits with electric light, power or railway wires, or conductors, or so as to prevent the granting by municipalities of the power to place telephone or telegraph wires or conductors in a separate conduit in the streets to be constructed for that purpose. And provided further, that nothing herein contained shall be so construed as to conflict with any orders made by the probate court of any county, containing a city of the first grade of the first class, for maintaining overhead or under-ground wires or conduits, for furnishing electric light, heat or power, where investments are made on the faith of the same; but all such orders of the court shall be valid and binding upon all parties thereto and their successors and assigns. (April 25, 1891, 88 v. 390.)

§ 3471-8. Sec. 3. BOND FOR RESTORATION OF STREETS, ETC.; BOARD OF IMPROVEMENTS TO FIX RENTAL.—Nothing herein contained, however, shall authorize any person, company or corporation to construct such subways or conduits or to excavate any portion of any street, sidewalk or other public way of any such city, until such person, company or corporation has first executed a bond in the sum of two hundred and fifty thousand dollars, conditioned to restore such streets, sidewalks and other public ways to their original state of usefulness, and to keep the same in repair to the satisfaction of the board of public improvements or their successors in office, and its chief engineer for a period of five years from and after such restoration thereof. The board of public improvements or their successors in office in cities of the first grade of the first class in which such subways may be constructed, shall have power to fix the rental to be charged by persons, companies or corporations owning or operating such subways for the use and occupation of such subways or conduits by electric companies or companies using or supplying electricity for any purpose, and shall estimate the same upon a percentage based on the amount invested in the construction, maintenance and operation of said subways and under-ground conduits. (April 25, 1891, 88 v. 390.)

PART IX.

TURNPIKE, PLANK-ROAD, AND AVENUE CORPORATIONS.

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§ 3472. **POWERS OF COMPANIES.** — A turnpike or plankroad company may construct a turnpike or plankroad, as shall be named in its articles of incorporation, between the termini named therein, and when it is so designated in the articles of incorporation, may improve and hold more than one road, when such roads diverge from one point, or branch from each other in the course of their routes. (May 1, 1852, 50 v. 274, § 32; March 4, 1853, 51 v. 484, § 2; S. & C. 293; S. & C. 319.)

No power to hold fee.

A turnpike company has no right to acquire and hold land in fee simple, when not necessary for the purposes of the company. — Turnpike Co. v. Railroad Co., 15 C. C. 268 (1898); s. c., 8 C. D. 269.

City cannot lay water pipes without compensation.

A city cannot lay its water pipes under the surface of a turnpike without compensation therefore. — Cincinnati Turn. Co. v. Avondale, 17 W. L. B. 294 (1887).

As to rights of individual to lay pipes.

Ave. Co. v. Village, 1 N. P. 85 (1894); s. c., 1 Dec. 99.

Cannot grant greater easement than it possesses.

McMaken v. Railway Co., 5 N. P. 367 (1897); s. c., 5 Dec. 358; Compton v. Railway Co., 5 N. P. 367 (1897); s. c., 5 Dec. 358; Avenue Co. v. St. Bernard, 1 N. P. 85 (1894); s. c., 1 Dec. 99.

§ 3473. **SUPPLEMENTAL ARTICLES, ETC.** — Any such company may file supplementary articles, for the specification and designation of an additional branch road connected with any previous work constructed by it, and may unite with any other turnpike or plankroad company in maintaining and holding any road in common between them and divide the proceeds thereof in proportion to their interest. (March 4, 1853, 51 v. 484, § 3; S. & C. 319.)

§ 3474. **MAY USE STONE, GRAVEL, OR PLANK.** — Any turnpike or plankroad company, in the construction or repair of its road, may make or construct any part thereof with either stone, gravel, or plank, as one or the other material may be most convenient for such part of the road; when plank is used it must be two and one-half inches thick, and cover sufficient of the road for the accommodation of

Turnpike and Avenue Companies, §§ 3475-3477.

teams, and may be placed in the center or on either side of the road; and a change of material must not impair the utility of the road, or render it less valuable to the traveling public. (May 1, 1852, 50 v. 274, § 33; March 12, 1853, 51 v. 395, § 2; April 3, 1854, 52 v. 24, § 1; S. & C. 295; S. & C. 334; S. & C. 370.)

§ 3475. **MAY ENTER UPON AND APPROPRIATE LANDS.** — Any such company, or its agents, may lay out, locate, survey, and make the turnpike or plankroad for the making of which it is incorporated, through any improved or unimproved lands, on the best route between the points or places designated in the articles of incorporation, contracting for and paying the owners of the land over which the road passes the damage done thereto by laying out and making the road, and for materials taken therefrom for constructing or repairing the same; when the company and the owner can not agree as to the amount of compensation, or when the owner is unknown or incapable of contracting, then such damages shall be assessed and paid in the manner prescribed by law; and when any part of the road is rendered unsafe for travel by the current of any river, water-course, or other unavoidable cause, the company may change the location of the road at such place so far as may be necessary, and may appropriate land therefor in the manner aforesaid. (May 1, 1852, 50 v. 274, § 32; March 8, 1865, 62 v. 36, § 1; S. & C. 293; S. & S. 116.)

Public easement may be assigned.

The interest of the public in the highways, consisting of a perpetual easement in the land covered by them for the needs of public travel, may, at the discretion of the legislature, be transferred to a plank-road company. The company is the assignee of the public and possessed of the same interest the public had. — *C. F. & C. Plankroad Co. v. Cane et al.*, 2 Oh. St. 419 (1853).

May build toll-house.

After a company has appropriated land sixty feet wide for the purposes of its road, and the resulting damages to the owners have

been ascertained, it may, within the sixty feet, build a toll-house and dig a well for the accommodation of the toll gatherer. — *Ward v. Turnpike Co.*, 6 Oh. St. 16 (1856).

Error in assessing damages.

Whether the freeholders, in assessing damages, formed erroneous conclusions as to the extent of injury by failing to estimate the detriment which a toll-house might occasion, cannot, in the absence of any showing in the record of the basis of their award, be considered by the court. An action of trespass against the company will not lie for errors made in assessing damages. — *Ward v. Turnpike Co.*, 6 Oh. St. 16 (1856).

§ 3476. **HOW RIGHT TO USE BRIDGE OR STREET ACQUIRED.** — Whenever a company deems it expedient or necessary, in laying out or building a turnpike or plankroad, for which it has become incorporated, to enter upon and take possession of any road, street, alley, or bridge, it shall present to the commissioners of the county in which such road, street, alley, or bridge is situate, a petition, signed by at least twelve citizens living upon or being interested in such road, street, alley, or bridge, and shall cause a notice to be published in some newspaper of general circulation in the county, for four consecutive weeks, of the object and prayer of such petition, that remonstrances may be made thereto; and the commissioners, at their next meeting after the presentation of such petition, notice having been given as aforesaid, shall hear and determine the same; and if it appear that it will be for the interest of the community using such road, street, alley, or bridge, to have the same taken and used for the purpose of constructing such turnpike or plankroad thereon, the commissioners shall grant a permit, in writing, to the company to take and use the same on such terms as they may deem fit for the interest of the community; and the company shall thereby acquire an exclusive right of way in such road, street, alley, or bridge; but nothing in this section shall be so construed as to extend to roads, streets, alleys, or bridges within the limits of a city or village in this state, nor to any macadamized road. (March 29, 1866, 63 v. 61, § 4; S. & S. 141.)

§ 3477. **WIDTH AND GRADE.** — All turnpikes and plank-roads shall be opened not exceeding sixty feet wide, thirty feet of which shall be cleared of brush and logs, and at least sixteen feet shall be made an artificial road, composed of stone, gravel,

Turnpike and Avenue Companies, §§ 3478-3479.

wood, or other convenient material, well compacted together in such manner as to secure a firm, even, and substantial road, and in no case shall the ascent in any such road be greater than five degrees; but when a company has been licensed by the county commissioners as directed by law, and has collected tolls on its road for ten years or upward, it may demand and receive such tolls thereon as are authorized by law, when the grade does not exceed seven degrees. (April 12, 1869, 66 v. 46, § 1; April 4, 1878, 75 v. 90, § 34; S. & C. 295.)

§ 3478. **HOW AUTHORITY TO TAKE TOLL ACQUIRED.** — A company when it has completed its road, or any part thereof not less than three miles and when, from time to time thereafter, it has completed any further or continuous portion thereof, may apply to the commissioners of the county in which the finished road or part thereof lies, or in case the same lies in two or more counties, to the commissioners of either of the counties, and the commissioners shall appoint three judicious, disinterested freeholders, who shall, on oath, examine the same, and report their opinion to the commissioners, in writing; if they report that the road, or such part thereof is completed agreeably to the provisions of this chapter, the commissioners shall by license in writing, authorize the company to erect gates, at suitable distances, and demand and receive, of persons traveling such road, the tolls allowed by law; if any such commissioner is a stockholder in the company making the application, the duties required of the commissioners shall devolve upon the probate judge of the county or counties aforesaid; and if any such probate judge is a stockholder in the company, such duties shall devolve upon the common pleas judge of the district in which such road lies, or the judge of any of the districts within which such road lies, in case the same lies in two or more districts. (April 18, 1870, 67 v. 94, § 1; May 1, 1852, 50 v. 274, § 35; March 12, 1853, 51 v. 395, § 3; March 4, 1853, 51 v. 484, § 4; April 29, 1872, 69 v. 196, § 1; S. & C. 295; S. & C. 334; S. & C. 320.)

Demand not necessary.

A demand for the toll is not necessary. The liability arises from passing the gate without payment. — *State v. Neil et al.*, 7 Ohio (1 pt.) 132 (1823).

Taking toll is franchise.

The right of taking toll is a franchise. — *Seymour v. Turnpike Co.*, 10 Oh. 477, 480 (1841).

Reservation by owner of land.

A reservation by the owner of land in granting a right of way for a toll road, that she and her descendants shall have the right to pass without payment of toll, does not create an estate running with the land. — *Turpin v. Pike Co.*, 7 N. P. 12 (1899) : s. c., 9 Dec. 668.

§ 3478a. **EXTENSION OF TURNPIKE ROAD TO OTHER IMPROVED ROAD.** — That any turnpike company, whose beginning point is in a turnpike road, and having completed more than two and one-half miles, but less than three miles, and connecting its said road with an improved graveled road, or with another turnpike road, shall have all the privileges, and shall in all other respects conform to the requirements of said original section three thousand four hundred and seventy-eight; provided, that the county commissioners shall first authorize said privilege by a vote entered upon their journal. (April 17, 1882, 79 v. 144.)

§ 3479. **PENALTIES FOR EVADING THE GATES.** — A person using any such road, who, with intent to defraud any such company, or to evade the payment of toll, passes through any private gate or bars, or along any other ground near a turnpike or plank-road gate erected in pursuance of law, or practices any fraudulent or forcible means with intent to evade or lessen the payment of such toll, shall, for every such offense, forfeit and pay a fine of five dollars, to be recovered with cost of suit and amount of toll due for passing through any such gate, before any justice of the peace of the county in which such offense was committed without stay of execution. And the fine or fines when collected for such offense, shall be paid into the common school fund in the township in which such offense was committed, but nothing herein

Turnpike and Avenue Companies, §§ 3480-3481.

shall be so construed as to prevent persons using any such roads between gates for common purpose. (March 22, 1881, 78 v. 77; Rev. Stat. 1880; May 1, 1862, 59 v. 101, § 37; S. & S. 149; S. & C. 296.)

Rights of abutting owner.

May erect a bridge over ditch constructed by turnpike company for drainage purposes, in order to enter turnpike from his premises; but cannot connect bridge with a private way and allow the public to use it as a "shun-
pike" to evade payment of toll. — Avenue Co. v. Bates, 2 C. C. 376 (1887); s. c., 1 C. D. 540.

Owner of land not abutting on turnpike, but on such private way, over which he has no right, has no right to erect such bridge. —

Avenue Co. v. Bates, 2 C. C. 376 (1887); s. c., 1 C. D. 540.

Owner of abutting property has right to lay water pipes under surface of turnpike, but company is entitled to compensation there-
fore. — Ave. Co. v. Village, 1 N. P. 85 (1894); s. c., 1 Dec. 99.

Right of city to lay water pipes.

Cincinnati Turn. Co. v. Avondale, 17 W. L. B. 294 (1887).

§ 3480. MILE-STONES TO BE PUT UP. — Each company shall put up a post or stone at the end of each mile, with the number of miles from some noted point or place, at one end of the road, fairly cut or painted thereon, and shall place near each gate a board, with the rates of toll painted thereon; and no toll shall be demanded unless such boards are kept up. (May 1, 1852, 50 v. 274, § 38; S. & C. 296.)

§ 3481. RATES OF TOLL. — Every company entitled by the laws of this state to charge tolls may receive from persons traveling on or using its road, the following tolls, and no more, for every ten (10) miles travel on such road, and in the same proportion for any less distance, to-wit: For every four-wheeled carriage or other vehicle, drawn by one horse or other animal, fifteen cents, and for each additional animal, five cents; for every sled or sleigh drawn by one horse or other animal, five cents, and for each additional animal, five cents; for every horse, or mule and rider, five cents; for every horse, mule or ass, six months old or upwards, three cents; for every head of neat cattle, six month(s) old or upwards, one cent; for every head of sheep or hogs, one-half cent; for every stage coach or omnibus, drawn by two horses or other animals, thirty cents, and for each additional animal, ten cents; for every two-wheeled carriage drawn by one horse or other animal, ten cents, and for each additional animal, five cents; and for every engine wagon or other vehicle, drawn or propelled by steam or otherwise than herein provided, such companies may charge and receive such rates of toll as their directors or boards of managers may from time to time direct, but not to exceed five (5) cents per mile; but on all turnpike roads constructed of and kept in repair with two-thirds broken limestone the companies operating the same may charge and receive for each ten miles travel on such road, and in the same proportion for any less distance, to-wit: For every four-wheeled carriage or other vehicle drawn by one horse or other animal, twenty cents, and for each additional animal, ten cents; for every sled or sleigh drawn by one horse or other animal, ten cents, and for each additional animal, five cents; for every horse or mule and rider, ten cents; for every horse, mule or ass, six months old or upwards, five cents; for every head of neat cattle, six months old or upwards, one and one-half cents; for every head of hogs, three-fourths of a cent; for every head of sheep, one-half cent; for every stage-coach or omnibus, drawn by two horses or other animals, forty cents, and for each additional, ten cents; for every two-wheeled carriage drawn by one horse, fifteen cents; and for every engine, wagon or other vehicle, drawn or propelled by steam or otherwise than herein provided, such companies may charge and receive such rates of toll as their directors or boards of managers may from time to time direct, but not to exceed five (5) cents per mile; but persons going to and from their regular place of worship on the Sabbath, or to and from funerals, militia musters, or elections, jurymen going to and returning from their attendance at court, and the troops and armies of the United States, and of this state, may pass on any such road free of toll; and a company incorporated for the purpose of constructing a turnpike or plankroad from a mine or quarry to a railroad,

Turnpike and Avenue Companies, §§ 3482-3484.

canal, slack-water navigation or navigable water, macadamized road or place within or upon the borders of this state, may, when such road is completed, charge and collect such amount of toll for teams, hauling the products of such mines or quarries on its road as its directors may determine, not exceeding four cents per mile for two-horse teams, and an increase of two cents per mile for each additional horse; but such rates shall not be charged for teams hauling the products of such mines or quarries for more than eight miles, nor shall other travelers on such roads be charged more than the ordinary rate of toll per mile as allowed by section thirty-four hundred and eighty-one. (February 13, 1891, 88 v. 33; March 22, 1889, 86 v. 133; April 17, 1882, 79 v. 147; February 24, 1881, 78 v. 35; Rev. Stat. 1880; March 27, 1875, 72 v. 85, § 1; June 12, 1879, 76 v. 153, § 1; March 16, 1865, 62 v. 143, § 1; S. & S. 148; S. & C. 296.)

Classification uniform and constitutional.

The acts of March 27, 1875 (72 v. 85) and of June 12, 1879 (76 v. 153), amendatory of the act of March 16, 1875 (S. & S. 147), dividing all turnpike companies within the

state into separate and distinct classes, have a uniform operation upon all the members of each class, and are not in conflict with article 2, section 26, of the constitution. — State ex rel. v. Turnpike Co., 37 Oh. St. 481 (1882).

§ 3482. **REPAIR OF ROADS WITHIN MUNICIPALITIES.** — If a company fail to keep any part of its road within the limits of a municipal corporation in repair for five days successively, the proper authority of such municipal corporation may pass a resolution requiring such company to repair the same within ten days after the service of a copy of such resolution on the gate-keeper nearest such municipal corporation, and the company shall declare its intention to abandon or repair the same; in case of a failure or refusal so to do within thirty days, or in case of a failure or refusal to repair in ninety days, the municipal corporation may file a complaint in writing, with a copy of the resolution, in the court of common pleas of the county, describing the portion of the road required to be repaired, and the court, or any judge thereof, shall appoint two disinterested persons as inspectors, who shall view the portion of the road complained of, and return their finding thereon, under oath, to the court, within ten days; and if they find the complaint to be true, such portion of the road shall be declared abandoned by the company, and the municipal corporation may improve or repair the same, and assess and collect the costs of such improvement or repairs in the same way as is provided by law in relation to the improvement of streets. (March 14, 1853, 51 v. 464, § 1; S. & C. 333.)

See *Madisonville v. Turnpike Co.*, 17 W. L. B. 30 (1886).

§ 3483. **PROCEEDINGS TO ENFORCE REPAIR.** — Notice of the complaint, and of the appointment and time of meeting of the inspectors, shall be served on the president or other officer of the company, or at its principal office, five days before the meeting of the inspectors; and if such service be made by any person other than the sheriff, it shall be verified by the oath of the person making the same; no toll shall be received at the gates for the portion of the road so declared abandoned; and if the keeper of any gate demand and receive toll for the same, he shall be liable to pay the sum of five dollars to the party injured, to be recovered by civil action before any justice of the peace having jurisdiction; (and) the costs of the proceeding on the complaint shall be paid by the company, if the action be sustained, but if not sustained they shall be paid by the municipal corporation, and execution shall issue therefor as in other cases. (March 14, 1853, 51 v. 464, § 2; S. & C. 334.)

§ 3484. **REPAIR OF ROADS OUTSIDE OF MUNICIPALITIES.** — If any company fail to keep in repair its road outside the limits of a municipal corporation for five days successively, or fail to build or rebuild any of the bridges or culverts across any or all of the streams crossing its road for a period of six months, any person may

Turnpike and Avenue Companies. §§ 3485-3486.

file a complaint, in writing, before any justice of the peace of the county, setting forth the nature and extent of the defect complained of, and designating the place or places in the road where it exists; the justice, upon at least three days' notice, to be given to the gate-keeper nearest the place complained of, shall appoint two disinterested persons as inspectors, to meet at the place complained of within five days, and of the time and place of which meeting reasonable notice shall be given to such gate-keeper; the inspectors shall then examine into the truth of the matter complained of, and if they find the complaint to be true, they shall file with the justice a report of their finding, in writing, and send a certified copy of the complaint, and of their finding thereon, to the keeper of each of the gates between which the defective place or bridge is located, and thereafter no toll shall be received at such gates for the intermediate distance until the parts of the road found defective by the inspectors are fully repaired, or an appeal is taken as hereinafter provided; if the keeper of any such gate demand and receive toll contrary to the provisions of this section he shall be liable to pay the sum of five dollars to the party injured, to be recovered by action before any justice of the peace having jurisdiction; the company shall be liable to any person injured, for the damages sustained by reason of such road or bridge being suffered to remain out of repair by the neglect of the company; the justice shall record the complaint, and the report of the inspectors; and the inspectors and justice shall be entitled to receive one dollar per day for their services, which shall be paid by the company, if the complaint be sustained, and if it fail, then by the complainant; and to the amount so taxed shall be added the expense of sending the notice to the gate-keepers, as required by this section, which shall be paid as aforesaid, and for which the justice shall render judgment against the party liable for the payment thereof. (April 9, 1878, 75 v. 106, § 1; March 11, 1867, 64 v. 51, § 1; [S. & S. 150, 151; S. & C. 335].)

County commissioners cannot compel repair.

The county commissioners have no such interest as to entitle them to a right of mandamus to compel a turnpike company to repair a bridge forming a part of such company's road. — *State ex rel. v. Turnpike Road Co.*, 16 Oh. St. 308 (1865).

Supervisor has no power.

A supervisor of highways has no power over plank roads constructed by incorporated companies and placed by law under their control; nor could he justify interference with such roads, although directed by the township trustees. — *C. F. & C. Plankroad Co. v. Cane et al.*, 2 Oh. St. 419 (1853).

§ 3485. APPEALS IN SUCH CASES. — If the sum necessary to make such repairs exceed twenty dollars, the company may appeal the proceeding, and from the report and judgment as to costs, to the court of common pleas of the county, on filing affidavit as to cost of repairs, and giving bail as in other cases of appeal, within ten days after the service of the certified copy of the report of the inspectors; the condition of the appeal bond shall be to abide by and perform the order of the court of common pleas; and the court of common pleas shall hear and determine as to the truth of the complaint and report, and make such order as to the collection of tolls while the proceeding is pending as the court may deem just; and if, upon the final hearing, the court find the complaint and report true, in whole or in part, it shall make such order as to such repairs, and as to the collection of tolls, as it may deem just. (April 9, 1878, 75 v. 106, § 1; March 11, 1867, 64 v. 51, § 2; S. & S. 151.)

Sections 3484 and 3485 cited in *Turnpike Co. v. Parks et al.*, 50 Oh. St. 568, 575 (1893).

Authority to declare turnpike abandoned, unconstitutional.

Sections 4914, 4916 and 4918, so far as they authorize probate courts to declare a turn-

pike road abandoned, without the right to jury or the right of appeal, are unconstitutional. — *Turnpike Co. v. Parks et al.*, 50 Oh. St. 568 (1893); *Turnpike Co. v. Gay et al.*, 50 Oh. St. 583 (1893).

§ 3486. PENALTIES AGAINST TOLL-GATHERERS FOR DETAINING TRAVELERS. — If a toll-gatherer on a turnpike or plankroad unreasonably detain a passenger after the toll has been paid or tendered, or demand or receive greater toll than

Turnpike and Avenue Companies, §§ 3487-3491.

is allowed by law on such road, he shall forfeit and pay a sum not exceeding twenty dollars, to be recovered, with costs of suit, before any justice of the peace having jurisdiction thereof, without stay of execution; but no suit shall be commenced against a toll-gatherer for an offense committed or penalty incurred under this section, unless the same be commenced within twenty days from the time the offense is committed or the penalty incurred. (May 1, 1852, 50 v. 274, § 39; S. & C. 297.)

§ 3487. **PENALTIES FOR FAST RIDING OR DRIVING OVER BRIDGES.**—No person shall carry fire across any wooden bridge, on any turnpike or plankroad in this state, except in a lantern or close vessel, under a penalty of five dollars; and no person shall ride or drive a horse, or drive a stage-coach or other vehicle, over any such bridge, faster than a walk, under a penalty of two dollars; but United States express mail shall not be subject to such penalty. (39 v. 36, § 3; S. & C. 336.)

§ 3488. **PENALTIES FOR OBSTRUCTING ROADS.**—Whoever deposits any wood, stone, or other kind of material, on any part of a turnpike or plankroad inside of the ditches of such road, or outside of the ditches, but so near thereto as to cause the banks thereof to break into the same, or causes the accumulation of rubbish, or any kind of obstruction, shall forfeit and pay the sum of five dollars. (39 v. 36, § 5; S. & C. 336.)

§ 3489. **HOW PENALTIES TO BE RECOVERED.**—All penalties and forfeitures incurred under the provisions of this chapter shall be recoverable, with costs of suit, before any justice of the peace having jurisdiction of the same, and shall be paid into the treasury of the proper county, as in other cases. (39 v. 36, § 6; S. & C. 336.)

§ 3490. **PENALTY FOR OBSTRUCTING TRAVEL ON ROADS.**—All persons driving carriages or vehicles of any description, on any public turnpike, road or highway of this state, shall, on meeting carriages or vehicles of any description keep to the right so as to leave half of the road free, and all persons riding on horseback, or on bicycle, tricycle, tandem bicycle, locomobile or automobile on meeting carriages or vehicles of any description, keep to the right so as to leave two-thirds of the road free, and if any person purposely and wilfully neglects or refuses to comply with the provisions of this section, or in any other manner wilfully hinder or purposely obstruct any person in the free passage of any such road or highway, or shall ride a bicycle, tricycle or tandem bicycle on the sidewalk or foot-path of any unincorporated hamlet or village, he shall, on conviction thereof, before any justice of the peace or other court having jurisdiction, for every such offense be fined in any sum not less than five dollars, nor more than twenty-five dollars, for the use of the common schools of the county in which the prosecution is had. (April 25, 1902, 95 v. 261; April 26, 1898, 93 v. 303; March 12, 1886, 83 v. 30; R. S. 1880; 36 v. 104, § 16; S. & C. 336.)

§ 3491. **WHEN MUNICIPAL LIMITS ARE EXTENDED BEYOND A TOLL-GATE.**—No company shall hereafter erect a toll-gate and collect tolls within the limits of any city or village, or within eighty rods of such limits; and where by the creation of a village, or the extension of the limits of a city or village, a toll-gate is brought within such limits, or within eighty rods thereof, the company shall remove the toll-gate to a point on its road not nearer to such limits than eighty rods, and so much of its road as is included within the limits of such city or village shall become a public street, and be kept in repair as other public streets, but no toll shall be taken thereon; but compensation shall be made to the company for the damages it will sustain by reason of such removal of its toll-gate, and surrender of such part of its road, and if the company and the proper authorities of the city or village do not agree thereon, the damages shall be ascertained in proceedings which the municipal authorities shall commence, to appropriate such property to the use aforesaid, in the manner provided by law for the appropriation of property by municipal corporations, or, in default of such agreement, or the institution of such appropriation proceedings, the

Turnpike and Avenue Companies, §§ 3402-3404.

company, at any time after the removal of the toll-gate, may recover the same from the city or village, by civil action. (March 23, 1869, 66 v. 36, § 1; April 4, 1878, 75 v. 90, § 34; S. & S. 841; S. & C. 339.)

Refers only to location of gate — does not limit right to toll.

A toll-gate properly located outside the prescribed boundaries may charge and collect toll not only for the eighty rods leading to the city limits, but also for such part of the road as is lawfully within the city limits. — Turnpike Co. v. Springfield, 27 Oh. St. 584 (1875). But see Turnpike Co. v. Kelley, 41 Oh. St. 144 (1885), holding that it is unlawful to collect toll at a gate on a turnpike road brought within the municipal limits by the extension thereof beyond it.

See Madisonville v. Turnpike Co., 17 W. L. B. 30 (1886), for a review of the decisions.

Must condemn whole.

Municipality cannot condemn less than the whole of a turnpike within its limits. — Turnpike Co. v. Cincinnati, 2 W. L. B. 126 (1877). See, also, Rood Co. v. Riverside, 25 Oh. St. 658 (1874).

Nature of proceedings.

Tremainsville Co. v. Toledo, 31 Oh. St. 588 (1877).

No removal prior to compensation.

Where, by the extension of the municipality, a turnpike having a toll-gate thereon is en-

braced within the city limits, such toll-gate need not be removed until compensation is made to the company. — Cincinnati v. Scarborough, 5 W. L. B. 77 (1880); Gates v. Turnpike Co., 4 N. P. 235 (1897); s. c., 6 Dec. 337.

Measure of damages.

Turnpike Co. v. Cincinnati, 6 N. P. 233 (1899); s. c., 9 Dec. 250; Cincinnati v. Scarborough, 5 W. L. B. 77 (1880); Avondale v. Turnpike Co., 18 W. L. B. 308 (1887).

No injunction at suit of individual.

An injunction against a turnpike in maintaining a toll-gate within eighty rods of the city limits will not be granted at the suit of a private individual not injured differently from the general public. — Kelley v. Turnpike Co., 1 W. L. B. 132 (1876); Gates v. Turnpike Co., 4 N. P. 235 (1897); s. c., 6 Dec. 337.

Mandamus proper remedy.

Where a turnpike is maintained within eighty rods of the city limits, the remedy is mandamus against city to institute appropriation proceedings. — Gates v. Turnpike Co., 4 N. P. 235 (1897); s. c., 6 Dec. 337.

§ 3492. **MAY SELL BRIDGE OR ROAD IN SUCH LIMITS TO CITY OR VILLAGE.** — A company, any part of whose road or bridge is, or hereafter becomes, embraced within the corporate limits of a city or village may contract with the proper authorities of such city or village, or of the township or county in which the same is situate, for the disposal, release, and abandonment of such part of its road or bridge, for such compensation and upon such terms as may be agreed upon between the company and such authorities; and any such contract heretofore made shall be as good and valid as if made under and by virtue of this section. (April 11, 1856, 53 v. 180, § 1; S. & C. 338.)

§ 3493. **FORECLOSURE OF MORTGAGES ON ROADS.** — When a company executes a mortgage upon its road, or any part thereof, the mortgagee or the assignee thereof, may, at any time after the money secured by the mortgage becomes due, foreclose the mortgage in the same manner as if it were upon real estate, and the sale so made shall be held to pass to the purchaser the corporate franchises of such company as fully as the mortgagor held the same at the time of executing the mortgage; and the laws relating to the foreclosure of mortgages upon real estate shall be applicable to the foreclosure of mortgages upon turnpikes or plankroads. (April 16, 1857, 54 v. 179, § 1; S. & C. 339.)

Right to take toll is property.

This section and the next show that the franchise of taking tolls is property in the

enlarged sense of the term. — Turnpike Co. v. Parks, 50 Oh. St. 568, 575 (1893).

§ 3494. **APPRAISERS: THE PURCHASER TAKES THE FRANCHISES.** — In such proceeding the court shall appoint the appraisers, and when the road runs into or through more than one county it may order the same to be appraised and sold entire or in parcels as to it may seem expedient; and the purchaser of any such road

Turnpike and Avenue Companies, §§ 3495-3498.

or part thereof shall be entitled to exercise all the corporate franchises purchased as fully as they belonged to such company before such sale, in any name that may be assumed by such purchaser. (April 16, 1857, 54 v. 179, § 2; S. & C. 339.)

See note under § 3493.

§ 3495. **HOW ROAD SURRENDERED TO COUNTY.** — Any company having its road located or constructed, or having the corporate right to construct any such road, through or into any county or counties of this state, may, with the consent of three-fourths of the stockholders, and with the like consent of all of the commissioners of such county or counties, relinquish and transfer to the commissioners of such county or counties the whole or any part of its road, together with all rights and privileges appertaining thereto; but any such transfer to such commissioners shall be limited to the part of such road within the boundaries of such counties respectively, and the transfer shall be without consideration, and no tolls shall be collected on such road within such county or counties. (March 11, 1853, 51 v. 405, § 1; January 25, 1861, 58v. 5, § 1; S. & C. 333; S. & S. 678.)

Commissioners' assent necessary.

No valid transfer can be made to the commissioners of the county without the assent

of such commissioners. — State ex rel. v. Turnpike Co., 16 Oh. St. 308 (1865).

§ 3496. **HOW SUCH TRANSFER TO BE EVIDENCED.** — Such transfer shall be evidenced by the execution of a written declaration, signed by the president or other principal officer, and the secretary or other recording officer, and under the seal of the company, and shall take effect and have full force when there is deposited with the auditor of the county within which the relinquished road lies the written declaration, or a copy thereof, and an entry is made upon the journal of the commissioners of such county, of an acceptance, signed by all the commissioners, of such relinquishment or transfer; which written declaration, so deposited, shall be entered by the auditor upon his record of roads, and thereafter such road, or part of road, shall be under the control of the commissioners of the county in which the same lies, who shall, by a proper order, provide that the same shall be a public highway, and that no tolls be collected thereon within the limits of such county. (January 25, 1861, 58 v. 5, § 2; S. & S. 678.)

§ 3497. **PRIVATE SALE OF ROADS.** — Any such company may, with the consent of three-fourths of the stockholders, relinquish and transfer, by sale or otherwise, to any person or persons other than commissioners of counties, the whole or any part of its road, together with all rights and privileges appertaining thereto, which sale or relinquishment shall be evidenced by a written deed of conveyance, under the seal of such company, signed by the president or other principal officer of such company, and the secretary or other recording officer thereof, which shall, before it shall have any validity or effect, be recorded in the official records of deeds of each county within which the road or any part thereof which has been so sold and conveyed lies, or be left for record in the office containing such official records; but such sale or transfer may be made upon the consent of the holders of three-fourths of the entire stock of the company, the holders of the stock so consenting in that case to be liable in their individual capacity to any stockholder not assenting, for such loss or injury as such non-assenting stockholder may sustain by reason of such sale or transfer. (April 17, 1857, 54 v. 198, § 3; S. & C. 340.)

§ 3498. **WHEN AND HOW A ROAD MAY BE SOLD TO COUNTY COMMISSIONERS.** — The board of directors of any company, when authorized so to do by a vote of the holders of a majority of the stock of the company, represented at a meeting of the stockholders called for that purpose by either (of) the board of directors or

Turnpike and Avenue Companies, §§ 3498a-3500.

ten stockholders of the company, of which at least twenty days' public notice has been given by advertisement in not more than two newspapers published in the county where such road or part thereof is situate, shall sell and convey the whole or any part of its road to the commissioners of the county, together with all rights and privileges appertaining thereto, which sale or relinquishment shall be evidenced by a written deed of conveyance, under the seal of such company, signed by the president or other principal officer of such company, and the secretary or other recording officer thereof, which shall, before it shall have any validity or effect, be recorded in the official records of deeds of each county within which the road or any part thereof which has been so sold and conveyed lies, or be left for record in the office containing such official records. (S. & C. 339.)

§ 3498a. COUNTY COMMISSIONERS MAY PURCHASE TOLL-ROADS WHEN PETITIONED TO DO SO; QUESTION OF PURCHASE TO BE SUBMITTED TO VOTE. — The county commissioners of any county in the state, when petitioned to do so by at least fifty freeholders, citizens of the counties, shall and they are hereby authorized and required to purchase any or all of the toll roads or parts of toll-roads within said counties, as hereinafter provided; provided however that before such purchase is made the commissioners of the county in which the people shall vote in favor of purchasing the toll roads, shall make an order to that effect on their journals and submit the purchase to the voters of said county either before or after an appraisement of the value of the roads has been had, at any regular spring or fall election, giving at least ten days' notice thereof, in at least two newspapers published in the county; and at such election the voters who are in favor of such purchase shall inscribe on their ballots, Purchase of toll roads, Yes; and those opposed thereto shall inscribe on the ballots Purchase of toll roads, No; and if, at any such election, a majority of those voting on said question are in favor of such purchase, the said commissioners may make such purchase, but not otherwise. The vote on said question shall be returned by the judges of election to the clerk of the court of common pleas, who shall open, count, and declare the same, as in an election for county officers, and certify the same to the county commissioners. (March 25, 1880, 77 v. 83.)

Cited in Turnpike Co. v. Parks, 50 Oh. St. 568, 582 (1893); Warden v. Commissioners, 38 Oh. St. 639, 640 (1883).

§ 3499. HOW TOLL-ROADS VOTED TO BE PURCHASED BY COUNTIES APPRAISED. — In any county where, heretofore or hereafter, an affirmative vote has been or may be given at any general election, in favor of purchasing any or all the toll-roads, or parts thereof, lying within such county, at a price to be fixed by three disinterested appraisers, who shall be appointed as follows: One by the court of common pleas of the county, or a judge of said court resident of the subdivision in which the county is situate; one by the probate judge of the county, and one by the commissioners of the county; said appraisers, after being sworn faithfully and honestly to discharge their duties in that behalf, shall personally inspect the road or roads, or parts thereof, so far as the same may be within such county, and make and return in writing, to the commissioners, a valuation of each of the roads or parts thereof; and if the commissioners, from any cause, fail to purchase any road or part thereof, other appraisers may be appointed in the same manner. But nothing herein contained shall prevent the commissioners from making or receiving propositions, and to purchase at any time within two years after an appraisement has been had at the appraised price; any law heretofore passed to the contrary, notwithstanding. (April 15, 1881, 78 v. 149; April 12, 1880, 77 v. 187; Rev. Stat. 1880.)

§ 3500. THE PURCHASE BY THE COMMISSIONERS. AND EFFECT THEREOF. — If the report is satisfactory, and the commissioners, or a majority of them, indorse their approval thereon as to all or any of the roads, or parts thereof, they shall cause

Turnpike and Avenue Companies, §§ 3501-3502.

an entry to be made to that effect on their journal, and thereupon they may purchase the same at a price not exceeding such appraisal, and pay such company or companies, in money or in bonds to be issued as hereinafter specified, and thereupon such roads or parts thereof so purchased, shall cease to be toll-roads, and become free roads, to be kept in repair in the manner prescribed in chapter 10, title 7, part 2.

§ 3501. **THE ISSUE OF BONDS FOR PURCHASE, AND THE TAX FOR THEIR REDEMPTION.** — For the purpose of paying for such roads or parts thereof, the commissioners shall issue bonds payable at such times, and in such amounts as will be as near as practicable equal to the semi-annual collection of taxes levied for that purpose, which bonds shall bear interest at a rate not exceeding six per centum, payable semi-annually, which bonds may be delivered to such companies in payment for such roads, or parts thereof, or sold for money at not less than their par value, but such bonds shall not run more than eight years from date, and for the payment thereof the commissioners shall levy, annually, on all the taxable property of such counties, in addition to the taxes they are otherwise authorized to levy, such sum as will fully pay such bonds and the interest thereon. (April 15, 1881, 78 v. 149; Rev. Stat. 1880.)

Constitutional.

The levying of taxes for the purchase of toll roads, in order to make them free to the public, is a constitutional exercise of the taxing power. — *Warder v. Commissioners*, 38 Oh. St. 639 (1883).

§ 3501a. **TAXES AND ASSESSMENTS FOR CONSTRUCTION OF FREE TURNPIKES MAY BE REFUNDED.** — The commissioners of the counties are hereby authorized and directed to refund to all persons residents of their respective counties, who have paid or may be required to pay, any tax or assessment for the construction of any free turnpike road or roads under the acts of March 29, 1867, April 15, 1867, March 29, 1875, and part second, title seven, chapter seven of the Revised Statutes of Ohio, or the acts amendatory thereof, or supplementary thereto, which road has not been converted into a toll-road; for the purpose of adjusting this refunding of assessments, the auditors of such counties shall prepare a book of such assessments paid in the counties, in which shall be noted all amounts so refunded, and in no instance shall the amount so refunded exceed the amount they have paid or may be required to pay towards the purchase of toll-roads or parts of toll-roads in their respective counties; provided, that all persons who shall demand or accept the refunding of the assessments paid by them, or any part thereof, shall thereby release all right to have the road or roads, to the construction of which they have contributed, to be converted into a toll-road or roads; and in any attempt to convert such road or roads into toll-roads, the names of such persons and the assessments by them contributed, shall be counted against the conversion of such road or roads, or parts thereof, into toll-roads; and for the purpose of refunding such assessments the commissioners are authorized to issue bonds in such amounts as will be necessary, which bonds may run not to exceed eight years, and bear not to exceed six per cent. interest, payable semi-annually; for the payment of such bonds the commissioners are required to levy on all the taxable property of the county such sum, annually, as will fully pay said bonds and the interest thereon, in addition to the taxes they are otherwise authorized to levy. (April 26, 1890, 87 v. 335; April 15, 1881, 78 v. 149.)

Constitutional.

The levying of a tax to refund assessments is constitutional. — *Warder v. Commissioners*, 38 Oh. St. 639 (1883).

§ 3502. **FEES OF APPRAISERS, COUNTY AUDITOR, AND TREASURER.** — Such appraisers shall be paid by the county, upon the allowance of the commissioners, three dollars per day and their necessary expenses, for the time actually employed in the business of their appointment; and the county auditor and county treasurer, for

Turnpike and Avenue Companies, §§ 3503-3510.

their services under the preceding section, shall be entitled to one-half of the lowest rate of fees now allowed to them by law for like services.

§ 3503. **SALE OF ROAD IN ONE COUNTY DOES NOT AFFECT PORTION OF ROAD IN ANOTHER.** — The sale by any company owning a toll road or such part of such road as lies within any county, shall not affect its organization or right, as to such part or parts of its road as may be situate outside of such county.

§ 3504. **TRANSFER NOT TO AFFECT CREDITORS.** — No relinquishment, sale, or transfer herein provided for shall prejudice or affect, in any way the claim of any creditor of the company which makes the same, nor shall the provisions of the three preceding sections extend or be applicable to any road in which the state is interested as a stockholder. (April 17, 1857, 54 v. 198, § 4; S. & C. 340.)

§ 3505. **ADDITIONAL STOCK AUTHORIZED.** — The directors of any company may open books of subscription along the line of its road for the purpose of raising additional stock for the completion, extension, planking, or otherwise improving or repairing its road. (March 12, 1853, 51 v. 395, § 1; S. & C. 334.)

§ 3506. **TWO OR MORE COMPANIES MAY CONSOLIDATE.** — When two or more turnpike or plankroad companies desire to consolidate themselves into a single corporation, they may do so in the manner and subject to the rules provided in this title for the consolidation of railroad companies. (May 1, 1852, 50 v. 274, § 43; S. & C. 298.)

§ 3507. **MAY ASSIST A ROAD WHICH IS AN EXTENSION.** — The directors of any such company may subscribe and pay such sums of money as the majority of the stockholders instruct them to subscribe, to build and keep in repair any turnpike or plankroad that is a continuation or an extension of its road; but such subscription shall not exceed the net revenue of its road. (April 12, 1858, 55 v. 160, § 1; S. & C. 340.)

§ 3508. **MAY ASSIST AN INTERSECTING FREE TURNPIKE.** — The directors of any company may subscribe and pay such sums of money as they may think advisable to build and keep in repair any free turnpike road that intersects their road; but such subscription shall not exceed the dividends of their company, and three-fourths of the stockholders of the company must consent to the subscription. (May 1, 1854, 52 v. 131, § 1; S. & C. 370.)

§ 3509. **ACCOUNTS EACH COMPANY MUST KEEP.** — Every company shall cause to be kept a fair and accurate account of the whole expense of making its road, with the expense of toll-gatherers, and all other necessary agents or officers whom the company may find it convenient to employ, and a fair and accurate account of the amount of toll received; the books of every company shall always be open for the inspection of the commissioners of any county through or into which it passes, or of the agent of the general assembly of the state and of any stockholder; and if any company refuse or neglect to exhibit its accounts, agreeably to the provisions of this section, when required to exhibit them by such commissioners or agent, all the rights granted by this chapter, and its right to be a corporation, shall cease and determine. (May 1, 1852, 50 v. 274, § 40; S. & C. 297.)

§ 3510. **THE BOOKS A COMPANY MUST KEEP.** — The directors of each company shall cause books to be kept, in which shall be entered all the transactions of the company, with the dates of such transactions; also stock books, in which shall be entered the names of the stockholders, the number of shares of stock owned by each,

Turnpike and Avenue Companies, §§ 3511-3515.

and all transfers of stock made during each year, and by and to whom made; on the first Monday of January of each year the directors shall cause a statement to be made in such stock books, showing the names of the owners of the stock of the company, and the respective number of shares held by each; and all books herein provided for shall, at all proper times, be open to the inspection of any stockholder. (April 17, 1868, 65 v. 89, § 1; S. & S. 146.)

§ 3511. **TOLL-GATE KEEPERS MUST REPORT.** — A keeper of a toll-gate shall, on the first Monday of January of each year, and at such other times as may be required by the company, make a report in writing, under oath, showing the amount of toll received at each gate respectively for the preceding year, the amounts paid to the company from time to time, the amounts retained on account of salaries of gate-keepers, the amount of tolls outstanding and uncollected, and also who and to what amount persons have passed through such gates without paying tolls, and by whose orders such persons have so passed; and all such statements shall be submitted to the stockholders at their annual meeting on the second Monday of January of each year. (April 17, 1868, 65 v. 89, § 2; S. & S. 147.)

§ 3512. **DIRECTORS' ANNUAL REPORT TO STOCKHOLDERS.** — The directors of each company shall cause to be made, in writing, and submitted to the stockholders of the company, at the regular meeting of the stockholders on the second Monday of January of each year — notice of which meeting shall be given by the directors, by publication for four consecutive weeks, in a newspaper printed and of general circulation in each county in which any part of the road is situate — a report of the transactions of the company for the year next preceding, which report shall show the amount of revenue received by the company from all sources during the year, and the amount of tolls received at each gate respectively, also a statement in detail of all the items of expenditure of the company for all purposes, including the amount expended on each mile of the road respectively; the amount paid to each officer of the company for his services, the amount paid to gate-keepers for salaries or otherwise, and the amount of money on hand after paying expenses of the company; also a statement of the outstanding liabilities of the company and to whom owing, and of the amounts due to the company, and by whom owing, and how secured; and the directors shall order a dividend to be made of the money then on hand, unless otherwise ordered by a majority of persons present at such meeting owning stock in the company. (April 17, 1868, 65 v. 89, §§ 3, 5; S. & S. 147.)

§ 3513. **TREASURER TO HOLD NO OTHER OFFICE IN COMPANY.** — The treasurer of a company shall hold no other office in the company, and when appointed, and before assuming the duties of his office, he shall take an oath of office, and give bond, with security to the satisfaction of the board of directors, conditioned for the faithful performance of his duties according to law. (April 17, 1868, 65 v. 89, § 4; S. & S. 147.)

§ 3514. **TOLL-GATE KEEPER TO BE DEEMED THE AGENT OF THE COMPANY.** — The keeper of a gate on any turnpike or plankroad shall be deemed and held to be the agent of the company or person owning the road; and judgment obtained against any such gate-keeper for a violation of this chapter, shall be considered and held to be a judgment against the company or person owning the road, and execution may issue thereon accordingly against the gate-keeper and such company or person. (May 1, 1862, 59 v. 101, § 4; S. & S. 150.)

§ 3515. **HOW OBSTRUCTING FENCES MAY BE REMOVED.** — If a person whose fence is upon, or who erects a fence upon, the limits of a turnpike or plankroad, or who places within the limits of such road any wood, stone, or other obstruction,

Turnpike and Avenue Companies, §§ 3516-3520.

other than permanent buildings already constructed, so as to interfere with the public travel upon such road, or prevents or interferes with the free passage of water in the side drains or ditches of such road, upon being notified by the president, a director, or the superintendent of such road to remove such fence or other obstruction, neglect or refuse to comply with such requirements within ten days from the service of such notice, he shall forfeit and pay to and for the benefit of the company owning such road a sum not less than one nor more than ten dollars for each and every day he permits such fence or obstruction to remain upon such road after the expiration of ten days from the service of such notice; which sum shall be recoverable by action in the name of the company, before any justice of the peace of the township where the fence is situate or the obstruction placed. (March 28, 1861, 58 v. 43, § 1; S. & S. 150.)

§ 3516. COMPANY MAY ASSESS STOCKHOLDERS. — When the stockholders of a turnpike or plankroad company are individually liable for the liabilities of such company, the proportion that each stockholder shall be required to pay to meet existing liabilities may be determined and collected in the manner hereinafter provided. (April 8, 1856, 53 v. 99, § 1; S. & C. 338.)

§ 3517. NOTICE OF MEETING FOR THAT PURPOSE. — The directors of any such company, desiring to take such action, may give notice to the stockholders by publication for at least thirty days in at least two newspapers published in the counties in which the road is located, for a meeting of the stockholders, specifying the time and place of meeting, and the object thereof. (April 8, 1856, 53 v. 99, §§ 2, 7; S. & C. 338.)

§ 3518. PROCEEDINGS THEREAT. — At such meeting a detailed statement shall be submitted, showing the assets and indebtedness of the company; and a majority of the stockholders may there determine upon the basis for assessing the stockholders to meet the indebtedness of such company, and fix the time or times, and the mode, for the payment of the amount assessed against each individual or corporation. (April 8, 1856, 53 v. 99, §§ 3, 4; S. & C. 338.)

§ 3519. COLLECTION OF ASSESSMENTS. — No stockholder shall be liable beyond the sum fixed by the charter of such company, and all assessments, when paid, shall be a credit on his liability; and a stockholder who fails to pay, as required, the amount so assessed, shall be liable to an action in the name of the company for the recovery thereof, as in other cases of indebtedness. (April 8, 1856, 53 v. 99, §§ 5, 6; S. & C. 338.)

§ 3520. THOSE ASSESSED FOR IMPROVED ROADS MAY BECOME INCORPORATED. — When a majority of the landholders whose lands have been or hereafter may be assessed to construct a road by virtue of proceedings had under the act of March 29, 1867, and the acts supplementary thereto and amendatory thereof desire to incorporate themselves into a turnpike company, they may proceed in the manner provided in chapter one; but in their articles of incorporation they shall also state that the road has already been constructed under and by virtue of said act, and the amount of capital stock of the company shall be, as near as the same can be arrived at, the amount expended in the construction of the road; and there shall be annexed to the articles of incorporation a petition, asking for the incorporation of the persons named in the articles of incorporation, for the purposes therein named, which petition must be signed by a majority of the landholders whose lands have been taxed for the making of the improvement, accompanied by a certificate of the auditor of the county in which the road is located, to the effect that the petition contains the signatures of a majority of the landholders whose lands have been so taxed. (May 7, 1869, 66 v. 131, § 16.)

Turnpike and Avenue Companies, §§ 3521-3527.

§ 3521. **WHO TO BE STOCKHOLDERS.** — No stock book shall be opened, and no subscriptions received to the stock of such company; the auditor of the county in which any road is located shall, on demand, furnish to the corporators a certified list of the landholders whose lands have been taxed for the construction or improvement of the road; and at the first election of directors and officers of the company, each person whose lands have been so assessed shall be entitled to one vote, and no more. (May 7, 1869, 66 v. 131, § 17.)

§ 3522. **CERTIFICATES OF STOCK TO BE ISSUED.** — After the company is organized its president and secretary shall issue certificates of stock to each landholder for the number of shares of the stock, of the sum which may be designated by the directors, and fractions of a share, as shall amount to the sum assessed upon his lands, and which he has already paid for making the improvement; and they shall also, from time to time, after the assessment on each landholder each year is paid, issue like certificates for the amount of the assessments so paid; but any person whose lands have been assessed, and whose assessments have been paid, may, at any time after the organization of the company, become a stockholder therein, by producing and exhibiting to the secretary of the company, the certificate of the auditor and treasurer of the county, showing the amount of the assessment on the lands of such person for the improvement, and that the same has been paid, and thereupon the president and secretary shall issue certificates of stock to him for the amount so paid. (March 30, 1875, 72 v. 172, § 18.)

§ 3523. **POWERS OF SUCH COMPANIES.** — A company so incorporated shall have the same powers and be subject to the same liabilities as other turnpike companies incorporated under the laws of the state. (May 7, 1869, 66 v. 131, § 19.)

§ 3524. **WHEN SUCH COMPANY MAY INCREASE CAPITAL STOCK.** — A company organized as provided in section thirty-five hundred and twenty, may, with the assent of the holders of a majority of its stock, and the consent of the county commissioners, increase its capital stock to such an amount as may be deemed necessary to extend its road or to build a branch road, not exceeding five miles in length, to form a connection with any other similarly improved road in an adjoining county or state. (April 29, 1872, 69 v. 191, § 1.)

§ 3525. **PROCEEDINGS FOR SUCH PURPOSE.** — For the purpose of increasing the capital stock of the company for the objects heretofore stated, books may be opened for subscriptions, under the direction and at the office of the auditor of the county in which the company is located, upon giving thirty days' previous notice in some newspaper published and of general circulation in the county, and all persons, whether original stockholders or otherwise, may become subscribers to the capital stock of the company; but the aggregate of such subscriptions shall not exceed the amount necessary to construct or build such road or branch; and if a company so organized refuse its assent to such extension, or to the construction of such branch road, for the purposes stated, or refuse, by the vote of the holders of a majority of its stock, to increase its capital stock for such purposes, a stock company may be organized under chapter one, which may build such extension or branch, and erect toll-gates, as provided in this chapter. (April 29, 1872, 69 v. 191, § 1.)

§ 3526. **COMPANY MAY DIVIDE ITS ROAD.** — A company whose road extends into two or more counties may subdivide its road into as many divisions as it may determine, as hereinafter provided, and may reorganize the company, so as to have a separate corporation for each of the subdivisions. (May 13, 1878, 75 v. 527, § 1.)

§ 3527. **PROCEEDINGS TO EFFECT SUBDIVISION.** — For the purpose of making such subdivision there shall be a meeting of the stockholders of the company, at the usual place of meeting, on a notice of at least four weeks, and if at such meeting

Turnpike and Avenue Companies, §§ 3528-3534.

the owners of at least two-thirds of the stock of the company assent thereto, in writing, the subdivision shall be made, and the stock of the entire corporation shall be apportioned among the several new corporations as previously agreed upon; each subdivision shall be liable for its proportion of the debts of the original corporation, in proportion to its stock; and the action of the stockholders' meeting shall be duly recorded, and, when attested by the president and secretary of the meeting, a copy thereof, duly certified by the president and secretary, shall be filed with the secretary of state, and shall become the articles of incorporation for each of the subdivided companies, and shall be recorded as other articles of incorporation are recorded. (May 13, 1878, 75 v. 527, § 2.)

§ 3528. REORGANIZATION OF SEPARATE COMPANIES. — After the certificate is filed with the secretary of state each of the subdivisions shall become a separate corporation, and reorganize as such by the election of a board of directors as other turnpike companies, and thenceforth each of the companies shall have the same powers, and be conducted in all respects, as other companies; and the rights of stockholders in each subdivision to their stock and property shall remain and continue therein as if they had been the sole stockholders in the subdivision prior to the subdivision, subject, however, to the same liabilities of stockholders for debts of the corporation and legislative control as other companies. (May 13, 1878, 75 v. 527, § 3.)

§ 3529. NAMES OF NEW COMPANIES. — The name of each of the companies of such subdivided corporations shall be such as may be assumed and designated in the certificate of incorporation. (May 13, 1878, 75 v. 527, § 4.)

§ 3530. ROADS MAY BE SOLD ON EXECUTION. — All turnpikes and plank-roads under the control of individuals or corporations, and held as property or as a franchise, shall be liable to sale upon execution, in the same manner as other property. (May 5, 1868, 65 v. 136, § 1; S. & S. 238.)

Cited in Turnpike Co. v. Parks, 50 Oh. St. 568, 575 (1893).

§ 3531. THE LEVY AND APPRAISEMENT. — All such property shall be levied upon, appraised, and sold as real estate is appraised and sold; and the appraisement shall be made with reference to the value thereof for the purposes for which it is or may be used, and shall include the value of the franchise therewith connected. (May 5, 1868, 65 v. 136, § 2; S. & S. 238.)

§ 3532. WHEN AN ORDER FOR APPRAISEMENT MAY BE MADE. — When any such property is levied upon and not appraised, and when portions of such property are situate in two or more counties, the court in which the judgment was rendered may, upon application of the creditor, order the same to be appraised, appoint appraisers, and have the same sold entire, or in such parcels as the court may deem most advantageous to the debtor; but if no such application be made the sheriff shall proceed as in other cases. (May 5, 1868, 65 v. 136, § 3; S. & S. 238.)

§ 3533. THE PURCHASER TAKES THE FRANCHISE. — The purchaser of any such road shall, upon the confirmation of the sale, be entitled to hold and exercise all the corporate franchises purchased at such sale, as fully as the same were held and exercised by the debtor before such sale, in any name assumed by the purchaser. (May 5, 1868, 65 v. 136, § 4; S. & S. 238.)

Cited in Turnpike Co. v. Parks, 50 Oh. St. 568, 575 (1893).

§ 3534. TRANSCRIPT TO BE FILED WITH SECRETARY OF STATE. — Upon the filing with the secretary of state of a duly attested copy of the sale, confirmation, and conveyance of any franchise as is herein provided for, such transfer shall be

Turnpike and Avenue Companies, §§ 3535-3536-2.

recorded in the same manner that original articles of incorporation are recorded; and thereupon the franchise shall vest absolutely in the purchaser, in the same manner as franchises vest in original corporators upon the recording of the certificate of incorporation. (May 5, 1868, 65 v. 136, § 5; S. & S. 238.)

§ 3535. WHEN RIGHT TO TAKE TOLL MAY BE SOLD ON EXECUTION. — When a judgment has been heretofore or is hereafter rendered against any turnpike, plankroad, or bridge company, and remains unsatisfied for ten days after the rendition thereof, execution may issue thereon against the goods and chattels of the company, which shall be levied upon and sold as in other cases; if sufficient goods and chattels can not be found to satisfy such execution, the officer holding the same may, if the judgment creditor so direct, levy upon the right of the company to take toll at any of its gates within the jurisdiction of the officer, which right the officer shall advertise and sell as personal property; and the person who will pay the amount due upon the execution for the right of using such gate or gates, and of taking toll at the same, for the shortest time, shall be the purchaser; but nothing herein contained shall be so construed as to deprive the company of the same right to give bail for stay of execution, within the same time after the rendition of a judgment that an individual might have. (March 31, 1879, 76 v. 49, § 1; S. & C. 337.)

Cited in *Turnpike Co. v. Parks*, 50 Oh. St. 568, 576 (1893).

§ 3536. CERTIFICATE OF SUCH SALE, AND ITS EFFECT. — The officer who makes sale of the right to take toll at any gate as aforesaid, shall give to the purchaser a certificate thereof, which certificate shall be sufficient to authorize him to take possession of such gate, and to hold the same during the time for which the same was sold; the purchaser shall have the full right to demand and receive the same tolls of and from all passengers passing through such gate as have been established and posted up by such company according to law; and during the possession thereof the purchaser, or his agent, shall conform to all rules, regulations, and contracts of the company, in the same manner as acquired of the gatherers of toll of the company, except that he shall hold for his own use all tolls collected at such gate for and during the time for which he purchased the same, and shall keep such part of the road in as good repair, so long as he holds the same under such contract, as when possession was taken thereof, ordinary wear and travel excepted. (March 31, 1879, 76 v. 49, § 2; S. & C. 337.)

§ 3536-1. Sec. 1. AVENUE COMPANIES MAY BE INCORPORATED IN CERTAIN COUNTIES; MAY APPROPRIATE LANDS. — In each county containing a city of the second grade of the second class companies may be incorporated for the purpose of constructing avenues, in the counties where they are organized; such avenues shall be opened not more than one hundred feet in width, at least sixty feet of which shall be cleared of all obstructions, and not less than thirty feet shall be made an artificial road, composed of stone, gravel, or other suitable material, well compacted together, in such manner as to secure a firm and substantial road, and shall not be less than one mile in length, and they may enter upon and appropriate any lands for the use of such avenue, according to the provisions of the statutes for the appropriation of private property by corporations. (March 31, 1879, 78 v. 103.)

§ 3536-2. Sec. 2. ERECTION OF TOLL-GATES ON CERTAIN AVENUES IN MONTGOMERY COUNTY. — When any such company completes not less than one mile of any such avenue to the acceptance of the county commissioners, or when the whole of any such avenue is completed to such acceptance by any such company, the company may erect a toll-gate thereon at, or at any point outside of, the corporation line of such city for the collection of such tolls as turnpike companies are allowed by law to collect. (May 1, 1885, 82 v. 209; April 6, 1881, 78 v. 103.)

PART X.

BRIDGE CORPORATIONS.

- § 3537. Powers of bridge companies.
- § 3538. Must post rates of toll.
- § 3539. Rates of toll allowed.
- § 3540. May make and enforce regulations.
- § 3541. Powers of Ohio river bridge companies.
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- § 3548. May change span or height of bridge.
- § 3548a. May borrow to construct or maintain avenues or approaches.
- § 3549. May own and run certain ferries; rates of ferriage.

§ 3537. **POWERS OF BRIDGE COMPANIES.** — A company incorporated to construct a bridge over any stream of water in this state shall either own the bank on each side of the stream where it is proposed to erect its bridge, or obtain the consent of the owner or owners thereof, in writing, to occupy the same; it may purchase, or appropriate in the manner provided by law, and hold, such real estate as will be required for the site of the bridge, and suitable avenues or approaches leading thereto. may use so much of any public street, road, or avenue as is necessary for landings and abutments, and may appropriate in the manner provided by law any rights or franchises necessary in the construction of the bridge; and the provisions of section thirty-four hundred and ninety-two shall be applicable to such companies. (April 29, 1872, 69 v. 185, § 55; April 11, 1856, 53 v. 180, § 1; S. & C. 338.)

May hold necessary real estate, in fee or otherwise.

A bridge company is authorized to purchase, appropriate and hold any interest in real estate, whether an estate in fee simple or

a less estate, which in the opinion of the directors will be required for the site of the bridge and of suitable approaches leading thereto. — Covington Bridge Co. v. Magruder et al., 45 W. L. B. 66 (1900).

§ 3538. **MUST POST RATES OF TOLL.** — Such company, previous to receiving tolls upon its bridge, shall set up and keep in a conspicuous place thereon a board, on which shall be written, painted, or printed, in a plain and legible manner, the rates of toll which are charged thereat; and if its charter provides that such rates shall be prescribed by the court of common pleas of the proper county, and the company demand and receive any greater rate of tolls than the rate so prescribed, it shall be subject to a fine of ten dollars. (May 1, 1852, 50 v. 274, § 61; S. & C. 301.)

Rates of toll must be posted.

To post the rates of toll at each end of the bridge, is a condition precedent to the right to exact tolls, and until performed the collection of toll is unlawful. — Bonham v. Taylor et al., 10 Ohio, 108 (1840).

What will excuse posting of tolls.

Any casual interruption in keeping of the rates of toll, caused by violence or otherwise and for a short period, would not deprive the company of any right, provided it had once performed its duty and there was not unreasonable delay in complying with the law. — Bonham v. Taylor, 10 Ohio, 108 (1840).

§ 3539. **RATES OF TOLL ALLOWED.** — Any company authorized by its charter to take tolls above the rates hereinafter provided may charge and receive the fol-

Bridge Companies, §§ 3540-3542.

lowing rates of tolls, and no more: For each foot passenger one cent; for each horse, mule, or ass, one year old and upwards, three cents; for each horse and rider ten cents; for every chase, chariot, gig, or other two or four-wheeled pleasure-carriage, drawn by one horse, fifteen cents; for every such vehicle drawn by two horses twenty-five cents, and if drawn by four horses thirty cents; for every sled or sleigh drawn by one horse or other animal ten cents, and for each animal in addition three cents; for every wagon drawn by one horse or other animal ten cents, and for each animal in addition three cents; for every wagon drawn by two horses or other animals fifteen cents, and for each animal in addition three cents; for each head of neat cattle, six months old or upward, one cent; and for each head of sheep, goats, or hogs, one-half cent; but this section shall not be construed to affect any company in whose charter special rates are provided, and no power is given to the legislature to alter or amend the same. (April 15, 1857, 54 v. 177, § 1; S. & C. 352.)

§ 3540. **MAY MAKE AND ENFORCE REGULATIONS.** — All bridge companies and owners are invested with full power and authority to make and enforce any rule or regulation deemed necessary or requisite to preserve and protect their property and collect their tolls, and may prevent any person from crossing any bridge owned by them on foot, or by riding, or driving any team or vehicle, or from driving any stock thereon, who fails to pay the regular fare when demanded; and the police or watchman of any such bridge shall have all the power and authority of policemen of cities, and may arrest any person who violates the law, or the rules of the company or person owning the bridge, without warrant, at or upon such bridge, and take him before the proper civil authority to be dealt with according to law. (April 12, 1867, 64 v. 128, § 5; S. & S. 57.)

§ 3541. **POWERS OF OHIO RIVER BRIDGE COMPANIES.** — A company organized to construct a bridge over the Ohio river may construct and maintain such bridge, with suitable avenues or approaches leading thereto, and with either a single span or a draw, as the company may determine; but in either case, in order that the bridge may not obstruct the navigation of the river, the same shall be built in accordance with the provisions of an act of congress approved July 14, 1862, entitled "an act to establish certain post-roads," or of any act of congress subsequently passed on the subject. (April 3, 1868, 65 v. 55, § 4; S. & S. 203.)

Paramount power in congress.

The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in congress. — Bridge Co. v. United States, 105 U. S. 475 (1881).

Withdrawal of assent equivalent to prohibition.

The withdrawal of congress of its assent to the maintenance of the bridge, when properly made, is equivalent to a positive enactment, that from the time of such withdrawal the further maintenance of the bridge shall be unlawful notwithstanding the legislation of

the several states upon the subject. — Bridge Co. v. U. S., 105 U. S. 479 (1881).

May withdraw assent whenever deemed necessary.

Congress could withdraw its assent whenever it determined that in regard to the construction of the bridge, other requirements than those originally prescribed were essential to secure due protection to the navigation of the river. Congress, by requiring change and modification, to which the company conformed, incurred no liability to the latter on account of the increased cost. — Bridge Co. v. U. S., 105 U. S. 480, 484 (1881).

§ 3542. **FURTHER POWERS OF OHIO RIVER BRIDGE COMPANIES.** — Such company may purchase, or appropriate in the manner provided by law, and hold such real estate as, in the opinion of its directors, will be required for the site of the bridge, and of suitable avenues or approaches leading thereto, and may locate the same on, or construct the same over, any public street, road, avenue, or alley; provided, that in constructing the same over any public street, road, avenue or alley, the said bridge shall be constructed at such height as not to interfere with travel passing on, over or along the same; and provided further, that no pier, or other obstruction, shall be constructed or built upon such street, road, avenue or alley, without the consent of the

Bridge Companies, §§ 3543-3547.

municipal or other authorities having charge or control of the same. And the company shall be responsible for injuries done to private property, adjacent or near to such bridge, by its elevation and construction, which may be recovered in a civil action brought by the owner, at any time within two years from the completion thereof. (February 8, 1889, 86 v. 25; Rev. Stat. 1880; April 3, 1868, 65 v. 55, § 5; S. & S. 203.)

May hold necessary real estate, in fee or otherwise.

A bridge company is authorized to purchase, appropriate and hold any interest in real estate, whether in fee simple or a less

estate, which in the opinion of the directors will be required for the site of the bridge and of suitable approaches thereto. — *Covington Bridge Co. v. Magruder et al.*, 45 W. L. B. 116 (1900).

§ 3543. **RATES OF TOLL PRESCRIBED.** — The company may fix and collect reasonable rates of toll for all persons, animals, vehicles, and property passing or transported over the bridge, but such rates shall at no time exceed those collected at the Covington and Cincinnati bridge; and the company shall set up and keep in a conspicuous place, at each end of the bridge, a board on which the rate shall be written, painted, or printed in a plain and legible manner. (April 3, 1868, 65 v. 55, § 6; S. & S. 203.)

§ 3544. **MAY LAY RAILWAY TRACKS ON BRIDGE.** — The company may lay down a railway track or tracks upon the bridge and its approaches, and may contract at any agreed sum or rate, with any railroad company organized in this state in accordance with law, or any railroad company organized in any other state of the United States, for the use of the bridge, for the purposes of such railroad company; and any such railroad company organized in this state may enter into such contract with the bridge company; but the bridge company shall not have the right to charge or collect from the railroad company for the use of the bridge in the transportation over the same of cars, railroad passengers, and freights, a greater toll than the following: For each ton (two thousand pounds) of freight not exceeding fifteen cents; for each passenger not exceeding fifteen cents; for each passenger, baggage, mail, or express car not exceeding one dollar; for each eight-wheeled freight car fifty cents; and for each four-wheeled freight car not exceeding twenty-five cents. (April 3, 1868, 65 v. 55, § 7; S. & S. 203.)

§ 3545. **MORTGAGE OF FRANCHISES AND SALE OF OBLIGATIONS.** — The company may include all its rights, income, profits, and franchises in any mortgage it may lawfully make, and upon a foreclosure of a mortgage of its bridge, land, and franchises, and a sale thereof, such sale shall pass to the purchaser the corporate franchises of the company as fully as the company had them at the time the mortgage was executed; and the company may dispose of any evidence of indebtedness it may lawfully issue as is provided in section thirty-two hundred and ninety. (April 3, 1868, 65 v. 55, § 8; S. & S. 204.)

§ 3546. **RAILROAD COMPANIES MAY SUBSCRIBE TO STOCK.** — Any railroad company or other private corporation organized under a law of this state, may become a subscriber to the capital stock of such bridge company, to an amount not exceeding one-third of such stock, or may purchase, or take by way of pledge, any of the bonds or other evidences of indebtedness issued by it. (April 3, 1868, 65 v. 55, § 9; S. & S. 204.)

§ 3547. **CONSOLIDATION OF COMPANIES.** — Such bridge company shall have the right to consolidate its capital stock with the capital stock of any bridge company in an adjoining state authorized to construct a bridge across the Ohio river, in the manner prescribed for the consolidation of railroad companies, and the two companies shall thereupon be merged into one corporation, possessing within this state all the

Bridge Companies, §§ 3548-3549.

rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of such corporation of this state so consolidated. (April 3, 1868, 65 v. 55, § 10; S. & S. 204.)

§ 3548. **MAY CHANGE SPAN OR HEIGHT OF BRIDGE.** — Such company may fix or change the span and altitude of any bridge which it may erect and construct, but the span shall not be less than three hundred feet in the clear over the main channel, and not less than two hundred and twenty feet in the clear in one of the next adjoining spans, and the height of the bridge in the center of the span over the main channel shall not be less than one hundred feet above the surface of the water at low water-mark, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high water-mark as may be provided in any act of congress now in force or hereafter passed; but this section shall not apply to any bridge built with a draw in accordance with the provisions of an act of congress approved July 14, 1862, entitled "an act to establish certain post roads," or any act of congress subsequently passed on the subject. (April 3, 1868, 65 v. 55, § 11; S. & S. 204.)

§ 3548a. **MAY BORROW TO CONSTRUCT OR MAINTAIN AVENUES OR APPROACHES.** — Any company which has heretofore constructed any bridge across the Ohio river, may construct, extend and maintain avenues or approaches thereto beyond the point where the same are now, or are by law authorized to be constructed, and, in the construction and maintenance of such avenues and approaches, may exercise all the rights, powers and privileges now conferred on bridge companies by the laws of the state of Ohio, and may borrow money and secure the payment of same as is provided in section 3256 of the Revised Statutes. (May 16, 1894, 91 v. 279.)

§ 3549. **MAY OWN AND RUN CERTAIN FERRIES; RATES OF FERRIAGE.** — Such companies may purchase, hold, and receive grants for, and run ferries within one-half mile of such bridges across said river, and do and perform all the necessary acts in relation thereto, but the rates of ferriage shall be subject to the control of the authorities as in case of ferries owned and run by individuals. (May 7, 1869, 66 v. 136, § 2.)

PART XI.

GAS AND WATER COMPANIES.

- § 3450. Powers of gas and water companies.
- § 3550a. In Cincinnati, gas company has powers of electric light company
- § 3551. May contract with public authorities.
- § 3552. Gas company may extend pipes beyond city.
- § 3553. Standard measure for gas.
- § 3554. Meter must be sealed and stamped.
- § 3555. Gas companies to furnish certain apparatus.
- § 3556. How and when meters in use to be tested.
- § 3557. What is merchantable gas.
- § 3558. Agents of company may enter premises to inspect meter.
- § 3559. When company may shut off the gas.
- § 3560. Penalties for tampering with meters.
- § 3561. Each company to provide certain apparatus.
- § 3561a. Laws made applicable to natural-gas companies in certain cities.

§ 3550. **POWERS OF GAS AND WATER COMPANIES.** — A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, town, or township, may manufacture, sell, and furnish the gas required therein for such or other purposes, and a company organized for the purpose of supplying the inhabitants of a city, village, town, or township with water may sell and furnish any quantity of water required therein for such or other purposes; and such companies may lay conductors for conducting gas or water through the streets, lands, alleys, and squares in such city, village, town, or township, with the consent of the municipal authorities of the city, village, or town, or with the consent of the trustees of the township, and under such reasonable regulations as they may prescribe. (April 17, 1867, 64 v. 255, § 53; S. & S. 157.)

May borrow money and give mortgage.

May borrow money to carry out the objects of its creation, and may secure the payment of the same, by note and mortgage. — *Hays v. Galion Gas Co.*, 29 Oh. St. 330 (1876); *Burt v. Rattle*, 31 Oh. St. 116 (1876).

Special charter, subject to control.

A corporation, acting under special charter, and invested with franchises to be exercised to subserve the public interest, is, in the discharge of such duties, subject to legislative supervision and control, unless it clearly appears from the terms of its charter that it was the intention to exempt it from such interference. — *State ex rel. v. Gas Light Co.*, 34 Oh. St. 572 (1878); approved *Zanesville v. Gas Light Co.*, 57 Oh. St. 1 (1889).

Held, that a company holding such special charter was subject to the provisions of the act of March 9, 1867 (S. & S. 60), restricting the price to be charged for the use of meters. — *State ex rel. v. Gas Light Co.*, 34 Oh. St. 572 (1878).

No exclusive or vested right.

This section does not grant an exclusive right to any one company to lay its conductors through streets. — *State ex rel. v. Hamilton*, 47 Oh. St. 52, 70, 71 (1890), and U. S. Sup. Ct. See same case, 11 U. S. Cir. Ct. 21 W. L. B. 94; 146 U. S. 258.

City may erect own plant.

Upon the termination of a contract between a gas company and the city for lighting the same, the latter refused to enter into a new contract, but built its own gas plant. Held, that no vested rights of the company were violated. — *State ex rel. v. Hamilton*, 47 Oh. St. 52, 72, 73 (1890); approved 146 U. S. 258.

May employ electricity.

Corporations furnishing gas for lighting purposes may amend their charters, by virtue of § 3238a, so as to employ both gas and electricity. — *Pickard v. Hughey et al.*, 58 Oh. St. 577 (1898).

Contracts with Municipalities, §§ 3550a, 3551.

Permit of council—when necessary.

The right to operate gas works is a franchise granted by the legislature. Municipal authorities cannot arbitrarily declare it a nuisance or prohibit it in a certain district. Consent to use streets for pipes is necessary.—*Defiance v. Defiance Gas, etc., Co.*, 12 Dec. 424 (1901).

Consent to use streets is irrevocable.

See *Defiance v. Defiance Gas, etc., Co.*, 12 Dec. 424 (1901).

Lighting companies cannot use natural gas.

Gas companies organized under the statutes in force in 1874, "to manufacture and furnish illuminating gas," etc., are not authorized to use natural gas to furnish light and heat.—*Gas Light Co. v. Findlay*, 2 C. C. 237 (1887); s. c., 1 C. D. 463.

Lighting companies cannot operate railway.

Company furnishing light and heat by means of gas and electricity cannot amend its charter so as to operate a street railway.—*State ex rel. v. Taylor*, 55 Oh. St. 61 (1896).

Council cannot grant exclusive right.

The city council cannot, without clear legislative authority, grant to any one an exclusive right to the use of streets and alleys of the city.—*State ex rel. v. Cincinnati Gas Co.*, 18 Oh. St. 262 (1868); approved, 115 U. S. 659, 118 U. S. 371; *Street Railway Co. v. Smith et al.*, 29 Oh. St. 291 (1876); *State ex rel. v. Hamilton*, 47 Oh. St. 52 (1890); *Gas Co. v. Newark*, 7 N. P. 76 (1896); s. c., 8 Dec. 418. See *Hamilton v. Hamilton Gas, etc., Co.*, 8 N. P. 510 (1901).

City's regulation of price.

See *Cleveland Gas Co. v. Cleveland* (U. S. Cir. Ct.), 35 W. L. B. 155 (1891); s. c., 71 Fed. 181; *State v. Gas Co.*, 18 Oh. St. 262

(1868); *State v. Ironton Gas Co.*, 37 Oh. St. 45 (1881); *Cincinnati Gas Co. v. Avondale*, 43 Oh. St. 257 (1885); *Zanesville v. Gas Light Co.*, 47 Oh. St. 1 (1889); *Toledo v. Gas Co.*, 6 N. P. 531 (1898); s. c., 8 Dec. 277; *Manhattan Trust Co. v. Dayton Gas Co.*, 55 Fed. 181 (1893).

For construction of contract stipulating for "average price."

Cincinnati v. Gas Co., 53 Oh. St. 278 (1895).

Council may require report.

Council having authority to regulate price of gas may require gas companies to file annual report, showing cost of gas, etc. Such ordinance must be of civil nature only.—*Cline v. Springfield*, 7 N. P. 626 (1899); s. c., 10 Dec. 389.

Injury to pipe by change of grade.

A gas company laying its pipes in the street does so subject to the right of the city to change the then existing grade; and in the absence of negligence the city is not liable for damages occasioned by the necessity of taking up and relaying of the pipes.—*Gas Co. v. Columbus*, 50 Oh. St. 66 (1893).

Cannot appropriate property.

A water company has no right to appropriate land by virtue of this section or sections 3551 and 3552.—*State v. Salem Water Co.*, 5 C. C. 58, 62 (1891); s. c., 3 C. D. 30.

Laying of pipes for natural gas in city streets is an additional servitude.

Webb et al. v. Ohio Gas Co., 16 W. L. B. 121 (1886).

Construction of §§ 3550 and 3551.

Brush El. Co. v. Jones El. Co. and Brush El. Co. v. Queen City El. Co., 23 W. L. B. 329 (1890) and 5 O. C. 340, affirmed without report 29 W. L. B. 72 (1893). See further on subject of regulation of gas companies, etc., §§ 2478 to 2491 and notes thereto.

§ 3550a. IN CINCINNATI, GAS COMPANY HAS POWERS OF ELECTRIC LIGHT COMPANY.—In cities of the first grade of the first class gas companies and gas light and coke companies organized under the laws of this state for the purpose of manufacturing and supplying gas for lighting the streets and public and private buildings and places, shall have, in addition to the powers already conferred, all the powers, privileges and franchises of electric light companies to construct, maintain and operate electric light plants and stations, with all fixtures and appliances necessary for furnishing electric light, heat and power to such cities and the inhabitants thereof; and such companies may lease or purchase, maintain and operate existing electric light plants and stations, together with all the fixtures, appliances, equipments and other property thereunto belonging, including the capital stock, rights and franchises of any existing company or companies, person or persons, owning the same. (April 25, 1893, 90 v. 291.)

§ 3551. MAY CONTRACT WITH PUBLIC AUTHORITIES.—The municipal authority of any city or village, or the trustees of any township, in which any gas or water company is organized, may contract with any such company for lighting or

Regulations as to Pipes, Meters, etc., §§ 3552 3555.

supplying with water the streets, lands, lanes, squares, and public places in such city, village, town, or township; but no such company shall go into operation in any city or village where such a corporation has been already formed, or is hereafter formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village, and authorized by ordinance. (April 18, 1874, 71 v. 93, § 54; S. & S. 158; S. & C. 300.)

Cited, *State v. Salem Water Co.*, 5 C. C. 58, 63 (1891); s. c., 3 C. D. 30; *State v. Hamilton*, 47 Oh. St. 52, 69 (1890).

Construction of §§ 3550 and 3551.

Brush El. Co. v. Jones El. Co. and Brush El. Co. v. Queen City El. Co., 23 W. L. B. 329 (1890) and 5 O. C. C. 340, affirmed without report 29 W. L. B. 72 (1893).

May be compelled to furnish gas.

Where it is the duty of a gas company to furnish gas to a city at the rates fixed by an ordinance of the city council, it may, if it refuse, be compelled by a mandatory injunction

so to do, so long as it continues to exercise and enjoy its franchise as a gas company—*Gas Light Co. v. Zanesville*, 47 Oh. St. 35 (1889).

Submission to vote, necessary for formation only.

A gas-light company (in operation) duly organized and authorized by the voters of a city to erect gas works, etc., can make legal contracts with the city to furnish gas without another vote of the people. This section applies only to the formation of another company.—*Gas Co. v. Lima*, 4 C. C. 22 (1890); s. c., 2 C. D. 396.

§ 3552. **GAS COMPANY MAY EXTEND PIPES BEYOND CITY.**—A gas company in any city or village may extend its pipes used for conveying gas to the various localities and inhabitants of such city or village, to any point or place in the vicinity of such city or village outside the corporate limits thereof; but the right of way must be obtained from the corporate or other authorities, or person having control of the places to be affected by such extension. (March 30, 1859, 56 v. 92, § 1; S. & C. 351.)

Extension equivalent to location of plant.

Where a gas company, under the provisions of this section, extends into a village its pipes used for conveying gas, and is vested with the right of way where such pipes are laid, and uses such pipes to convey to the village lamps, gas manufactured outside of such village, and uses such manufactory and pipes as one

plant, such company may be regarded as established in such village, within the meaning of section 2478; and such extension of pipes may be regarded as the extension of gas works for supplying the village with gas, within the meaning of section 2485.—*Cincinnati Gas Co. v. Avondale*, 43 Oh. St. 257 (1883).

§ 3553. **STANDARD MEASURE FOR GAS.**—The standard or unit of measure for the sale of illuminating gas by meter shall be the cubic foot, containing sixty-two and three hundred twenty-one one-thousandth pounds avoirdupois weight of distilled or rain water, weighed in air, of the temperature of sixty-two degrees Fahrenheit's scale, the barometer being at twenty-nine and one-half inches. (April 6, 1866, 63 v. 164, § 5; S. & S. 159.)

§ 3554. **METER MUST BE SEALED AND STAMPED.**—No meter shall be set unless it is tested by a meter-prover, sealed and stamped as provided in section thirty-five hundred and fifty-six, and any company authorizing the setting of a meter, or allowing the same to be used by any consumer of gas, without being so sealed and stamped, shall forfeit and pay not less than twenty-five nor more than one hundred dollars, to be recovered upon the complaint of any such consumer, in the name of the state, before any court of competent jurisdiction. (March 9, 1867, 64 v. 39, § 6; S. & S. 161.)

§ 3555. **GAS COMPANIES TO FURNISH CERTAIN APPARATUS.**—There shall be provided, at the expense of the gas companies of this state, by the state sealer of weights and measures, at the Ohio state university, a standard measure of the

Meters, Inspection of Gas, etc., §§ 3556-3560.

cubic foot, and such other apparatus as in his judgment shall be necessary for the performance of his duties under this chapter. (March 17, 1891, 88 v. 123; April 6, 1866, 63 v. 164, § 7; S. & S. 159.)

§ 3556. **HOW AND WHEN METERS IN USE TO BE TESTED.**—Meters in use shall be tested on the request of the consumer, in his presence, if desired, with a meter-prover tested and sealed as provided in section thirty-five hundred and sixty-one, by an officer or servant of the company; if the meter be found to be correct, the party requesting the inspection shall pay a fee of twenty-five cents, and the expense of removing the same for the purpose of being tested, and the re-inspection shall be stamped on the meter; if proved incorrect, no fees or expense shall be paid by the consumer, and the company shall furnish a new meter without any charge to the consumer; and no gas company shall have the right to charge rent for meters. (March 9, 1867, 64 v. 39, § 9; S. & S. 161.)

§ 3557. **WHAT IS MERCHANTABLE GAS.**—Illuminating gas shall not be merchantable in this state which has a minimum value of less than twelve candles—that is, a burner consuming five cubic feet per hour shall give a light, as measured by the photometric apparatus in ordinary use, of not less than twelve standard sperm candles, each consuming one hundred and twenty grains per hour; and every gas-meter must be tested with the burner, and under the pressure best adapted to it, and the result shall be calculated at a temperature of sixty degrees Fahrenheit. (March 9, 1867, 64 v. 39, § 10; S. & S. 162.)

§ 3558. **AGENTS OF COMPANY MAY ENTER PREMISES TO INSPECT METER.**—An officer or servant of a gas company, duly authorized in writing by the president, treasurer, agent, or secretary of the company, may, at any reasonable time, enter any premises lighted with gas supplied by such company, for the purpose of examining or removing the meters, and of ascertaining the quantity of gas consumed or supplied; and if any person, at any time, directly or indirectly, prevent or hinder any such officer or servant from so entering any such premises, or from making such examination or removal, such officer or servant may make complaint under oath, to any justice of the peace of the county wherein such premises are situate, stating the facts in the case, so far as he has knowledge thereof, and the justice may thereupon issue a warrant, directed to any constable of the city or town where such company is located, commanding him to take sufficient aid, and repair to such premises, accompanied by such officer or servant, who shall examine such meters and ascertain the quantity of gas consumed or supplied therein, and, if required, remove any meters belonging to the company. (April 6, 1866, 63 v. 164, § 11; S. & S. 159.)

§ 3559. **WHEN COMPANY MAY SHUT OFF THE GAS.**—If any person so supplied with gas neglect or refuse to pay the amount due for the same, or for the rent of the meter, or other articles hired by him of the company, the company may stop the gas from entering the premises of such person; in such cases the officers, servants, or workmen of the gas company may, after twenty-four hours' notice, enter the premises of such parties, between the hours of eight in the forenoon and four in the afternoon, and take away such meter, or other property of the company, and may disconnect any meter from the mains or pipes of the company; and no gas company shall have the right to refuse to furnish gas on account of any arrearages due the company for gas furnished to former occupants of the same premises. (April 6, 1866, 63 v. 164, § 12; S. & S. 160.)

§ 3560. **PENALTIES FOR TAMPERING WITH METERS.**—Every person who willfully or fraudulently injures, or suffers to be injured, any meter belonging to any gas company, or prevents any meter from duly registering the quantity of gas sup-

Testing Apparatus — Natural Gas Companies, §§ 3561, 3561a.

plied through the same, or in any way hinders or interferes with its proper action or just registration, or attaches any pipe to any main or pipe belonging to such company, or otherwise burns or uses or causes to be used, any gas supplied by such company, without the written consent of an officer thereof, unless the same passes through a meter set by the company, or fraudulently burns the gas of the company, or waste(s) the same, shall for every such offense, forfeit and pay to the company not more than one hundred dollars, to be recovered in an action brought by the company against such offender, and in addition thereto, shall pay the company the amount of damage by it sustained by reason of such injury, prevention, waste, consumption or hindrance. (April 6, 1866, 63 v. 164, §§ 13, 14; S. & S. 160.)

§ 3561. EACH COMPANY TO PROVIDE CERTAIN APPARATUS.— All gas companies supplying the public with illuminating gas which are not supplied with such apparatus, shall forthwith provide for their use a meter-prover, the holder of which shall contain not less than five feet, the same to be tested, stamped, and sealed by the state sealer of weights and measures, at the Ohio state university, before being used, and a photometer for the comparison of the lights of gases and candles by means of a disk. (March 17, 1891, 88 v. 123; April 12, 1876, 73 v. 227, § 3; S. & S. 159.)

§ 3561a. LAWS MADE APPLICABLE TO NATURAL GAS COMPANIES IN CERTAIN CITIES.— The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings and manufacturing establishments of all cities of the third grade of the second class, having a population not exceeding 16,000 at (the) federal census of A. D. 1880, with natural gas for fuel; but said company shall be liable for any damage that may result from the transportation of the same, provided the township trustees shall not assent to the laying down of any line of pipes in any township of this state, as provided in sections three thousand five hundred and fifty and three thousand five hundred and fifty-one, until the company or corporation proposing to lay the same shall obtain the assent, in writing of a majority of the land-owners whose lands may be adjacent to the road or highway upon which said line of pipes or conductors are to be laid. (May 1, 1885, 82 v. 213.)

Company liable, without negligence.

This section imposes a duty on the company of keeping natural gas under its control, while transporting the same, and the company is liable for any damages that may result from such transportation, although not negligent

in regard thereto.— Gas Fuel Co. v. Andrews, 50 Oh. St. 695 (1893).

Laying of pipes for natural gas in city streets is an additional servitude.

Webb et al. v. Ohio Gas Co., 16 W. L. R. 121 (1886).

PART XII.

HYDRAULIC CORPORATIONS.

- § 3562. May enter upon land for survey.
- § 3563. When and for what purpose may appropriate land.
- § 3564. Certain companies released from cause of forfeiture.
- § 3565. May borrow money and make mortgage.
- § 3566. Companies may consolidate.
- § 3567. Notice of meeting for such purpose.
- § 3568. Proceedings at the meeting.
- § 3569. When water may be drawn from canals.
- § 3570. Certain provisions of chapter five applicable.

§ 3562. **MAY ENTER UPON LAND FOR SURVEY.** — A company incorporated under the laws of this state for hydraulic or manufacturing purposes, to which the board of public works, for a stipulated revenue, has leased and granted, or may hereafter lease and grant, the right to use and employ the surplus water of any of the public canals of this state, for propelling the machinery of such company, may enter upon any land upon or across which it may be desired to build, excavate, or construct its hydraulic canal, race-ways, or water-channel, for conveying and discharging such surplus water to and from the point at which it is desired to employ the same, and survey the route thereof. (April 5, 1866, 63 v. 147, § 1; S. & S. 172.)

§ 3563. **WHEN AND FOR WHAT PURPOSE MAY APPROPRIATE LAND.** — Such company may appropriate so much of the land as it may deem necessary for its canal, race-way, or water-channel, with the necessary culverts, waste-weirs, aqueducts, water-gates, abutments, and fixtures, and the right of way over adjacent lands sufficient to enable it to construct and repair the same, if the probate court, in the proceedings instituted for that purpose, find that the erection and operation of its proposed works will be subservient to the public welfare. (April 5, 1866, 63 v. 147, §§ 2, 3, 4; S. & S. 172, 173.)

§ 3564. **CERTAIN COMPANIES RELEASED FROM CAUSE OF FORFEITURE.** — All hydraulic companies incorporated and organized before March 23, 1866, which became liable to a judgment of ouster from their corporate franchises, by reason of a non-user thereof for five or more years, but against which no proceeding to obtain such judgment had been commenced, and which had resumed and were then in the bona fide exercise of their franchises, are relieved from such cause of forfeiture, and no judgment for that cause shall be rendered against them, or either of them. (March 23, 1866, 63 v. 50, § 1; S. & S. 173.)

§ 3565. **MAY BORROW MONEY AND MAKE MORTGAGE.** — Any hydraulic company may, for the purpose of repairing, completing, or extending its works, borrow money to an amount not exceeding one-half of its capital stock actually paid in, and may secure the payment of the money so borrowed by the issue of bonds or notes, bearing interest not to exceed the rate authorized by law, and secured by mortgage on its real estate, or any part thereof; but such bonds or notes shall not be issued without the assent in writing of the holders of a majority of the stock in the company. (April 25, 1873, 70 v. 160, § 1.)

Hydraulic Companies, §§ 3566-3570.

§ 3566. COMPANIES MAY CONSOLIDATE. — Any hydraulic company now or hereafter organized under the laws of this state, may consolidate with any other hydraulic company in this or any adjoining state, when the works of such companies are connected or proposed to be connected, which consolidation shall be by an agreement of the corporations, duly ratified by a vote of the holders of two-thirds of the stock of each of the companies; when so consolidated the companies shall constitute one company, and take such name as the agreement shall designate; if both are organized under the laws of this state, the consolidated company shall possess all the rights, privileges, and franchises of each of the corporations parties in the agreement, and if one is organized under the laws of any other state, the consolidated company shall possess all the rights, privileges, and franchises of the company organized under the laws of this state, and in either case the consolidated company shall possess and hold all the property and rights of action, subject to all liens upon the respective property of each of the companies; and all debts, liabilities, and duties of either of the companies shall henceforth attach to the new company, and may be enforced against it. (April 27, 1872, 69 v. 177, § 1.)

§ 3567. NOTICE OF MEETING FOR SUCH PURPOSE. — The notice of a meeting to take into consideration the agreement to consolidate, shall be given to the stockholders of such companies, by the secretaries of the respective companies, by publication in a newspaper printed and published in the county where such corporation is located, thirty days previous to such meeting, stating the object of the meeting; a printed copy of such notice shall be sent by the secretary of each company, by mail, to any stockholder whose residence is out of the county; and the publication and sending of such notice must be certified by the secretaries on their respective record books. (April 27, 1872, 69 v. 177, § 2.)

§ 3568. PROCEEDINGS AT THE MEETING. — The stockholders at the meeting so called shall take into consideration the agreement to consolidate, and, after the adoption of the same, shall appoint the time and place for the election of directors and other officers of the new corporation provided for in the agreement, a certified copy of which, and of the proceedings and vote on the consolidation, shall be certified by the officers of such meeting, under their seals, and be acknowledged by them before an officer authorized by law to take acknowledgment of deeds, and shall be forthwith filed in the office of the secretary of state; and a copy of the agreement and act of consolidation so filed in the office of the secretary of state, duly certified by him, shall be evidence of the existence of such consolidated company. (April 27, 1872, 69 v. 177, § 3.)

§ 3569. WHEN WATER MAY BE DRAWN FROM CANALS.— All canal companies and persons having oversight of any canal are prohibited from hereafter drawing off the water from such canal for the purpose of cleaning out the same, or making the general annual repairs thereof, and from allowing the water to remain out of the same, at any time between the thirtieth day of June and the thirtieth day of September in any year; and if any such company or person violate the provisions of this section, such company or person shall forfeit and pay to the state not less than five hundred nor more than three thousand dollars, to be recovered in a civil action, before any court having jurisdiction thereof. (January 31, 1845, 43 v. 17, § 1; S. & C. 225.)

§ 3570. CERTAIN PROVISIONS OF CHAPTER FIVE APPLICABLE.— The provisions of chapter five for the foreclosure of a mortgage of a turnpike or plank-road, and the sale thereof upon such mortgage or upon execution, shall apply to the foreclosure of a mortgage of the canal of any company, and to the sale thereof on such proceedings or on execution. (April 16, 1857, 54 v. 179, §§ 1, 2; S. & C. 339.)

PART XIII.

CEMETERY ASSOCIATIONS.

- § 3571. May acquire land not exceeding one hundred acres.
- § 3572. Certain associations may acquire additional land.
- § 3573. Appropriation of land by cemetery associations; exceptions.
- § 3574. How receipts and income to be applied.
- § 3574-1. Additional land for entrance; how secured.
- § 3575. Sale of lots.
- § 3576. Plat of grounds; regulations.
- § 3577. County commissioners may purchase road to cemetery.
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- § 3580. Officers of cemetery association may appoint policemen.
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§ 3571. **MAY ACQUIRE LAND NOT EXCEEDING ONE HUNDRED ACRES. —** A company or association incorporated for cemetery purposes may purchase, appropriate, or take by gift or devise, and hold, not exceeding one hundred acres of land, which shall be exempt from execution, from taxation, and from being appropriated to any other public purpose, if used exclusively for burial purposes, and in no wise with a view to profit. (March 29, 1875, 72 v. 113, § 5.)

Does not exempt from assessments.

The exemption from taxation does not include exemption from assessment for local improvements. — *Lima v. Cemetery Ass'n*, 42 Oh. St. 128 (1884).

Assessment can be enforced.

While the lands, so far as exempted, cannot be sold, an assessment may be enforced by such remedies as the statutes and courts of equity afford. — *Lima v. Cemetery Ass'n*, 42 Oh. St. 128 (1884); *Gilmour v. Pelton*, 2 W. L. B. 158 (1877).

§ 3572. **CERTAIN ASSOCIATIONS MAY ACQUIRE ADDITIONAL LAND. —** Any such company or association which is limited to the ownership, by appropriation or otherwise, of a designated number of acres of land for such purpose, may purchase, according to law, additional lands to the extent necessary for such purposes; but not more than fifty acres shall be purchased in any year, and not more in the aggregate shall be so purchased and held by any such company or association than one hundred acres. (March 20, 1877, 74 v. 60, § 1.)

Cemetery Associations, §§ 3573-3574-1.

§ 3573. APPROPRIATION OF LAND BY CEMETERY ASSOCIATIONS; EXCEPTIONS. — If it be necessary to acquire any lands by appropriation, such proceedings shall be taken therefor as are provided for the appropriation of property to the use of corporations; but no lands shall be so appropriated until the probate court is satisfied that suitable premises can not be obtained by contract upon reasonable terms, and no lands shall be appropriated upon which there is any dwelling-house, barn, stable or other farm-buildings, or upon which there is any orchard or nursery, or any valuable mineral or other medicinal spring, or any well actually yielding oil, or salt water, unless the same shall adjoin a cemetery already located and used, on the same or opposite side of a public highway; nor shall any land be appropriated nor any cemetery located, whether it is being established by an association incorporated for cemetery purposes or by benevolent or religious societies, within two hundred yards of any dwelling house, unless the owner of such dwelling house gives his consent, or unless the entire tract be so appropriated as a necessary addition to or enlargement of a cemetery already located and used; provided, however, that the limit shall not be less than one hundred yards where it is sought to appropriate for cemetery purposes property adjoining a cemetery already located and used, when such dwelling house has been erected subsequently to the laying out and establishing of such cemetery; but in cities of the third and fourth grade of the second class, where the cemetery lies within a municipal corporation, the association may, without such consent, appropriate property within one hundred feet, or the width of a street, of any dwelling house. The provisions of this section shall not be applicable to a corporation or cemetery association, owning a cemetery of less dimensions than five acres and situate within one mile of the corporate limits of any city of the first grade of the first class. (March 22, 1893, 90 v. 103; April 2, 1886, 83 v. 63; May 1, 1885, 82 v. 217; March 6, 1880, 77 v. 41; Rev. Stat. 1880; March 29, 1875, 72 v. 113, § 5; 76 v. 137, § 5.)

§ 3574. HOW RECEIPTS AND INCOME TO BE APPLIED. — After paying for such land all future receipts and incomes of such company or association, whether from sale of lots, donations, or otherwise, shall be applied exclusively to laying out, preserving, protecting, and embellishing the cemetery, and the avenues leading thereto, the erection of such buildings as may be necessary for the cemetery purposes, and to paying the necessary expenses of the cemetery company or association; no debts shall be contracted in anticipation of future receipts, except for original purchasing, laying out, inclosing, and embellishing the ground and avenues, for which a debt or debts may be contracted not exceeding ten thousand dollars in the whole, to be paid out of future receipts; and such company or association may adopt such rules and regulations as it may deem expedient for disposing of and conveying burial lots; but any person not already the owner of a lot in the cemetery shall have the right to purchase any lot not before sold by the company or association, and have it conveyed to him by the company or association, upon tender of the usual price asked therefor by it. (March 29, 1875, 72 v. 113, § 5.)

§ 3574-1. ADDITIONAL LAND FOR ENTRANCE; HOW SECURED. — Whenever in the judgment of the officers of any cemetery association within this state, it is necessary to secure additional land for the purpose of making an entrance to its grounds, or to improve an entrance already made, said officers may make application to the county commissioners of the county in which said cemetery is located for the appointment of appraisers; the county commissioners shall, upon such application being made to them, appoint three disinterested free-holders of the county as appraisers, whose duty it shall be to view the land sought to be obtained, and appraise its value, and make due return of said appraisement to the county commissioners; and when said cemetery association shall have made payment of the amount of said appraisement, together with the cost thereof, then the title to said land shall vest in said association; an appeal may be taken from the appraisement made by such

Cemetery Associations, §§ 3575-3580.

appraisers to the probate court of the county in which such cemetery or such entrance may be located in manner provided in chapter 4, title 6, of the Revised Statutes. (April 6, 1893, 90 v. 153.)

§ 3575. **SALE OF LOTS.**—Burial-lots sold by such company or association shall be for the sole purpose of interments, shall be subject to the rules prescribed by the company or association, and shall be exempt from taxation, execution, attachment, or any other claim, lien, or process whatever, if used exclusively for burial purposes, and in no wise with a view to profit. (February 24, 1848, 46 v. 97, § 6; S. & C. 227.)

§ 3576. **PLAT OF GROUNDS; REGULATIONS.**—Every such company or association shall cause a plat of its grounds and of the lots by it laid out, to be made and recorded, or filed in the recorder's office of the county in which situated; the lots to be numbered by regular consecutive numbers; it may inclose, improve and adorn the grounds and avenues, erect buildings for its use, prescribe rules for inclosing and adorning lots, and for erecting monuments in the cemetery, and prohibit any use, division, improvement, or adornment of a lot which it deems improper; and an annual exhibit shall be made of the affairs of the company or association. (March 8, 1888, 85 v. 76; R. S. 1880; February 24, 1848, 46 v. 97, § 7; S. & C. 227.)

§ 3577. **COUNTY COMMISSIONERS MAY PURCHASE ROAD TO CEMETERY.**—The county commissioners of the several counties may, on petition for that purpose by any turnpike road company, purchase so much of any turnpike road as lies between any city or village and any cemetery or public burying-ground, and make the same a free road to such cemetery or burying-ground, the cost of the same to be paid out of the county bridge fund; and so much of such road as is so purchased by the county commissioners shall be kept in repair by them, and the cost of such repairs shall be paid for out of the county general fund. (March 17, 1877, 74 v. 40, § 1.)

§ 3578. **EXEMPTIONS OF BURIAL GROUNDS.**—Lands appropriated and set apart as burial grounds, either for public or private use, and so recorded or filed in the recorder's office of the county where the same are situate, or any burial ground that has been used as such for fifteen years, shall not be subject to sale on execution on any judgment, to taxation to dower, nor to compulsory participation (partition); but land so appropriated and set apart as a private burial ground shall not be so exempt if it exceed in value the sum of fifty dollars. (March 8, 1888, 85 v. 76; R. S. 1880; 33 v. 11, § 11, (§ 1); S. & C. 227.)

See note under § 3571.

§ 3579. **MAY ACT AS SOLDIERS' MONUMENTAL ASSOCIATION.**—Any such company or association may act either as a soldiers' monumental or as a cemetery association, and may, as it shall elect, take charge of the management of cemetery grounds, or monuments especially erected in honor of soldiers or seamen who have died in the service of the state, or of the United States, or both; and monuments, and the surroundings thereof, erected in honor of deceased soldiers or seamen, shall be protected by and under the penalties prescribed in the statutes for the protection of cemeteries and burial-grounds. (March 16, 1865, 62 v. 44, § 1; S. & C. 68.)

§ 3580. **OFFICERS OF CEMETERY ASSOCIATION MAY APPOINT POLICEMEN.**—The trustees, directors, or other officers of any cemetery company or association, whether incorporated or unincorporated, and township trustees having charge of township cemeteries, may appoint as many day and night watchmen of their grounds as they deem expedient. Such watchmen, and all superintendents, gardeners and agents of such company or association or of said township trustees, stationed on the grounds, may take and subscribe, before any mayor or justice of the peace in the town-

Cemetery Associations, §§ 3581-3582.

ship where such grounds are situate, an oath of office similar to the oath required by law of constables, and upon taking such oath, such watchmen, superintendents, gardeners, or agents shall have, exercise and possess all the powers of police officers within and adjacent to the cemetery grounds, and any person violating the by-laws, rules and regulations adopted by such trustees, directors or other officers, or the laws of this state in reference to the protection, good order, care and preservation of cemeteries, and the trees, shrubbery, structures, and adornments therein, shall be guilty of a misdemeanor, and fined in any sum not more than fifty dollars nor less than five dollars; and such watchmen, superintendents, gardeners and agents may arrest, on view, all persons found violating the provisions of this section, and bring such persons so offending before the mayor or justice of the peace within such township, to be dealt with according to law. (April 12, 1889, 86 v. 254; Rev. Stat. 1880; April 6, 1869, 66 v. 48, § 2; S. & S. 69.)

§ 3581. POWERS OF ASSOCIATION IN CERTAIN COUNTIES. — The trustees of any cemetery company or association, in any county containing a city of the first class, may purchase, or take by gift or devise, land for the sole and exclusive use of a cemetery, not exceeding five hundred acres in extent, and hold the same exempt from execution, and from appropriation for public purposes, three hundred acres of which shall be exempt from all taxation; and the trustees, whenever in their opinion any portion of their lands is unsuitable for burial purposes, may sell such portion, and apply the proceeds thereof to the general purposes of the company or association; but upon such sales being made, the lands so sold shall be returned by the trustees to the auditor of the proper county, to be by him placed upon the grand duplicate for taxation. (April 3, 1866, 63 v. 88, § 1; April 6, 1870, 67 v. 25, § 1; S. & S. 69.)

Must be in actual use as cemetery.

The mere purchase of additional ground, on which some work has been done in preparing it for burial purposes, but which has not been platted, and in which no interments have been made, does not exempt it from tax. — *German Cemetery v. Brooks*, 8 C. C. 439 (1894); s. c., 4 C. D. 478.

§ 3581a. ACQUISITION OR SALE OF LAND IN COUNTY CONTAINING CITY OF THE SECOND CLASS; EXEMPTIONS; TAXATION. — The trustees of any cemetery company or association in any county containing a city of the second class, may purchase or take by gifts or devise, land for the sole and exclusive use of a cemetery, not exceeding three hundred acres in extent, and hold the same exempt from execution, and from appropriation for public purposes, two hundred acres of which shall be exempt from all taxation; and the trustees whenever in their opinion any portion of their lands is unsuitable for burial purposes, may sell such portions, and apply the proceeds thereof to the general purposes of the company or association; but upon such sales being made, the lands so sold shall be returned by the trustees to the auditor of the proper county, to be by him placed upon the grand duplicate for taxation. (April 1, 1896, 92 v. 114.)

§ 3582. HOW RECEIPTS AND INCOME TO BE APPLIED. — The receipts and income of such company or association, whether derived from the sale of lots, from donations, or otherwise, shall be applied to the payment of the purchase of such lands, to the laying out, preservation, protection, and establishment of the cemetery, and the avenues within the same, to the erection of such buildings as may be necessary, and to the general purposes of such company or association; no debts shall be contracted in anticipation of future receipts, except for the original purchase of the land, and laying out, inclosing, and embellishing the grounds, and avenues therein; and no part of the proceeds of land sold, or any of the funds of any such company or association, shall ever be divided to its stockholders or lot-owners, but all its funds shall be used exclusively for the purpose of the company or association, as herein above specified, or invested in a fund the income of which shall be used and appropriated as aforesaid. (April 6, 1870, 67 v. 35, § 2.)

Cemetery Associations, §§ 3583-3586-1.

§ 3583. **MAY ACCEPT AND EXECUTE CERTAIN TRUSTS.** — Every cemetery company or association shall have full power and capacity to take, hold, possess, use, enjoy, and occupy such property of any kind as may be hereafter legally given, granted, or devised to it, for the purpose of building or repairing fences, graves, vaults, monuments, walks, cemetery lots, drives, or avenues in its cemetery, or for the purpose of building or repairing therein any particular fence, cemetery lot, grave, vault, monument, walk, drive, or avenue, and to appropriate such property, or the proceeds thereof, to any of the foregoing purposes, according to the terms of the trust for which the same may be given, granted, or devised as aforesaid. (April 11, 1876, 73 v. 210, § 1.)

§ 3584. **WHEN SUCH CORPORATION MAY HOLD LAND IN VILLAGE.** — Any association of persons who have been and are acting as a cemetery association, and have purchased and improved land for cemetery purposes, paid for by subscriptions of lot-holders and the sale of lots, and who are acting through a board of trustees chosen by members of the association, may, when the lands thus occupied for cemetery purposes have been brought or held within the corporate limits of any village subsequently to the time of their purchase and improvement, become incorporated for cemetery purposes, as though the lands held by the association were outside of such corporate limits. (May 7, 1878, 75 v. 132, § 1.)

§ 3585. **POWERS OF CERTAIN CORPORATIONS.** — Any association organized under the preceding section may, as the successor of the original association, through and by the concurrence of the original association, take possession of, hold, and use for cemetery purposes, all the property belonging to and held by the original association for such purposes, with full power to sell and convey lots, and to do all and singular the things necessary in the proper arrangement of the affairs of such association. (May 7, 1878, 75 v. 132, § 2.)

§ 3586. **RIGHTS OF LOT-OWNERS ASSURED.** — All rights of present lot-owners in the cemetery grounds of the original association are reserved and assured to them, and made valid, without reference to the form of conveyance issued to them by the trustees of the original association. (May 7, 1878, 75 v. 132, § 3.)

§ 3586a. **RIGHTS AND POWERS OF CREMATORY ASSOCIATIONS.** — Any company or association incorporated for the purpose of the erection and maintenance of a crematory or other place or building for cremating the dead, may exercise all the rights and powers conferred by this chapter, subject to the same conditions; provided, however, that no building shall be erected for any such purpose by any company, association, person or persons within two hundred yards of any dwelling-house, unless the owner of such dwelling-house give his consent, and it shall be unlawful for any person or persons, company, association or firm to establish a morgue on any street or part of a street upon which are dwelling-houses, unless the owner or occupants of such dwelling-houses within two hundred yards (200 yards) of said proposed morgue give their written consent thereto; provided that this act shall not apply to any crematory already built, or morgue already established. (April 3, 1900, 94 v. 95; April 11, 1893, 90 v. 161.)

§ 3586-1. **Sec. 1. AUTHORIZING SALE OF CERTAIN CEMETERIES; APPLICATION OF PROCEEDS.** — The trustees of any cemetery association, whose cemetery is within the limits of any city or village, interments in which have been prohibited by ordinance of such municipal corporation, or whose cemetery has been abandoned as a place for the burial of the dead, or which association is involved in debt which it is unable to pay, may apply by petition to the court of common pleas, of the county wherein such cemetery is located, for the sale of the whole or a portion of said cemetery grounds, and the court may order the same to be sold, either the whole or such

Cemetery Associations, §§ 3586-2-3586-5.

portion thereof as the court may direct, and the money derived from such sale shall, under the direction of the court, be applied to the costs and expenses of the removal and reinterment of the remains of the dead therein, and to the payment of the debts, if there be any, of such cemetery association, and the surplus, if any, shall be invested upon interest, and the income therefrom applied to keeping in repair the unsold portion thereof, or if the entire premises be sold, then the surplus shall be divided pro-rata along the lot-owners, and the court shall grant such time for the removal of the dead, after the confirmation of such sale, as it may deem necessary. (February 1, 1888, 85 v. 7; April 29, 1885, 82 v. 164.)

§ 3586-2. Sec. 2. NOTICE OF APPLICATION; ORDER OF SALE. — Notice of the filing of such application shall be given by publication in some newspaper of general circulation in the county where it is filed, for four consecutive weeks, setting forth the object and prayer thereof, and that any person claiming an interest in the subject-matter of such petition may appear and file an answer therein; and the court shall, on final hearing of the case, make such order or decree as will best secure the rights of the persons having an interest in such cemetery. (April 29, 1885, 82 v. 164.)

§ 3586-3. Sec. 1. CEMETERY ASSOCIATIONS MAY CREATE SINKING FUND. — Any cemetery association which has been organized under any general or special law of this state is hereby fully authorized and empowered to create a sinking fund, out of any surplus money they may have on hand, or which may have been given to said association by will, deed or otherwise. (April 3, 1883, 80 v. 91.)

§ 3586-4. HOW SUCH FUNDS MAY BE INVESTED. — That it shall be lawful for any cemetery association so organized to invest any sum of money appropriated to said sinking fund in any bonds of the United States, state of Ohio or of any city of the state of Ohio, or to loan it upon first mortgage of real estate in the state of Ohio worth double the loan, or upon collateral of any of the above securities of equal face value with the loan; provided, however, that it shall not be lawful to loan any such money to any member of said cemetery board. (April 3, 1883, 80 v. 91.)

§ 3586-5. Sec. 3. HOW EXPENDED. — That all moneys thus appropriated to any sinking fund, and all interest derived thereon shall be held exclusively for the enlargement of cemetery grounds, their improvement, repair or adornment, or for constructing or keeping in repair any buildings, monuments or other structures deemed necessary or appropriate for cemetery grounds, and shall not be appropriated or used for any other purpose whatever. (April 3, 1883, 80 v. 91.)

PART XIV.

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- § 3631-21. Exclusion of association; proceedings in injunction; rein-statement.
- § 3631-22. Who subject to penalty provided in preceding section.
- § 3631-23. Conflicting or inconsistent laws repealed; lodges, etc., to which act is applicable.

STIPULATED PREMIUM PLAN.

- § 3631-24. Incorporation of companies for life insurance on the stipulated premium plan.
- § 3631-25. Completion of organization. Deposit of securities.
- § 3631-26. Life insurance on stipulated premium plan defined; corporations subject to provisions of act; existing statutes.

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- § 3631-27. Existing corporations, etc., may accept provisions of act; how. Existing contract or liability of corporation not affected by its reincorporation or acceptance. Pending action or rights unaffected.
- § 3631-28. Minimum premiums.
- § 3631-29. Reserve fund. Impairment of fund remedied. Duty of superintendent in case of failure to remedy impairment.
- § 3631-30. Limited payment policies.
- § 3631-31. Cash values.
- § 3631-32. Distribution of surplus.
- § 3631-33. What policy shall set forth. Obligation of company to beneficiaries or insured. Refusal or failure to pay.
- § 3631-34. Foreign corporations must procure certificate of authority. Renewal certificates. Superintendent may refuse certificate. Obligations similar to those of either states. Foreign company to furnish evidence to entitle it to license.
- § 3631-35. Discrimination prohibited. Contracts by agents. Rebate of premium prohibited.
- § 3631-36. Policy holder not personally liable for losses of corporation.
- § 3631-37. Withdrawal of securities upon relinquishment of business.
- § 3631-38. Taxes.

§ 3587. FOR WHAT PURPOSES COMPANIES MAY BE FORMED. — Any number of persons, not less than thirteen, may associate and form a company to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith, on the mutual or stock plan, and grant, purchase, or dispose of annuities. (April 27, 1872, 69 v. 150, § 1.)

Must deposit security.

Companies organized under this section must furnish security for the assured, as provided in § 3593. — *State v. Moore*, 38 Oh. St. 7, 11 (1882).

Classification of companies.

Life insurance companies, other than fraternal, are divided into two classes, first those companies that have a capital stock, or, at least, capital; and, second, those that have neither capital stock nor capital. The general powers of the former are granted by § 3587; those of the latter by § 3630. — *Ohio ex rel. v. Ins. Co.*, 58 Oh. St. 1 (1898).

Power of each class.

The first class is limited to insuring on the "mutual or stock" plan, the other class, to insuring "on the assessment" plan. It follows then, that while Ohio corporations coming under the first class have no power to do business under the assessment plan, yet a foreign corporation having such power under

its charter, should be allowed to do business in this state. — *Ohio ex rel. v. Ins. Co.*, 58 Oh. St. 1 (1898).

Incidental powers.

Unless restrained, corporations have incidental powers to make any contract. But such contracts must not be contrary to the objects for which the corporation is created. — *Strauss v. Ins. Co.*, 5 Oh. St. 59 (1856); *White's Bank v. Ins. Co.*, 12 Ohio St. 601 (1861).

Insurance business may lawfully be confined to corporations.

Commonwealth v. Vrooman, 164 Pa. 306 (1894).

Policy issued to minor not void.

A policy issued on the life of a minor is not absolutely void, nor are notes given by him for premium void, although the assured has power to elect to avoid both on arriving at majority. — *Ins. Co. v. Hillard, Admr.*, 44 W. L. B. 353 (1900).

§ 3588. ARTICLES OF INCORPORATION; WHAT TO CONTAIN. — Such persons shall file in the office of the secretary of state articles of incorporation, signed by them, setting forth their intention to form a company for the purposes named in this chapter, which articles shall comprise a copy of the charter they propose to adopt; and the charter shall set forth the name of the company, which shall not be the corporate name or title used to designate any fire, life, marine, or other insurance company already existing under the laws of this state, the place where it is to be located, the kind of business to be undertaken, the manner in which the corporate powers of the company are to be exercised, the number of directors or trustees, who must be stockholders, or members, and which number may be increased, at the will of the stockholders representing a majority of the stock, or of a majority of the members, to any number not exceeding twenty-one, the manner of electing trustees or directors and other officers, a majority of whom shall be citizens of this state, and the time of such

Articles — Capital Stock, etc., §§ 3589-3591.

election, the manner of filling vacancies, the amount of capital to be employed, and such other particulars as may be necessary to explain and make manifest the objects and purposes of the company, and the manner in which it is to be conducted. (April 27, 1872, 69 v. 150, § 4; April 11, 1863, 60 v. 75, § 1; May 14, 1878, 75 v. 557, § 1; S. & S. 217; S. & S. 219.)

§ 3589. **ARTICLES MUST BE APPROVED BY THE ATTORNEY-GENERAL** — When such articles are filed in the office of the secretary of state, and the name assumed by the company is not so nearly similar to the name of any other company organized in this state as to lead to confusion or uncertainty on the part of the public, the secretary of state shall submit the same to the attorney-general for examination, and if found by him to be in accordance with the provisions of this chapter, and not inconsistent with the constitution and laws of the United States and of this state, he shall certify to and deliver the same to the secretary of state, who shall cause the same, with the certificate of the attorney-general, to be recorded in a book to be kept for that purpose, and upon application of the signers thereof the secretary of state shall furnish to them a certified copy of such articles and certificate. (April 27, 1872, 69 v. 150, § 5; May 14, 1878, 75 v. 557, § 1; S. & S. 219.)

Similarity of names.

The power vested in the superintendent of insurance to reject any name or title applied for by any company if it is too similar to one already appropriated, is limited to domestic corporations.—*Ins. Co. v. Van Cleave*, 47 L. R. A. (Ill.) 795 (1898).

the auditor) in determining the name under which the association may do business is not conclusive as to another association claiming a prior right to the use of same or similar name.—*Grand Lodge v. Graham*, 65 N. W. 837 (Ill.) (1896).

See generally *American Order, etc., v. Merrill*, 151 Mass. 558 (1890); *High Court, etc., v. Commissioner*, 73 N. W. 326 (1897).

Same subject; action of officer not conclusive.

The action of the proper officer (in this case

§ 3590. **NOTICE OF OPENING OF BOOKS OF SUBSCRIPTION.**—When the signers of the articles of incorporation receive from the secretary of state a certified copy thereof, and desire to organize such company, they shall publish their intention in a paper published and having general circulation in the county in which the company is to be organized; and when such publication has been made in such newspaper for six weeks, they may open books to receive subscriptions to the capital stock, keep such books open until the amount required by this chapter is subscribed, distribute the stock among the subscribers, if more than the necessary amount is subscribed, collect the capital, and complete the organization of the company. (April 27, 1872, 69 v. 150, § 6; S. & S. 219.)

§ 3591. **THE WHOLE CAPITAL MUST BE PAID IN, AND INVESTED.**—No joint stock company shall be organized under this chapter with a less capital than one hundred thousand dollars, and the whole capital shall, before proceeding to business, be paid in and invested in treasury notes, in stocks or bonds of the United States, in stocks or bonds of the state of Ohio, or of any municipality or county thereof, or in mortgages on unincumbered real estate within the state of Ohio worth double the amount loaned thereon. If the amount loaned shall exceed one-half the value of the land mortgaged, exclusive of structures thereon, such structures shall be insured in an authorized fire insurance company in any amount not less than the difference between one-half the value of such land exclusive of structures, and the amount loaned, and the policy assigned to the mortgagee. (March 5, 1902, 95 v. 38; April 27, 1894, 91 v. 39; April 9, 1873, 70 v. 118, § 7; S. & S. 219.)

Note and mortgage given for stock, how regarded.

Where one executes to the company his note and mortgage in part payment of stock subscriptions, the stock will be regarded as paid in, and the note and mortgage given for money loaned or invested by the company. Such stockholder's liability on his note and mort-

gage is no less than that of any other borrower, nor are his rights superior to a non-borrowing stockholder.—*Union Cent. Ins. Co. v. Curtis*, 35 Oh. St. 343, 350 (1880).

As to investments, see *Ehrman v. Ins. Co.*, 35 Oh. St. 324 (1880); *Ins. Co. v. Jones*, 35 Oh. St. 351 (1880); *Ins. Co. v. Curtis*, 35 Oh. St. 343 (1880). See notes under § 3598.

Capital Stock — Commencing Business, etc., §§ 3592-3596.

§ 3592. **A COMPANY MAY INCREASE ITS CAPITAL STOCK.**— When a company organized under any law of this state requires, in the opinion of the board of directors thereof, a larger amount of capital than that fixed by its articles of incorporation, they shall, if authorized by the holders of two-thirds of the stock, file with the secretary of state a certificate setting forth the amount of such desired increase, and thereafter such company shall be entitled to have the increased amount of capital fixed by the certificate, and the same shall be invested as required by the preceding section. (April 27, 1872, 69 v. 150, § 6.)

§ 3593. **DEPOSIT OF SECURITIES TO BE MADE WITH SUPERINTENDENT.**— Any company may invest its capital in the stocks, bonds, or mortgages mentioned in section thirty-five hundred and ninety-one, and change and invest the same, or any part thereof in like manner, at pleasure; but no company shall commence business until it has deposited with the superintendent of insurance at least one hundred thousand dollars in the stocks, bonds, and mortgages aforesaid, or one or more of them, duly made or assigned to the superintendent in trust for the purposes mentioned in this chapter; and when any mortgage of real estate is assigned to the superintendent, the assignment shall be immediately entered in the records of the county in which the real estate is situate, the fee for the recording of which shall be paid by the company. (April 27, 1872, 69 v. 150, § 8; S. & S. 219.)

Deposit primarily for benefit of policy holders.

The deposit is solely for the security of policy holders, and not for the security of general creditors, and before resort can be had to this fund, there must be shown some specific amount due, or that may become due, on account of such policy holders.—Falkenbach v. Patterson, 43 Oh. St. 359 (1885).

Accommodation securities accrue to policy holders, not to general creditors.

Where accommodation securities are given

to the company, for the purpose of being deposited with the superintendent, upon the insolvency of the company, such securities are subject to the claims of the policy holders; but as against general creditors, the same defenses may be invoked as against the company. The makers of such accommodation securities, as against policy holders, are estopped to deny the existence of the corporation and its powers to issue such policies.—Falkenbach v. Patterson, 43 Oh. St. 359 (1885). See Cooke v. Warner, 56 Conn. 234 (1888).

§ 3594. **COMPANY MAY CHANGE SUCH DEPOSITS, AND COLLECT INTEREST.**— The superintendent of insurance shall hold such securities as security for policyholders in the company; but so long as any company so depositing continues solvent he shall permit it to collect the interest or dividends on its securities so deposited, and from time to time to withdraw such securities, or any part thereof, on depositing with him other securities of the kinds heretofore named, and of equal value with those withdrawn. (April 27, 1872, 69 v. 150, § 9; S. & S. 220.)

§ 3595. **WHEN COMPANY MAY COMMENCE BUSINESS.**— When the company is fully organized, and has deposited the requisite amount of securities as aforesaid, the superintendent shall, unless he find the name assumed by the company so nearly similar to the name of another company organized in this state as to lead to confusion or uncertainty on the part of the public, furnish the company with a certificate of such deposit, which, with a certified copy of the papers required by this chapter, when filed in the county recorder's office of the county wherein such company is located, shall be the authority to commence business and to issue policies, and the same may be used in evidence for and against the company in all actions. (April 27, 1872, 69 v. 150, § 10; May 14, 1878, 75 v. 557, § 2; S. & S. 220.)

§ 3596. **WHAT KIND OF BUSINESS SUCH COMPANIES MAY DO.**— No company, organized under the laws of this state, shall undertake any business or risk, except as herein provided, and no company, partnership or association, organized or incorporated by act of congress, or under the laws of this or any other state of the United States, or by any foreign government, transacting the business of life insurance in this state, shall be permitted or allowed to take any other kind of risks, except

Consolidation — Re-insurance, etc., § 3597.

those connected with, or appertaining to making insurance on life or against accidents to persons, or sickness, temporary or permanent physical disability, and granting, purchasing and disposing of annuities; nor shall the business of life insurance, or life and accident insurance, in this state be in any wise conducted or transacted by any company, partnership or association which in this state, or any other state or country, makes insurance on marine, fire, inland, or any other risk, or does a banking or any other kind of business in connection with insurance. (May 2, 1902, 95 v. 355; March 27, 1888, 85 v. 119; R. S. 1880; April 4, 1872, 69 v. 150, § 3; February 20, 1874, 71 v. 12, § 2; S. & S. 218.)

Loan on note and mortgage, not banking.

The loaning of money, secured by note and mortgage, is not the doing "of a banking, or other kind of business."—National Bank v. Ins. Co., 41 Oh. St. 1 (1885); Hall v. Kummero et al., 7 N. P. 394 (1897); s. c., 5 Dec. 176.

Purchase of bill of exchange, legal.

A company authorized to loan its funds, but prohibited from using the same in the business of exchange or money broker, may lawfully purchase a bill of exchange.—White's Bank v. Ins. Co., 12 Oh. St. 601 (1861).

§ 3597. INSURANCE COMPANIES; DEFINITION; CONSOLIDATION AND RE-INSURANCE; PETITION TO SUPERINTENDENT; NOTICE TO POLICY HOLDERS; HEARING OF PETITION BY COMMISSION; COSTS; PENALTY.—The word company or companies when used in this act shall mean any corporation or association authorized to do the business of life, accident or health insurance, either on the stock, mutual, stipulated premiums, assessment or fraternal plan. No company organized under the laws of this state to do the business of life, accident or health insurance, either on stock, mutual, stipulated premiums, assessment or fraternal plan, shall consolidate with any other company, or reinsure its risks, or any part thereof with any other company, or assume or reinsure the whole of (or) any portion of the risks of any other company, except as hereinafter provided; but nothing herein contained shall prevent any such company from reinsuring a fractional part, not exceeding one-half, of any single risk. When any such company shall propose to consolidate with any other company, or enter into any contract of reinsurance, it shall present its petition to the superintendent of the insurance department of this state, setting forth the terms and conditions of such proposed consolidation or reinsurance, and praying for the approval or of any modification thereof, which the commission hereinafter provided for may approve. The superintendent shall thereupon issue an order of notice, requiring notice to be given by mail to the policy-holders of such company, of the pendency of such petition, and the time and place at which the same will be heard, and the publication of said order of notice and said petition, in five daily newspapers designated by the superintendent, at least one of which shall be published in the city of Columbus, for at least two weeks before the time appointed for the hearing upon said petition. The governor of the state, or in event of his inability to act, some competent person resident of the state to be appointed by him, the attorney-general of the state, and the superintendent of insurance of the state, shall constitute a commission to hear and determine upon said petition. At the time and place fixed in said notice, or at such time and place as shall be fixed by adjournment, said commission shall proceed with said hearing, and may make such examination into the affairs and condition of said company as it may deem proper. The superintendent of the insurance department of this state shall have the power to summon and compel the attendance and testimony of witnesses and the production of books and papers before said commission. Any policy holder or stockholder of the above-named company or companies may appear before said commission and be heard in reference to said petition. Said commission, if satisfied, that the interests of the policy holders of such company or companies are properly protected, and that no reasonable objection exists thereto, may approve and authorize the proposed consolidation or reinsurance, or of such modification thereof as may seem to it best for the interests of the policy holders, and said commission may make such order with reference to the distribution and disposition of the surplus assets of any such company

Investments — Real Estate, §§ 3598, 3599.

thereafter remaining, as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all the members of said commission, and it shall be the duty of said commission to guard the interests of the policy holders of any such company or companies proposing to consolidate or reinsure. All expenses and costs incident to proceedings under this section shall be paid by the company or companies bringing said petition. Any officer, director or stockholder of any such company or companies violating or consenting to the violation of this section shall be punished by fine of not less than ten thousand dollars, and by imprisonment in a county or city jail for not less than one year. (April 6, 1900, 94 v. 103; April 15, 1880, 77 v. 267; April 27, 1872, 69 v. 150, § 2; S. & S. 218.)

See § 3691-13.

§ 3598. HOW HOME COMPANIES MAY INVEST ACCUMULATIONS.—A company organized under the laws of this state may invest its accumulations as follows, and may sell, change, or re-invest the same, or any part thereof, at pleasure:

1. In United States, state, county, or city bonds, if the market value of the bonds at the date of purchase, is at least eighty per cent. of their par value.

2. In bonds and mortgages upon unincumbered real estate, the market value of which real estate is at least double the amount loaned thereon, at the date of the investment. If the amount loaned shall exceed one-half the value of the land mortgaged, exclusive of structures thereon, such structures shall be insured in an authorized fire insurance company in an amount not less than the difference between one-half the value of such land, exclusive of structures, and the amount loaned, and the policy assigned to the mortgagee; and the value of such real estate shall be determined by a valuation, made under oath, by two real estate owners, residents of the county where the real estate is located.

3. In loans upon the pledge of such bonds or mortgages, if the current market value of the bonds or mortgages is at least twenty-five per cent. more than the amount loaned thereon.

4. In loans upon its own policies, not exceeding the reserve or present value thereof computed according to the American experience table of mortality, with interest at four per cent., the same being the amount of debts of life insurance companies by reason of their outstanding policies in gross.

This section shall not prohibit any company from accepting any other assets than herein enumerated in payment of debts due the company, in order to protect its interests, or from acquiring real estate for its own use, or by foreclosure in accordance with the laws of the state. (March 5, 1902, 95 v. 39; May 14, 1878, 75 v. 576, § 11; S. & S. 220.)

Title of property acquired in an unauthorized manner.

Where property which a corporation, under certain circumstances, is authorized to acquire, is purchased in a mode or for a purpose not authorized, the title of the corporation to the property cannot be defeated by a party, who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer.—*Ehrman v. Ins. Co.*, 35 Oh. St. 324 (1880).

Loans made contrary to statute, void.

A loan made in contravention of subdivision 4 of this section cannot be enforced, and all agreements connected therewith are void. — *Hoover v. Life Ins. Co.*, 7 N. P. 369; s. c., 6 Dec. 432; modified, 61 Oh. St. 656 (1899).

Substantial compliance sufficient.

A loan made on a promissory note and mortgage instead of bond and mortgage is a substantial compliance, and valid. (Held, as to foreign corporation.)—*National Bank v. Ins. Co.*, 41 Oh. St. 1 (1885).

See notes under § 3591.

§ 3599. WHAT REAL ESTATE THEY MAY ACQUIRE.—No company organized under the laws of this state shall purchase, hold, or convey real estate, except for the purposes and in the manner herein set forth, to wit:

1. Such as is requisite for its immediate accommodation in the transaction of its business; or,

2. Such as has been mortgaged to it in good faith, by way of security for loans previously contracted, or for money due; or,

Dividends, Reports, §§ 3600-3603.

3. Such as has been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or,

4. Such as it has purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts. (April 27, 1872, 69 v. 150, § 12; S. & S. 220.)

See note to *Ehrman v. Ins. Co.*, under § 3598.

§ 3600. **WHEN REAL ESTATE MUST BE SOLD.** — All such real estate acquired as aforesaid, and which is not necessary for the accommodation of a company in the convenient transaction of its business, shall be sold and disposed of within two years after the company acquires title to the same; and the company shall not hold such real estate for a longer period than herein mentioned, unless it procure a certificate from the superintendent of insurance that the interests of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the superintendent shall direct in the certificate. (April 27, 1872, 69 v. 150, § 13; S. & S. 221.)

§ 3601. **CERTAIN ACTIONS AUTHORIZED.** — Actions may be maintained by any company formed under the laws of this state, against any of its members, officers, policyholders, or stockholders, for any cause relating to the business of the company; and actions may be prosecuted and maintained by any member, stockholder, or policyholder, or the heirs or legal representative of either, against the company, for losses which accrue on any risk, if payment be withheld more than two months after the losses become due. (April 27, 1872, 69 v. 150, § 15; S. & S. 221.)

As to limitations in policy as to time of bringing suit.

See *Metropolitan Ins. Co. v. Gierl*, 16 O. C. C. 294, affirmed 57 Oh. St. 671 (1898); *Prudential Ins. Co. v. Howles*, 19 O. C. C. 621 (1900); *Corn City Ins. Co. v. Schwan*, 1 O. C.

C. 192 (1885); *United Firemen's Ins. Co. v. Kukral*, 7 O. C. C. 356 (1893); *Kirk v. Ohio Valley Ins. Co.*, 6 W. L. B. 200 (1881), affirmed 11 W. L. B. 228 (1884); *Minerick v. Ins. Co.*, 1 Clev. Rep. 134; s. c., 1 Clev. Rep. 217 (1878); compare, *Meyer v. Ins. Co.*, 6 N. P. 34 (1898).

§ 3602. **WHEN DIVIDENDS MAY BE PAID.** — The directors, managers, or officers of any company organized under the laws of this state shall not, directly or indirectly, make or pay any dividend, or pay any interest, bonus, or other allowances in lieu of dividend, to its stockholders, except from the surplus funds, after reserving therefrom an amount sufficient to re-insure all its outstanding risks and policies, estimating the value thereof by the table known as the American experience table, with interest at four per cent. per annum. (April 27, 1872, 69 v. 150, § 16.)

§ 3603. **HOME COMPANIES MUST MAKE ANNUAL REPORTS TO SUPERINTENDENT.** — The president or vice-president, and secretary or actuary, or a majority of the directors, of each company organized under the laws of this state, shall, annually, on the first day of January, or within sixty days thereafter, prepare, under oath, and deposit in the office of the superintendent of insurance, a statement showing the condition of the company on the thirty-first day of December then next preceding, exhibiting the following facts and items, in the following form, to wit:

1. The number of policies issued during the year.
2. The amount of insurance effected thereby.
3. The amount of premiums received during the year.
4. The amount of interest, and all other receipts, specifying the items.
5. The amount paid to policyholders of the company for losses during the year.
6. The amount of all other expenditures and disbursements of the company, specifying such items as the superintendent may call for.
7. Amount of losses unpaid.
8. Whole number of policies in force.
9. Amount insured thereby.
10. Amount required to re-insure all policies in force, estimating the same by

Foreign Companies, § 3604.

the table known as the American experience table of mortality, with interest at four per cent. per annum.

11. Amount of capital stock, specifying amount paid and unpaid.
12. Amount of dividends unpaid; also amount of all other liabilities.
13. A detailed statement of all the assets of the company, and the manner of their investment.
14. An exhibit of the policy obligations of the company, which shall include, in the first annual statement, a schedule showing the number, date, age, when insured, amount insured, term of policy, and term of premium, of all policies then in force, and in every succeeding annual statement a schedule of the foregoing items as to all policies issued during the year, and a similar schedule as to policies which have ceased to be in force during the year. (April 9, 1873, 70 v. 118, § 17; S. & S. 221.)

§ 3604. COMPANIES ORGANIZED BY CONGRESS OR IN OTHER STATE MUST PROCURE LICENSE. — No company organized by act of congress, or under the laws of any other state of the United States, shall transact any business of insurance in this state until it procures from the superintendent of insurance a certificate of authority so to do; nor shall any person or corporation, directly or indirectly act as agent in this state for any such company, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, until such person or corporation procures from the superintendent of insurance a license so to do, in which the superintendent shall state that the company has complied with all the requirements of this chapter applicable to such company, and deposits a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent is established; nor shall any such company take risks or transact any business of insurance in this state, unless possessed of the amount of actual capital required of similar companies organized in this state under the provisions of this chapter, nor unless the entire capital stock of the company is fully paid up, and invested as required by the laws of the state where organized; but if the company is a mutual company, actual cash assets of the same amount and description, invested and deposited as required by the laws of the state where it was organized, shall be accepted in lieu of capital stock. (May 15, 1878, 75 v. 572, § 18; S. & S. 223.)

See § 3630e and § 3656, and notes thereto.

Applicable to incorporated and unincorporated associations.

Foreign companies and associations, whether incorporated or not, are required to procure a license. — State ex rel. Ackerman et al., 51 Oh. St. 163 (1894).

This decision was based on the theory that the association was attempting corporate acts and hence came within the provisions of the statute. On the question as to discriminations against individuals or partnerships of other states in favor of resident individuals or partnerships. — See Hoadley et al. v. Insurance Board, 37 Fla. 564 (1896); Hoadley v. Purifoy, 30 L. R. A. (Al.) 351 (1895); Fort v. State, 23 L. R. A. (Ga.) 86 (1893); Commonwealth v. Reinoehl, 25 L. R. A. (Penn.) 247 (1894).

Insurance business may lawfully be confined to corporations.

Commonwealth v. Vrooman, 164 Pa. 306 (1894).

Failure to procure license, etc.; does not render policy void.

The failure of a foreign company to comply with the provisions of the act of April 16,

1867 (64 v. 192), will not make void a policy issued by such company. — Union Ins. Co. v. McMillen, 24 Oh. St. 67 (1873); Ins. Co. v. Way, 62 N. H. 622 (1883); Clark v. Middleton, 19 Mo. 53 (1854); Ins. Co. v. Walsh, 18 Mo. 229 (1853). See also Columbia Ins. Co. v. Kinyon, 37 N. J. L. 33 (1874); Ins. Co. v. Brinkley et al., 29 L. R. A. (Ark.) 712 (1895).

Same subject; will not excuse payment of premium.

In an action brought against the company on the policy, such failure will not excuse the policy holder from payment of premiums or complying with other conditions and terms of the policy. — Union Ins. Co. v. McMillen, 24 Oh. St. 67 (1873), and cases under preceding note.

Same subject; company cannot sue to recover premiums or assessments — neither can receiver bring such action.

Stewart v. Ins. Co., 38 N. J. L. 436 (1876); Lycoming Ins. Co. v. Wright, 55 Ver. 526 (1883); Rose v. Kimberly, 89 Wis. 545 (1895); Seamans v. Zimmerman, 59 N. W. 290 (Ia.) (1894); Seamans v. Temple, 63 N. W. 408

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(Mich.) (1895); *Barker v. Lamb*, 68 N. W. 686 (Ia.) (1896).

Same subject; assured may maintain action against company.

Union Ins. Co. v. McMillen, 24 Ohio St. 67 (1873); *Phoenix Ins. Co. v. Pennsylvania Co.*, 20 L. R. A. (Ind.) 406 (1893); *Knight Templars' Ins. Co. v. Berry*, 50 Fed. 439 (1892); *Swan v. Ins. Co.*, 96 Pa. 37 (1880); *Ins. Co. v. Rust*, 141 Ill. 85 (1892); *Pennypacker v. Ins. Co.*, 80 Ia. 56 (1890).

Company can recover premiums in this state on property located in foreign state, though not permitted to do business in latter.

Eureka Ins. Co. v. Parks, 1 Cin. Sup. Ct. 574 (1871); *Seamans v. Knapp*, 89 Wis. 171 (1895).

Same subject; company may sue on bond or mortgage.

Ins. Co. v. Sawyer, 44 Wis. 387 (1878); *Hards v. Ins. Co.*, 8 Biss. 234 (1878).

Failure to procure certificate; no defense to action on agent's bond.

Failure to comply with regulations creates no defense to an action brought against an agent of such company and his sureties on a bond given for the faithful performance of duties.—*Ins. Co. v. Ellis*, 32 Oh. St. 388 (1877).

Same subject; will not invalidate acts of agent.

The acts of an agent, within the scope of the authority conferred upon him, are valid and binding, not only in favor of third persons, but as between principal and agent, notwithstanding the failure to procure and file the certificate required.—*Ins. Co. v. Ellis*, 32 Oh. St. 388 (1877).

No arbitrary power to refuse license.

Where a foreign company, tendering compliance with our laws, applies for authority to do business within this state, the superintendent of insurance has no mere arbitrary discretion to refuse such admission.—*State ex rel. v. Moore*, 42 Oh. St. 104 (1884).

May use discretion, exercised in good faith.

Superintendent may inquire into the financial soundness of a company seeking admission, and if exercised in good faith, he is invested with discretion to refuse admission, which exercise of discretion will not be controlled by mandamus.—*State ex rel. v. Moore*, 42 Oh. St. 104 (1884).

Duration of license.

The license continues in force until the first day of April of the year after the date of issue, and no longer.—*State ex rel. v. Ins. Co.*, 47 Oh. St. 167, 178 (1890). See § 3610.

License no bar to quo warranto.

License merely protects the company in the transaction of its business, but it does not bar ousting the company on quo warranto.—*State ex rel. v. Ins. Co.*, 49 Oh. St. 440 (1892); *State ex rel. v. Ackerman*, 51 Oh. St. 163 (1894).

Exercise of unlawful privileges, tested by quo warranto.

A foreign company, exercising in this state franchises and privileges without authority of law, may be ousted therefrom by quo warranto.—*State ex rel. v. Ins. Co.*, 47 Oh. St. 167 (1890); *State ex rel. v. Ins. Co.*, 49 Oh. St. 440 (1892); *State ex rel. v. Ackerman*, 51 Oh. St. 163 (1894); *State ex rel. v. Casualty Co.*, 39 Minn. 538 (1888).

Granting license ministerial act.

Issuing of license to foreign insurance company is a ministerial and not a judicial act.—*State ex rel. v. Ins. Co.*, 49 Oh. St. 440 (1892); *State ex rel. v. Casualty Co.*, 39 Minn. 538 (1888).

Remedy to prevent revocation of license.

Mandamus will not lie to prevent the superintendent from revoking the license of a company to do business in this state. Injunction is the proper remedy.—*State ex rel. v. Helin*, 50 Oh. St. 714 (1893); overruling *State ex rel. v. Reinmund*, 45 Oh. St. 214.

Noncompliance by company; assured may sue on policy.

Ins. Co. v. McMillen, 24 Oh. St. 67 (1873); *Clark v. Middleton*, 19 Mo. 53 (1854).

§ 3605. DEPOSIT WITH SUPERINTENDENT OF INSURANCE OR OTHER OFFICER. — No such company shall transact any business of insurance in this state unless at least one hundred thousand dollars of its assets are invested in the interest paying bonds or stocks of the United States, or of this state or of any municipality or county thereof, or the interest paying state bonds or stocks of some other state of the United States, of the market value of one hundred thousand dollars in the city of New York, or in bonds and mortgages on unincumbered real estate in this state, or in the state under the laws of which it was organized, of at least double the value of the amount loaned thereon, and such bonds and mortgages are deposited with the superintendent of insurance of this state, or the chief financial or other officer of the state in which such company was organized, designated by the laws of such state to

Foreign Companies, §§ 3606-3608.

receive the same; and if such bonds and mortgages are deposited with the superintendent of insurance or other officer of another state, the superintendent of insurance of this state shall be furnished with the certificate of such state officer, under his hand and official seal, that he, as such officer, holds in trust and on deposit, for the benefit of the policy-holders of such company, the securities above mentioned, giving the items of such securities, and stating that he is satisfied such securities are worth at least one hundred thousand dollars. (February 27, 1894, 91 v. 40; May 15, 1878, 75 v. 572, § 18; S. & S. 223.)

§ 3606. MUST FILE COPY OF CHARTER, AND A STATEMENT. — Such company shall also file with the superintendent a certified copy of its charter, or deed of settlement, together with a statement, under the oath of the president, vice-president, or other chief officer or manager, and the secretary of such company, stating the name of the company, the place where it is located, and the amount of its capital, with a detailed statement of all the facts required in the annual statement required of companies organized under this chapter, except as to statement required by item fourteen, section thirty-six hundred and three, which statement shall be filed by such company only when required by the superintendent of insurance for purposes of actual valuation, as provided by the insurance laws of this state; also, a copy of its last annual report, if any was made. (May 15, 1878, 75 v. 572, § 18.)

Cited in *State v. Hahn*, 50 Oh. St. 714 (1893).

§ 3607. MUST ALSO FILE A WAIVER. — Any such company desiring to transact any such business in this state by an agent, shall file with the superintendent of insurance a written instrument, duly signed and sealed, authorizing any agent of such company in this state to acknowledge service of process for and in behalf of the company in this state, and consenting that the service of process, mesne or final, upon any such agent, shall be taken and held to be as valid as if served upon the company according to the laws of this or any other state or government, and waiving all claims or right of error by reason of such acknowledgment of service, and that if suit be brought against it after it ceases to do business in this state, and it has no agent in the county in which suit is brought upon whom service of process can be had, as provided in section thirty-six hundred and seventeen, service upon it shall be had by the sheriff mailing a copy of the summons or other process, postage prepaid, addressed to it at the place of its principal office located in the state where it was organized, or, if it is a foreign insurance company, to such company at the place of its principal office in the United States, at least thirty days prior to the date of taking judgment in the suit; but the sheriff's return shall show the time and manner of such service. May 15, 1878, 75 v. 572, § 18.)

For purpose of suit, regarded as domestic corporations.

Companies doing business under license obtained become, in a suit brought against them in this state, personally amenable to the juris-

diction of the courts of this state, and are to be treated, for purposes of suit, as corporations of this state. — *Ins. Co. v. Best*, 23 Oh. St. 105 (1872).

§ 3608. MUST FILE ANNUAL STATEMENT AS TO TONTINE COMPANIES. — Every such company doing business in this state shall, annually, file a statement of its condition and affairs in the office of the superintendent of insurance, and in the form and manner required of similar companies organized under the laws of this state; provided, that in such statement no such item as "all other expenditures," or "incidentals," shall be allowed or recognized; but that every item of disbursement or expenditure shall be clearly and distinctly stated and classified when required by the superintendent of insurance, and for the protection of the interests of policy-holders in this state, as provided by the laws of this state, and any such company issuing policies on tontine or semi-tontine plan, or which claims to be mutual as to its profits

Foreign Companies, §§ 3609-3611.

to residents of this state, shall, after the payment of the first premium thereon, and not more than sixty days and not less than ten days prior to the maturity of each and every premium, thereafter in writing notify every such policy-holder, namely the person whose life is insured or the assignee of said policy, if said company has been notified of said assignment, and the address of said assignee given residing in this state, of the time of payment of such premium, and proof of the depositing of said notice to said policy-holder or assignee in the post-office by said company or its agent, postage prepaid to the last address as given by said policy-holder or said assignee to said company shall be conclusive proof of the serving of said notice, and shall set forth fully in said notice the amount of dividend belonging to said policy, when requested by the policy-holder if the same be a participating policy, and at the end of the tontine or semi-tontine period of each policy, the company issuing the same shall make a statement to the policy-holder of all the dividends and profits accruing to said policy, and from what sources the same has been derived. (April 17, 1891, 88 v. 307; April 27, 1872, 69 v. 150, § 20; S. & S. 223.)

Cited in *State v. Hahn*, 50 Oh. St. 714 (1893).

Effect of failure to give notice.

Smith v. Ins. Co., 1 W. L. B. 285, affirmed 44 Oh. St. 156 (1886).

See also *Ins. Co. v. Pottker*, 33 Oh. St. 479 (1878).

§ 3609. **RENEWAL CERTIFICATES OF AUTHORITY.** — If such annual statement be satisfactory evidence to the superintendent of insurance of the solvency and ability of the company to meet all its engagements at maturity, and that the deposit is maintained as above required and provided, he shall issue renewal certificates of authority to the agents of the company, certified copies of which shall be filed in the recorder's office of the county wherein the agency is located, and which renewal certificates shall be the authority of such agents to issue new policies in this state for the ensuing year. (April 27, 1872, 69 v. 150, § 21; S. & S. 223.)

See notes to § 3614.

§ 3610. **FOREIGN COMPANIES MUST MAKE DEPOSIT, AND APPOINT AGENT FOR SERVICE.** — No person shall act in this state, as agent or otherwise, in receiving or procuring applications for life insurance, nor in any manner aid in transacting the business of any company, partnership, or association, incorporated by or organized under the laws of any foreign government, until such company, partnership, or association deposits with the superintendent of insurance, for the benefit of the policyholders of the company, partnership, or association, who are citizens or residents of the United States, securities to the amount of one hundred thousand dollars, of the kind required for similar companies of this state, executes a waiver as provided in section thirty-six hundred and seven, and appoints an agent or attorney, in each county in this state in which the company establishes an agency, on whom process of law can be served, and files with the superintendent of insurance a duly certified copy of its charter, or deed of settlement, and also a duplicate original copy of the letter or power of attorney of such company, partnership, or association, appointing the attorney thereof, which appointment shall continue until another attorney is substituted. (April 27, 1872, 69 v. 150, § 22; S. & S. 222.)

See notes to § 3614.

§ 3611. **ANNUAL AND OTHER STATEMENT TO BE FILED.** — Such company, partnership, or association shall also file a statement of its condition and affairs in the office of the superintendent of insurance, in the form and manner required for the annual statements of similar companies organized under the laws of this state, and shall, annually, on the first day of January, or within sixty days thereafter, file with the superintendent of insurance a statement of all its affairs, in the manner and form

Foreign Companies, §§ 3612-3615.

required of similar companies of this state, except as to the requirements of schedule of item fourteen, section thirty-six hundred and three, which schedule shall be filed only when required by the superintendent for purposes of actual valuation, as provided by the laws of this state. (April 27, 1872, 69 v. 150, § 24; S. & S. 224.)

§ 3612. **SUPPLEMENTARY STATEMENTS.**—Such annual statement shall be accompanied by a supplementary statement, duly verified by the attorney or general agent of the company, partnership, or association in this state, giving a detailed description of the policies issued, and those which have ceased to be in force, during the year, the amount of premiums received, and claims and taxes paid in this state and the United States, for the year ending on the thirty-first day of December; and the supplementary statement shall also contain a description of the investments of the company, partnership, or association in this country, and such other information as may be required by the superintendent of insurance. (April 27, 1872, 69 v. 150, §§ 25, 26; S. & S. 224.)

§ 3613. **RENEWAL CERTIFICATES OF AUTHORITY.**—If the annual statement be satisfactory evidence to the superintendent of the solvency and ability of the company, partnership, or association to meet all its engagements at maturity, he shall issue renewal certificates of authority to the agents of the company, partnership, or association, certified copies of which shall be filed by such agents in the recorder's office of the county where the agency is located, and which renewal certificates shall be the authority of such agents to issue new policies in this state for the ensuing year. (April 27, 1872, 69 v. 150, § 26; S. & S. 224.)

§ 3614. **CERTIFICATES OF AUTHORITY TO ACT AS AGENT.**—No person, company, or corporation shall, directly or indirectly, act as agent for any such company, partnership, or association, either in procuring applications for insurance, taking risks, or in any manner aiding in the transaction of the business of life insurance in this state, until it procures from the superintendent a certificate of authority, which shall be renewable annually, stating that the requirements of this chapter as to such company, partnership or association have been complied with, and setting forth the name of the attorney for such company, partnership, or association a certified copy of which certificate shall be filed in the recorder's office of the county where the agency is to be established, and which shall be the authority of such company, partnership, or association, and its agent, to do business in this state. (April 27, 1872, 69 v. 150, § 27; S. & S. 223.)

Agent's duty to procure certificate.

A personal duty is imposed on the agent to procure such certificate and file it with the recorder, and a violation of this duty subjects him to a penalty.—*Ins. Co. v. Ellis*, 32 Oh. St. 388 (1877).

Regulations for benefit of policy holders.

Such regulations are for the benefit of policy holders and others doing business with the company.—*Ins. Co. v. Ellis*, 32 Oh. St. 388 (1877).

Agent's acts binding, without certificate.

The acts of an agent, within the scope of the authority conferred upon him by the com-

pany, are valid and binding, not only in favor of third persons, but as between principal and agent, notwithstanding his failure to procure and file such certificate.—*Ins. Co. v. Ellis*, 32 Oh. St. 388 (1877).

Failure to procure certificate, no defense in favor of sureties.

In an action against such agent and his sureties on a bond given for the faithful performance of his duties, his failure to comply with this section is no defense in favor of such sureties.—*Ins. Co. v. Ellis*, 32 Oh. St. 388 (1877).

Authority of agents.

See *Kehm v. German Mutual Ins. Co.*, 8 N. P. 542 (1901).

§ 3615. **PENALTIES FOR FAILURE TO MAKE STATEMENTS.**—If any company, partnership, or association, organized without this state, neglect or refuse to make such annual statements, all persons acting in this state as its agents, or otherwise, in transacting the business of insurance, shall be subject to the penalties pro-

Foreign Companies, §§ 3616-3620.

vided by law in case of the failure of an insurance company organized under the laws of this state to make an annual statement. (April 27, 1872, 69 v. 150, § 28; S. & S. 225.)

§ 3616. DURATION OF LICENSES. — All licenses granted by the superintendent of insurance in pursuance of this chapter shall continue in force, unless suspended or revoked, until the first day of April of the year next after the date of their issue. (April 27, 1872, 69 v. 150, § 19.)

Applied in *State ex rel. v. Ins. Co.*, 47 Oh. St. 167, 178 (1890).

§ 3617. WHEN FOREIGN COMPANIES MUST APPOINT AGENTS TO RECEIVE SERVICE. — If any company, partnership, or association, organized under the laws of any other state or government, cease to do business in this state according to law, it shall appoint, in the manner herein provided for, in every county wherein an agency existed at the date of such discontinuance, one or more agents for the purpose of receiving service of process in all actions upon policies of insurance issued to the citizens of this state while it was lawfully transacting the business of insurance in this state, and service of process upon such agents, in such actions, shall be held to be as valid as actual service upon the company, partnership, or association; and in every case where no such agent is appointed, the agent last designated and acting for the company, partnership, or association shall be deemed and taken to be duly authorized by it to receive service of process as aforesaid; but the officer who serves such process shall also send a copy of the process served on the agent, by mail, to the address of such company, partnership, or association, at the place of its principal or home office at the time it ceased to do business in this state, and the return of such officer upon such process shall distinctly show that such copy was mailed as aforesaid at least thirty days before any judgment shall be rendered in such action. (April 27, 1872, 69 v. 150, § 19.)

§ 3618. WHO ARE AGENTS TO RECEIVE SERVICE. — If any such company, partnership, or association cease to transact business in this state according to the laws thereof, the agents last designated, or acting as such for it, shall be deemed to continue agents for it, for the purpose of serving process, and for commencing actions upon any policy or liability issued or contracted while it transacted business in this state; and service of such process upon any such agent, for the causes aforesaid, shall be deemed a valid service upon the company, partnership, or association. (April 27, 1872, 69 v. 150, § 23; S. & S. 223.)

§ 3619. COMPANIES MAY CHANGE SECURITIES, AND COLLECT INTEREST. — Nothing in this chapter contained shall be construed to prevent the company, partnership, or association from collecting the interest on any securities deposited by it, so long as it continues solvent, and complies with all the provisions of this chapter applicable to it, nor from exchanging them for other securities of equal value, and of the kind hereinbefore named, with the officers having them in trust as aforesaid. (May 15, 1878, 75 v. 572, § 18.)

§ 3620. AUTHORITY TO BE WITHDRAWN IN CERTAIN CASE. — If any company, partnership, or association organized without the limits of this state, and doing business within this state, make an application for a change of venue, or to remove any suit or action to which it is a party, heretofore or hereafter commenced in any court of this state, to the United States district or circuit court, or to any federal court, the superintendent of insurance shall forthwith revoke and recall the license or authority to such company, partnership, or association to do or transact business within this state; and no renewal or authority shall be granted to such company, partnership, or association for three years after such revocation, and it shall thereafter be prohibited from transacting any business in this state until again duly licensed and authorized. (May 15, 1878, 75 v. 572, § 18.)

Copies of Policies, §§ 3621-3623.

A former statute compelled all foreign companies, as a condition precedent to doing business in this state, to waive all claim to removing causes against them to the United States courts. This statute was held constitutional in *Ins. Co. v. Best*, 23 Oh. St. 105 (1872), but was declared invalid in *Railway Assurance Co. v. Pierce*, 27 Oh. St. 155 (1875), on the authority of *Home Ins. Co. v. Morse*, 20 Wall. 445 (1875). See *Rowland v. Ins. Co.*, 2 W. L. B. 57.

Section constitutional.

Constitution of United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases to the federal court. The statute

obstructing such right is illegal and void. Agreement of company filed in pursuance to such statute is void, but revocation of license is valid, as state may make such conditions as it sees fit. — *Ins. Co. v. Morse*, 20 Wall. 445 (1875).

Same subject.

State has a right to impose conditions not in conflict with constitution of United States to the transaction of business within its territory by a foreign insurance company, or, having granted a license, to revoke it, with or without cause. The right to exclude existing, the means by which exclusion is caused is not the subject of judicial inquiry. — *Doyle v. Ins. Co.*, 94 U. S. 535 (1876).

§ 3621. **POLICYHOLDERS ENTITLED TO COPIES OF APPLICATIONS.** — Every person holding a policy of insurance issued by any company on the life of any person shall be entitled to be furnished by such company with a copy of any application or document, either written or printed, or both, held by such company, upon which such policy was issued, or which may affect the validity or (of) the same; and the company, upon demand made for such copy, by the holder of such policy, or by any person upon whose life such policy was so issued, shall make, and forthwith furnish to such person, a certified copy of all such applications or friends' certificates, under the hand of the president, secretary, or other proper officer of the company, and under its seal. (May 5, 1877, 74 v. 181, §§ 1, 3.)

Copy must be delivered during lifetime of assured.

Where it is provided that the answers made to a medical examiner by the assured are to become a part of the policy, copies of such answers must be delivered to the assured dur-

ing his lifetime, and failing so to do, the company, in an action on the policy, is estopped from denying the truth of any of the answers. — *Dickmeier, Admr., v. Ins. Co.*, 4 N. P. 13 (1896); s. c., 6 Dec. 161. See §§ 3622, 3623, 3624, 3625, and notes thereto.

§ 3622. **EFFECT OF FAILURE TO DELIVER COPIES.** — If such company neglect or fail for thirty days from the time of such demand to furnish to such person a copy of all such papers as are mentioned in the preceding section, and as provided therein, it shall thereafter be forever barred from setting up, by way of defense to any suit on such policy of insurance, any error or incorrectness, or fraud or misrepresentation of the person making the same, or any mistake therein whatever; and such application or other paper or document shall thereafter be taken and held, so far as the same may affect any claim under such policy, or any fund secured thereby, to be in all respects true and correct. (May 5, 1877, 74 v. 181, § 2.)

§ 3623. **COPIES OF APPLICATION TO ACCOMPANY POLICIES ISSUED.** — Every company doing business in this state shall return with, and as part of any policy issued by it, to any person taking such policy, a full and complete copy of each application or other document held by it which is intended in any manner to affect the force or validity of such policy, and any company which neglects so to do shall, so long as it is in default for such copy, be estopped from denying the truth of any such application or other document; and in case such company neglect, for thirty days after demand made therefor, to furnish such copies, it shall be forever barred from setting up, as a defense to any suit on such policy, any incorrectness or want of truth of such application or other document. (May 5, 1877, 74 v. 181, § 3.)

See notes under § 3625.

Application filled up by agent, not binding on assured.

Where answers in the application are filled

up by the agent from his own knowledge, the fact that a copy of the application is attached to the policy will not bind the assured as to statements thus made. — *Donnelly v. Ins. Co.*, 70 Ia. 693 (1886).

Applications, §§ 3624-3625.

§ 3624. **APPLICATIONS, ETC., IN CIPHER VOID.**—No company doing business in this state shall take any application, medical certificate, or other document, for insurance upon the life of any person, in cipher, or by character of any sort other than ordinary written or printed language; and any such application, medical certificate, or other document taken in violation of this section shall be held to be void and of no effect as against any person claiming under any policy of insurance issued thereon. (May 5, 1877, 74 v. 181, § 4.)

§ 3625. **WHEN A FALSE ANSWER IS MATERIAL.**—No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer. (May 15, 1878, 75 v. 572, § 18.)

Is constitutional.

This provision is constitutional and not in conflict with the fourteenth amendment of the federal constitution.—*Ins. Co. v. Block et al.*, 12 C. C. 224, 233 (1893); s. e., 6 C. D. 166; *Ins. Co. v. Brobst*, 56 Oh. St. 728 (1897); *Ins. Co. v. Warren*, 59 Oh. St. 53 (1898).

Soliciting agent is agent of company.

In filling up the application for a policy, the soliciting agent is the agent of the company and not the assured.—*Ins. Co. v. Williams*, 39 Oh. St. 584 (1883).

When policy never attaches.

Where statements are made in the application, which is made part of the policy, are untrue, but are made without fraud and under misapprehension, and the policy by its terms is thereby made void, the contract of insurance never attached and the assured may recover premiums paid.—*Ins. Co. v. Pyle*, 44 Oh. St. 20 (1886).

Decided prior to enactment of this section.—*See Ins. Co. v. Warren*, 59 Oh. St. 53, for effect of this section, and also note to *Ins. Co. v. Howle*, infra.

Section does not apply to conditions in policy.

Section applies to false answers to interrogatories in application only, and does not apply to conditions in the policy itself.—*Ins. Co. v. Howle*, 62 Oh. St. 204 (1900).

Assured must be furnished with copy.

Application not admissible as evidence until it is shown that assured has been furnished with copy of same.—*Andrews, Admr., v. Ins. Co.*, 7 N. P. 322 (1897); s. e., 7 Dec. 307.

Application forged by agent; no defense to recovery.

An action on a policy cannot be defeated by the company showing that its agent, taking the genuine application, imposed upon the company a spurious application, which the company believed to be genuine.—*Ins. Co. v. Eshelman*, 30 Oh. St. 648 (1876).

Same subject; company cannot rescind.

In such a case the company cannot rescind its contract and cancel the policy by tendering the executors of the deceased policy holder the premium received, with interest, as soon as the fraud was discovered.—*Ins. Co. v. Eshelman*, 30 Oh. St. 648 (1876).

False representations of agent; assured may rescind.

Where a person has been induced to take a policy by the fraudulent representations of the agent of the company, the assured may have the policy declared void and recover back the premiums paid.—*Ins. Co. v. Wright*, 43 Oh. St. 533 (1878); *Martin v. Ins. Co.*, (Sup. Ct. Tenn.) 3 W. L. B. 646 (1877). *See Ins. Co. v. Pottker*, 33 Oh. St. 459 (1878).

Collusion between agent and assured; no defense to recovery.

The company is liable where the false answers are known to its agent, notwithstanding that the agent and assured acted in collusion.—*Prudential Ins. Co. v. Kilbane*, 15 C. C. 62 (1897); s. e., 8 C. D. 790.

Interest of beneficiary in return premiums.

In case of rescission by the assured, the beneficiaries of the policy, if they are different from the assured, are not necessary or proper parties.—*Martin v. Ins.*, (Tenn.) 3 W. L. B. 646 (1877).

What is meant by "good health" or "sound health" in application.

Ohio Mutual Ins. Co. v. Draddy, 8 N. P. 140 (1900); *Ins. Co. v. Howle*, 62 Oh. St. 204 (1900).

What constitutes a defense.

To constitute a defense to a policy by reason of false answers to questions in the application, it must be clearly shown that the answers to such questions were wilfully false and were fraudulently made, that the same were material and induced the company to

Beneficiaries, Claims of Creditors, §§ 3626-3628.

issue the policy, and that but for such answers the policy would not have been issued, and that neither the company nor its agents had knowledge of the falsity or fraud of such answers.—*Ins. Co. v. Warren*, 59 Oh. St. 45 (1898); *Ins. Co. v. Howle*, 62 Oh. St. 204 (1900).

See *Northwestern, etc., Ins. Co. v. Risley*, 22 O. C. C. 160 (1901).

Section commented upon and compared with § 3643, relating to fire insurance.—*Ins. Co. v. Webster*, 7 C. C. 511; s. c., 4 C. D. 704; affirmed, 53 Oh. St. 558 (1895).

Construction of application.

It is policy of the law to construe certificates of health furnished to a life insurance company favorably to the applicant.—Ohio

Mutual Ins. Co. v. Draddy, 8 N. P. 180 (1900). See notes to §§ 3621 and 3626.

No application to fraternal beneficiary associations.

This section does not apply to associations organized under § 3631-11.

Grand Lodge, etc., v. Bunkers, 23 O. C. C. 487 (1902).

Burden of proof.

North American Ins. Co. v. Sickles, 23 O. C. C. 594 (1902).

Section fixes liability notwithstanding terms of policy.

North American Ins. Co. v. Sickles, 23 O. C. C. 594 (1902).

§ 3626. **WHEN COMPANIES ESTOPPED FROM CERTAIN DEFENSES.**—All companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending, upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions, or misstatements of the assured in any application made by such assured on which the policy was issued, except as to age. (69 v. 150, § 32.)

Constitutional.

Is constitutional and does not violate the fourteenth amendment of the constitution of the United States.—*Ins. Co. v. Block et al.*, 12 C. C. 224, 234 (1893).

Applies to policy in foreign company.

In an action by the beneficiaries under the policy, this provision will be applied notwithstanding that the policy stipulates that it shall be regarded as made under the laws of the state where the company resides.—*Ins. Co. v. Block et al.*, 12 C. C. 224 (1893); s. c., 6 C. D. 166.

Cannot be evaded by contract.

The provision was enacted on grounds of public policy, and cannot be evaded by any agreement between the insured and the company.—*Ins. Co. v. Block et al.*, 12 C. C. 224 (1893); s. c., 6 C. D. 166.

New York company's policy subject to New York law.

Policies issued and delivered by a New York company in another state are subject to the

terms of N. Y. Laws 1892, chapter 690, section 92, providing that "no life insurance company doing business in this state shall declare a policy forfeited without having given prescribed notice."—*Ins. Co. v. Dingley*, 100 Fed. 408 (1900).

Suicide as defense.

Does not preclude the defense that assured committed suicide.—*Stark v. Ins. Co.*, 24 W. L. B. 416 (1890); *Ins. Co. v. Maguire*, 19 C. C. 502 (1900); *Pagenhard v. Ins. Co.*, 4 N. P. 169 (1897).

Premiums on policy fraudulently issued.

Company is not liable for premiums paid upon a policy wrongfully issued by one of its agents, without knowledge of the insured and under false representations of the agent.—*Brokamp v. Ins. Co.*, 16 C. C. 630 (1898); s. c., 9 C. D. 412.

See *Shaddinger v. Ins. Co.*, 30 W. L. B. 337 (1893); *Lowe v. Ins. Co.*, 41 Oh. St. 273 (1884); also notes to §§ 3621 and 3625.

§ 3627. **THIS CHAPTER APPLIES TO COMPANIES HERETOFORE ORGANIZED.**—All companies organized under any law of this state shall continue corporations for the purpose for which they were chartered, but subject to all the provisions, requirements, and penalties imposed on companies organized under this chapter, and entitled to all the benefits and privileges of this chapter. (April 27, 1872, 69 v. 150, § 29.)

Cited in *Ins. Co. v. Webster et al.*, 7 C. C. 511, 535 (1893); s. c., 4 C. D. 704.

§ 3628. **HUSBAND MAY INSURE FOR BENEFIT OF WIFE AND CHILDREN.**—Any person may effect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his widow and children, or of either, as he may cause to be appointed and provided in the policy;

INSURANCE EXEMPT FROM CLAIMS OF CREDITOR.—and the sum or net amount of insurance becoming due and payable by the terms of insurance, shall be

Beneficiaries, Claims of Creditors, § 3628.

payable to his widow, or to his children, for their own use, as provided in the policy, exempt from all claims by the representatives and creditors of such person;

PREMIUMS PAID IN FRAUD INURES TO CREDITOR.—provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid in fraud of creditors with interest thereon, shall inure to their benefit from the proceeds of the policy;

WHEN COMPANY LIABLE TO CREDITOR.—but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment notice shall be given the company by a creditor specifying the amount of his claim and the premiums which he alleges have been so fraudulently paid. (April 19, 1898, 93 v. 130; February 8, 1847, 45 v. 53, § 1; S. & C. 737.)

This section formerly limited the amount of premiums to be annually paid for such exempt insurance to one hundred and fifty dollars; and in case of excess there should be paid to the beneficiaries named in the policy such portion of the insurance as one hundred and fifty dollars will bear to the whole annual premium, and the residue to the representatives of the deceased. It will be noted that there is now no limitation to the amount of premium which the insured may expend, and that the creditors can only reach the amount of any premiums and interest on the same which have been paid in fraud of their rights, and subject to the statute of limitations. In this respect §§ 3628 and 3629 are now alike.

When a wife regarded feme sole.

When a husband, acting as agent for his wife, takes out in her name, and for her sole use, a policy on his life, the wife as to such policy must be regarded as a feme sole.—*Jacob v. Ins. Co.*, 1 Cin. Sup. Ct. 519 (1871); *Ins. Co. v. Applegate*, 7 Oh. St. 293 (1857).

Husband's representations subsequent to application not admissible.

When in such case the husband, in his application for the policy, has made certain representations as to his health, which representations are made a part of the policy, his subsequent declarations, made pending his unauthorized negotiations for the surrender of the policy, and tending to show the false or fraudulent character of the representations in the application, are not competent evidence in an action brought by the wife upon the policy.—*Ins. Co. v. Applegate*, 7 Oh. St. 293 (1857).

Husband's representations prior to application not admissible.

So in an action by the wife, on a policy issued upon her and her husband's joint application, and for her sole benefit, the declarations of her husband made prior to the application, and showing that certain statements therein are untrue, are not admissible.—*Ins. Co. v. Cheever*, 36 Oh. St. 201 (1881).

When failure to send notice will excuse payment of premium.

Where by the terms of the policy the premium on the same is reduced, by reason of the participation by the beneficiary in the earnings of the company, and it has been the uniform practice of the company to notify the beneficiary of the amount of premium due, and by reason of the neglect to give such

notice a premium is not paid at the time specified in the policy, such failure to pay will not bar a recovery upon the policy, although by its terms the same is to be forfeited in case of failure to pay premiums upon the specified dates.—*Ins. Co. v. Smith*, 44 Oh. St. 156 (1886). See *Ins. Co. v. Pottker*, 33 Oh. St. 459 (1878); *Ins. Co. v. Troy*, 20 C. C. 644 (1900).

See § 3608.

When husband ceases to become wife's agent.

Where the company has uniformly sent notices of the amount of premium due to the insured (the husband of the beneficiary), and he has regularly paid the same, he will be regarded, in making such payments, as agent for the wife; but where the company has been notified by the husband, shortly after marriage, that he and the wife have separated, the company is not justified in treating him as her agent, for the purpose either of receiving notice for her or of making surrender of the policy.—*Ins. Co. v. Smith*, 44 Oh. St. 156 (1886).

Husband merely as such cannot surrender policy payable to wife.

In such case the attempt by the husband, without knowledge of the wife, to surrender the policy to the company is unavailing and does not impair the rights of the wife.—*Ins. Co. v. Smith*, 44 Oh. St. 156 (1886).

Beneficiaries' rights cannot be modified.

Where a husband procures a policy payable to his wife, and after paying several premiums gives a premium note containing a recalcitrant forfeiture clause, than the policy, such clause will not avail the company as against the wife.—*Union Cent. Ins. Co. v. Baxter*, 62 Oh. St. 385 (1900); *Fuss v. Kroner*, 21 W. L. B. 400 (1890).

See, as to rights of beneficiary of certificate in mutual benefit association, notes under § 3630.

Divorce by beneficiary.

Where a policy on the life of the husband is payable to the wife, she is entitled to the same, notwithstanding a divorce obtained by her.—*Overhiser, Adm'x. v. Overhiser et al.*, 44 W. L. B. 81 (1900); *In re Insurance Policy*, 7 N. P. 527 (1897); s. c., 5 Dec. 501; *Supreme Commandery v. Everding et al.*, 20 C. C. 689 (1903); s. c., 11 C. D. 419.

Wife May Insure Life of Husband, § 3629.

Upon death of beneficiary, policy reverts to assured.

In case all the beneficiaries named in the policy die before the death of the assured, such policy reverts to the assured, and upon his death becomes part of his personal estate. — *Ryan v. Rothweiler*, 50 Oh. St. 595 (1893); *Frank, Admr., v. Bauman*, 35 W. L. B. 5. (1896); *Richmond v. Johnson*, 7 W. L. B. 224 (1881).

Policies of mutual protective association not subject to section.

Policies issued by a company for the mutual protection of its members, on the assessment plan, as provided in section 3630, are not subject to sections 3628 or 3629. — *In re Estate of C. F. Andress*, 5 N. P. 253 (1897); s. c., 6 Dec. 174.

Section applies to foreign companies.

Section applies as well to a policy issued by a company organized and conducted outside the limits of Ohio as to a policy issued by a company of this state. — *Cross v. Armstrong*, 44 Oh. St. 614 (1887).

Sections 3628 and 3629 construed.

Section 3628 applies where the insurance is effected by the person whose life is insured, for the benefit of his widow and children, or either. The policy is a chose in action belonging to the husband, subject to the limitations of this section.

Section 3629 applies where the insurance is effected by the wife on the life of her husband, and although the premiums may have been paid by him, the policy is yet the wife's separate property, upon which the husband's creditors have no claim, unless the payment of premiums by him has had the effect of withdrawing funds to which the creditors were entitled. As to creditors whose claims existed when such payments were made, fraud might be presumed: as to subsequent creditors it would be necessary to show that there was fraudulent intent. — *Weber, Loper & Co. v. Paxton et al.*, 48 Oh. St. 266, 271 (1891).

Policy secured by wife on life of husband not affected by this section.

A policy purporting on its face to have been effected by a married woman on the life of her husband, wherein the company agrees to pay such insurance to her, and if not living, then to her children, is prima facie the sole property of the wife, and as such is not affected by section 3628. — *Weber, Loper & Co. v. Paxton et al.*, 48 Oh. St. 271 (1891).

Premiums paid by husband, not sufficient to defeat wife's rights.

The fact that the premiums have been paid by the husband is not sufficient, of itself, to overcome the legal effect of the terms of the

contract. — *Weber, Loper & Co. v. Paxton et al.*, 48 Oh. St. 266, 271 (1891).

Creditors must show insolvency and fraud.

Where creditors of the husband seek to reach the proceeds of such policy, they must establish not only that the husband was insolvent at the time of his decease, but that such payments, or some of them, were made in fraud of existing creditors. — *Weber, Loper & Co. v. Paxton et al.*, 48 Oh. St. 266, 271 (1891).

Decisions under old law note.

The decisions following construe the law as it was before the amendment of April 19 1898, 93 v. 131.

Merely fixes exemptions of wife and children.

Merely fixes exemption rights of wife and children in the benefit fund; also fixes rights of creditors, and does not give any insurance interest to wife and children. — *In re Estate Andress*, 5 N. P. 253 (1897); s. c., 6 Dec. 174.

Premium on each policy taken by itself.

The premium on each policy must be taken by itself and not that of several policies added together. — *Hinch, Admr., v. d'Utassy*, 1 Dec. 372.

Assignment of policy to wife, void as to creditors.

The assignment by a husband to his wife of a policy payable to himself, and upon which he has paid the premiums, is voidable as to creditors if made with intent to defraud them. Section 3629 must be construed with §§ 3628 and 6344, and was not intended to dispense with the bona fides of the transaction. — *Child v. Graham et al.*, 7 W. L. B. 43 (1882); *Bank v. McLean*, 25 W. L. B. (Mich. Sup. Ct.) 235 (1891).

Amount creditors will receive.

When such assignment is set aside, the entire proceeds of the policy inure to the creditors, when the insurance permitted by § 3628 has been received by the wife. — *Child v. Graham et al.*, 7 W. L. B. 43 (1882).

Administrator need not interplead in foreign court as to excess insurance.

In an action on a policy, payable to the widow, where the amount of annual premiums exceeds one hundred and fifty dollars, brought by her in the state where the company is located, the administrator of the deceased, a resident of this state, cannot be compelled to interplead, and a judgment of such foreign court cannot bar his rights against the widow as to such excess insurance. — *Cross v. Armstrong*, 44 Oh. St. 614 (1887).

See 38 W. L. B. 239, and notes to § 3629, also § 3631-18 and § 5427.

§ 3629. WIFE MAY INSURE LIFE OF HUSBAND. — Any married woman may, by herself, and in her own name, or in the name of any third person, with his assent as her trustee, cause to be insured the life of her husband, for her sole use, for any

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definite period, or for the term of his natural life, and if she survive such period or term, the amount of insurance becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or any of his creditors; a policy of insurance on the life of any person, duly assigned, transferred, or made payable to any married woman, or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the same, or his creditors; and the amount of the insurance provided for in the preceding section, or this section, may be made payable, in case of the death of the wife before the period at which it becomes due, to his, her, or their children, for their use, as shall be provided in the policy of insurance, or to their guardian, if under age; but if there are no children upon the death of the wife, such policy shall revert to and become the property of the party whose life is insured, unless it has been transferred as hereinafter provided; and if by its terms, or a transfer thereof, a policy is payable to a married woman solely for her use, she may sell, assign, or surrender the same, but the party whose life is insured shall concur in and become a party to the transfer; but if a policy be procured by any person with intent to defraud his creditors, an amount equal to the premium paid thereon, with interest, shall inure to the benefit of his creditors, subject, however, to the statute of limitations. (April 27, 1872, 69 v. 150, § 30; February 8, 1847, 45 v. 53, §§ 2, 3; June 12, 1879, 76 v. 160, § 1; S. & C. 737.)

Policies of mutual protective association, not subject to section.

Policies issued by a company for the mutual protection of its members, on the assessment plan, as provided in § 3630, are not subject to

§ 3628 or 3629. — In re Estate of Andress, 5 N. P. 253 (1897); s. c., 6 Dec. 174.

See notes to Weber, Loper & Co. v. Paxton, and Ryan v. Rothweiler, under preceding section. See, also, Ins. Co. v. Hamilton, 41 Oh St. 274 (1885).

§ 3630. **MUTUAL PROTECTION ASSOCIATIONS; POWERS; ACCUMULATIONS; CERTIFICATES; BY-LAWS.** — A company or association may be organized to transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, as the member may direct, in such manner as may be provided in the by-laws, and may receive money either by voluntary donation or contribution, or collect the same by assessments on its members, and may accumulate, invest, distribute and appropriate the same in such manner as it may deem proper; that all accumulations and accretions thereon shall be held and used as the property of the members and in the interest of the members, and shall not be loaned to, used, appropriated, or invested for the benefit of any officer or manager of such company or association; and provided, that no company or association shall issue a certificate for a greater amount than such company or association shall be able to pay from the proceeds of one assessment; and such company or association shall not be subject to the preceding sections of this chapter. Associations organized under this section (3630) may change or amend their constitution or by-laws by the assent thereto in writing of a majority of the members, or by a majority of those present, in person or by proxy, at a meeting held for that purpose, thirty days' notice of such meeting having been given with the proposed changes in full by the acting president personally or by letter mailed to each member, provided, however, that such change shall not take effect or be in force until the same has been submitted to, and approved by the superintendent of insurance. Such associations may provide in their by-laws that there shall be not less than five nor more than fifteen trustees, whose term of office shall not be more than three years. If the term be made more than one year, the by-laws may provide for electing at the first election a portion of them for one year, a portion of them for two

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years and a portion of them for three years, and thereafter elections shall be for a term of three years. Such associations by their regulations or by-laws may provide for —

1. The time, place and manner of calling and conducting their meetings.
2. The number of members constituting a quorum.
3. The time of the annual election for trustees and the mode and manner of giving notice thereof.
4. The duties and compensation of officers.
5. The manner of election, or appointment, and tenure of office of all officers; the tenure of the trustees shall not be for more than three years, one-third of whom may be elected annually. The provisions of sections 3251 and 3252 shall not apply to associations organized under section 3630.

6. Provided, however, that nothing herein shall be construed to affect or impair the powers or franchises of corporations, companies or associations heretofore organized under the provisions of original section 3630, or under the said section as heretofore amended; and provided also, that such companies or associations may avail themselves of the provisions of this act by amendment of their articles of incorporation as provided in section 3238a. (March 31, 1891, 88 v. 251; May 14, 1886, 83 v. 161; Rev. Stat. 1880; February 3, 1875, 72 v. 23, § 3.)

Construction of section before amendment (88 v. 251). — State v. Ins. Co., 47 Oh. St. 167 (1890).

Not subject to preceding sections of this chapter.

A company organized for the purposes specified in this section, whether incorporated before or after the amendment of Feb. 3, 1875 (72 v. 23, § 3), is not subject to the laws of this state relating to life insurance companies. — State v. Mutual Protection Ass'n, 26 Oh. St. 19 (1875); State v. Standard Life Ass'n, 38 Oh. St. 281 (1882); In re Estate of Andress, 5 N. P. 253 (1897); s. c., 6 Dec. 174.

Subject to general law governing corporations not for profit.

Corporations organized under this section, though not subject to the provisions relating to life insurance companies on the mutual or stock plan, are subject to the general provisions of chapter 1, title 2, which apply to corporations formed for purposes other than profit. — State v. Standard Life Ass'n, 38 Oh. St. 281 (1882).

Cannot guarantee fixed amount.

Associations have no power to issue policies guaranteeing any fixed amount, except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it. — State ex rel. v. Ins. Co., 47 Oh. St. 167 (1882).

Limitation as to beneficiary.

Associations organized under this section are not authorized to provide for the payment of stipulated sums to persons other than the family or heirs of a deceased member. (Amended [88 v. 251] to extend to families, heirs, executors, administrators or assigns of deceased members. Section 6 of this section provides for the amendment of previously organized associations.) — State v. Mutual

Benefit Ass'n, 42 Oh. St. 579 (1885); National Mutual Aid Ass'n v. Gonser, 43 Oh. St. 1 (1885); State ex rel. v. Mutual Relief Ass'n, 29 Oh. St. 399 (1876); State v. Standard Life Ass'n, 38 Oh. St. 281, 296 (1882).

Foreign mutual companies may do assessment business.

While life insurance companies organized in this state to transact business on the mutual plan have no authority to do business on the assessment plan, yet such a foreign corporation having such power should be allowed to do business in this state under § 3630e. — Ohio ex rel. v. Matthews, 58 Oh. St. 1 (1898).

Regulations of association govern rights of members.

The laws and regulations of such an association determine the rights of the members; and a fund raised by the association in pursuance of such laws and regulations, to be paid to the family or heirs of a deceased member, in the manner therein specified, unless otherwise directed by such member during his lifetime, will, on failure to give such direction, be controlled by such laws and regulations. — Arthur et al. v. Odd Fellows Benef. Ass'n et al., 29 Oh. St. 557 (1876); Charch v. Charch, Exr., et al., 57 Oh. St. 561 (1898).

Same subject; applies to foreign as well as domestic associations.

Charch v. Charch, Exr., et al., 57 Oh. St. 561 (1898).

Rules of association govern as to change of beneficiary.

Change of beneficiary can only be made in the manner provided by the rules of the association. Where a certificate of such association is payable to the wife, and by the rules a change of beneficiary can only be made by the surrender and issue of a new certificate, such

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change cannot be made (the wife being in life) by will. — *Charch v. Charch, Exr., et al.*, 57 Oh. St. 561 (1898); *Stephenson v. Stephenson*, 64 Ia. 534 (1884). But see *Vance v. Park*, 15 C. C. 713 (1898); s. e., 8 C. D. 425.

What rules govern change of beneficiary.

Method of changing beneficiary depends on rules in force at time of change, not when certificate was issued. — *Supreme Council v. Feanke*, 34 Ill. App. 651 (1890).

Exceptions to rule that beneficiary must be changed in prescribed manner.

I. If association has waived a strict compliance with its rules. — *Thesing v. Knights et al.*, 24 W. L. B. 401 (1890); *Knights of Honor v. Watson*, 64 N. H. 517 (1888); *Mayer v. Reserve Fund*, 49 Hun. 336 (1888); *Martin v. Stubbings*, 126 Ill. 387 (1888).

a. But company cannot waive charter provisions. — *Duval v. Goodson*, 79 Ky. 224 (1880); *Presbyterian Fund v. Allen*, 106 Ind. 593 (1886); *Supreme Council v. Perry*, 140 Mass. 580 (1886).

II. If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been made.

III. If the assured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done. — *Ancient Order v. Noll*, 15 L. R. A. (Mich.) 350 (1892); *Clark v. Hirschl*, 81 Ia. 200 (1890); *Spawn v. Chew*, 60 Texas, 532 (1883); *Nat'l Ass'n v. Kirgin*, 28 Mo. Ap. 80 (1887); *Marsh v. Supreme Council*, 149 Mass. 512 (1889); *Supreme Conclave v. Cappela*, 41 Fed. 1 (1890).

What constitutes direction as to payment of fund.

Where by such regulations the fund is to be paid "to the widow, children, mother, sister, father or brother of a deceased member, and in the order named, if not otherwise directed by the member," the relatives will take the fund in the order named, unless the member otherwise directed during his lifetime; and the will of a member, who died seized of both real and personal property, devising to his children "my estate and property, real, personal and mixed," is not such an execution of the power of direction as will control the fund. — *Arthur et al. v. Benef. Ass'n*, 29 Ohio St. 557 (1876); *Stephenson v. Stephenson*, 64 Ia. 534 (1884). But see *Vance v. Park*, 15 C. C. 713 (1898); s. e., 8 C. D. 425.

Beneficiary funds form no part of testator's estate.

In re Estate of Andress, 5 N. P. 253 (1896); 6 Dec. 174; *Odd Fellows Benef. Ass'n v. Diebert*, 2 C. C. 462 (1887); s. e., 1 C. D. 238;

Arthur et al. v. Odd Fellows Benef. Ass'n, 29 Oh. St. 557 (1876).

Relationship need only exist when certificate issued.

It is sufficient that at the time of the issuance of the certificate there was a relation existing which entitled the party to be a beneficiary, and nothing occurring afterwards will terminate his interest in such case, divorce and remarriage. — *Supreme Commandery v. Evending et al.*, 29 C. C. 680 (1893); s. e., 11 C. D. 419.

Who are members.

The members of such corporation are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation are entitled to the mutual protection and relief promised, or whose family or heirs are, in case of death, entitled to the specific relief provided. — *State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882).

Members may adopt by-laws and regulations.

Such members are the elective and controlling body authorized to elect trustees and prescribe regulations for the government of the same, not inconsistent with the laws of the state. Neither the incorporators nor the trustees first elected are authorized to adopt a by-law providing that they shall hold office during life, and in case of vacancy to fill same by appointment. — *State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882).

Power of trustees.

Trustees are charged with the duty of faithfully executing the trust which the law and regulations impose on them. They are entitled to reasonable compensation; but any plan by which money is collected from members by assessment or otherwise, with a view to their individual profit, and beyond what is necessary to defray the reasonable expenses of the trust, is a breach of such trust. — *State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882). See notes to *State v. Mut. Benef. Ass'n*, *infra*, under this section.

What constitutes insurance contract.

A certificate of membership in such a corporation, in which the holder agrees to pay a membership fee, annual dues and pro rata assessments in consideration of the company's stipulation to pay to his family or heirs a sum of money, is a contract of life insurance. — *State v. Standard Life Ass'n*, 38 Oh. St. 281 (1882).

Compensation of trustees.

Trustees having accepted designated sums, as compensation for their services in particular years, have no power in subsequent years to vote themselves further compensation for services of previous years.

Such trustees, unless especially invested with the additional authority of officers or agents, are limited to such compensation as will reasonably pay for their time and ex-

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penses in going to, attending and returning from their official meetings, and for services while in session.—*State v. Mutual Benefit Ass'n*, 42 Oh. St. 579 (1885).

Trustees cannot act individually.

Trustees have no authority to act for or bind the association except in their aggregate capacity as a board; and where they assume, by virtue of their trusteeship, to act in the individual capacity as officers or agents of the corporation, they cannot thereby create against it a legal liability to compensate them as trustees for such services.—*State v. Mutual Benefit Ass'n*, 42 Oh. St. 579 (1885).

See also *State v. Standard Life Ass'n*, supra, under this section.

Invalid assignment of certificate.

"D." a member of an association, in consideration of a loan, assigned his certificate of membership to a person in no way related to him, with the agreement that the assignee should pay all future assessments, and upon "D.'s" death to receive the sum due on the certificate. The assignee, in good faith and in reliance of the assignment, paid such assessments until "D.'s" death. "D." left a widow. The rules of the association provided that the certificate should be payable to the widow, children, mother, sister, father or brother of the deceased member, and in the order named, unless otherwise directed by the member previous to his death. Held:

1. That the assignment was void.

2. That a member cannot direct the payment of the beneficiary fund to any other person than those named in the rules of the association, and that the words "unless otherwise directed" simply empower the member to designate who, of such persons named, shall receive the fund in disregard of the order in such rules.

3. That the fund being in court for distribution, it will be ordered paid, (a) the costs; (b) to the assignee, the assessments paid subsequent to the assignment, with interest thereon; (c) the balance to the widow.

4. That the fund became no part of the estate, and that as to such loan the assignee had no claim upon the fund.—*Odd Fellows Benef. Ass'n v. Diebert et al.*, 2 C. C. 462 (1887); s. c., 1 C. D. 589.

Charter limitation as to beneficiary cannot be changed.

Where the charter of an association limits it to the payment of its protective funds to certain designated persons, a member of such association can by no act of his own, name any other beneficiary than those designated in the charter.—*Odd Fellows Benef. Ass'n v. Diebert et al.*, 2 C. C. 462 (1887); 1 C. D. 589; *Mutual Aid Ass'n v. Gonser*, 43 Oh. St. 1 (1885); *Supreme Council v. McGinness*, 59 Oh. St. 531 (1899).

Who are "legal heirs" as beneficiaries.

"Legal heirs," as beneficiaries in a policy issued on the assessment plan to one having

no wife and children, means next of kin as distributees under statute of descent, and the insurance money is not subject to claims of creditors of estate.—*In re Estate of Andress*, 5 N. P. 253 (1897); s. c., 6 Dec. 174; *Mutual Life Ass'n v. Pollard et al.*, 3 C. C. 577 (1888); s. c., 2 C. D. 333; *Mutual Aid Ass'n v. Gonser*, 43 Oh. St. 1 (1885); *Jamieson v. Knights' Aid Ass'n*, 12 W. L. B. 272 (1884).

Have inherent power of expulsion.

State ex rel. v. Relief Society, 2 W. L. B. 125 (1877); *Bishop v. Chamber of Commerce*, 5 N. P. 365 (1887); s. c., 5 Dec. 356; *Cheney v. Ketcham*, 5 N. P. 139 (1898); s. c., 7 Dec. 183.

Exercise of power of expulsion.

The power of expulsion from membership and benefits cannot be exercised by a committee or subordinate branch, except upon clear and express authority, fairly and reasonably exercised.—*State v. Fraternal Mystic Circle*, 9 C. C. 364 (1895); s. c., 6 C. D. 385, 61 Oh. St. 628; *Cheney v. Ketcham*, 5 N. P. 139 (1898); s. c., 7 Dec. 183.

Unlawful expulsion; remedy.

Mandamus will not be granted for the purpose of restoring to membership one though unlawfully expelled from an association. Proper remedy, injunction or damages.—*Fraternal Mystic Circle v. State*, 61 Oh. St. 628 (1899); *Cheney v. Ketcham*, 5 N. P. 139 (1898); s. c., 7 Dec. 183; *State v. Zesch*, 5 N. P. 274 (1898); s. c., 7 Dec. 298. *Contra*, *Lavelle v. Societe, etc.*, 17 R. I. 680 (1892).

As to remedies of order.

See notes to § 3631-11.

Damages for wrongful expulsion.

Ludowski v. Benefit Society, 29 Mo. App. 337 (1888); *Lavelle v. Societe, etc.*, 17 R. I. 680 (1892); *Peyre v. Relief Society*, 90 Cal. 240 (1891).

Action for damages bar to action to restore membership.

State v. Lipa, 28 Oh. St. 665 (1876).

Valid expulsion destroys insurance rights.

Order of Red Men. v. Murbach, 13 Md. 91 (1858); *Woolsey v. Odd Fellows*, 61 Ia. 492 (1883); *Ellerbe v. Faust*, 119 Mo. 653 (1894); *Supreme Council v. Connema*, 3 O. C. C. 130 (1888).

See also *Dimmer v. Supreme Council, etc.*, 22 O. C. C. 366 (1901).

Designation of improper beneficiary; effect.

Designation of a person not included within the class to be benefited under rules of the association does not relieve it from payment to the proper person.—*Parke v. Welsh*, 33 Ill. App. 188 (1889); *Supreme Council v. McGinness*, 59 Oh. St. 531 (1899). But see *Knights, etc. v. Watson*, 64 N. H. 518 (1888).

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Interest in policy, reserving right to change beneficiary.

A policy issued in favor of the wife of the assured, which reserves to the latter the right to change the beneficiary, confers upon the wife no right which can pass to her estate in case of her death prior to that of her husband. *Tafel, Admr., v. Knights of the Golden Rule*, 12 W. L. B. 35 (1884).

Beneficiary of certificate has no vested rights.

Thesing v. Knights et al., 24 W. L. B. 401 (1890); *Martin v. Stubbings*, 126 Ill. 387 (1888); *Knights of America v. Franke*, 34 Ill. App. 651 (1890); *Knights v. Watson*, 64 N. H. 518 (1888).

See *Pellazino v. Society*, 16 W. L. B. 27 (1886).

See as to rights of beneficiary of ordinary life policy.

Ins. Co. v. Smith, 44 Oh. St. 156 (1886); *Union Cent. Ins. Co. v. Buxer*, 62 Oh. St. 385 (1900).

Failure to pay certificate or make assessment—remedy and measure of damages.

Hall v. Live Stock Ass'n, 25 W. L. B. 79 (1891); *Lueders v. Ins. Co.*, 12 Fed. 465

(1882); *Jackson v. Relief Ass'n*, 2 L. R. A. (Wis.) 786 (1889); *Relief Ass'n v. Houghton*, 103 Ind. 286 (1885); *Kansas Prot. Union v. Whitt*, 36 Kan. 760 (1887); *Relief Ass'n v. Ass'n*, 18 W. L. B. 263 (1886); *Van Hook v. Pine*, 36 N. J. Eq. 133 (1882).

Same subject; necessary averment in petition.

Earnshaw v. Mutual Aid Society, 68 Md. 465 (1888); *Relief Ass'n v. Houghton*, 103 Ind. 286 (1885); *Burland v. Life Ass'n*, 47 Mich. 424 (1882); *Taylor v. Relief Ass'n*, 94 Mo. 35 (1887); *Courtney v. Ass'n*, 53 N. W. (Ia.) 238 (1892).

Who may be beneficiary.

Mother, though not living with family—*Life Ass'n v. Harrison*, 23 W. L. B. 160 (1890).

Who is dependent.

One engaged to be married to the insured is not a dependent within the meaning of a statute limiting beneficiaries to the family or "dependent."—*American Legion v. Perry*, 15 W. L. B. (Mass.) 397 (1886); *Parke v. Welch*, 33 Ill. App. 188 (1889).

See *Supreme Council v. McGinness*, 59 Oh. St. 531 (1899).

For liability on assessments, rules governing same, etc., see notes under § 3650.

§ 3630a. MUTUAL AID ASSOCIATION ANNUALLY TO FILE WITH SUPERINTENDENT OF INSURANCE SWORN STATEMENT OF ITS TRANSACTIONS; WHAT SUCH STATEMENTS TO CONTAIN.—That each corporation, company, or association now organized, or that may hereafter be organized, in pursuance of sections three thousand two hundred and thirty-six and three thousand two hundred and thirty-eight of the act to revise and consolidate the general statutes of Ohio, passed June 20, 1879, or under any other law of this state, for the purpose of doing business under the provisions of section three thousand six hundred and thirty of said act, or for the purpose of doing such business as is contemplated by said section, shall, on the first day of January, each year, or within sixty days thereafter, deposit in the office of the superintendent of insurance, a statement, under oath, of all its transactions for the year next preceding said first day of January, and the condition of its business at the close of said year, according to printed blanks, which shall be prepared and furnished by the superintendent of insurance, showing, in detail, the transactions of each company or association, exhibiting the following facts and items, in the following form, to wit:

1. Number of certificates or policies issued during the year.
2. The amount of the indemnity effected thereby.
3. Number of death losses during the year.
4. Number of death losses paid during the year.
5. Total amount received from death assessments during the year.
6. Total amount paid to certificate-holders or policy-holders for losses during the year.
7. Number of death claims not due, but for which assessments have been made.
8. Number of losses for which assessments have not yet been issued.
9. Number of death claims compromised or resisted during the year, and reasons for such compromise or resistance.
10. Does the association or company charge annual dues?
11. How much are the dues for one thousand dollars (\$1,000.00) of indemnity?

 Mutual Aid Associations, §§ 3630b, 3630c.

12. Does the association or company use the death assessments to meet its expenses, in whole or in part?
13. Amount of death assessments used to meet expenses during the year.
14. Do the certificates or policies issued by association or company guarantee a fixed amount to be paid, regardless of amount realized from assessments made to meet the same?
15. If so, state how the amount is guaranteed.
16. What security for such guarantee?
17. Does the association or company issue endowment certificates or policies, or undertake and promise to pay to members during life any sum of money or thing of value?
18. If so, how are these payments or promises provided for?
19. If by reserve, state the amount of reserve.
20. From what source is the reserve fund obtained?
21. How invested?
22. What guarantee or security have the certificate-holders for this reserve?
23. How many classes or divisions of endowment certificates or policies have the association or company?
24. How many years required for maturity of first class or division? How many years required for maturity of second class or division? How many years required for maturity of third class or division? How many years required for maturity of fourth class or division?
25. Number of certificates or policies in force in first class or division. Number of certificates or policies in force in second class or division. Number of certificates or policies in force in third class or division. Number of certificates or policies in force in fourth class or division.
26. Date of organization of association or company.
27. Number of certificates or policies lapsed during the year.
28. Whole number of certificates or policies in force at the beginning and end of the year.
29. The aggregate amount of certificates in force at the beginning of the year.
30. The aggregate amount of certificates lapsed during the year.
31. The aggregate amount of certificates in force at the end of the year.
32. Maximum, minimum, and average age of members received during the year.
33. Has the association or company any agents who have not given bonds?
34. In what state is the association doing business? (April 12, 1880, 77 v. 178.)

This act does not enlarge the class of companies provided for in the preceding section.—*State v. Moore*, 38 Oh. St. 7 (1882).

§ 3630b. **TO MAKE REPORT TO SUPERINTENDENT WITHIN NINETY DAYS.**—Within ninety days after the passage of this act, each corporation, company, or association doing business in pursuance of said section three thousand six hundred and thirty, shall report, under oath, to the superintendent of insurance its transactions for the year 1879, on the form required to be furnished in the first section of this act. (April 12, 1880, 77 v. 178, 180.)

§ 3630c. **FAILURE TO FILE STATEMENT TO WORK FORFEITURE OF FRANCHISE; ATTORNEY-GENERAL TO INSTITUTE PROCEEDINGS.**—Any such corporation, company, or association which shall fail or refuse to file a statement or report, or whose treasurer fails to file a bond as required by this act, shall forfeit its right to do business, which forfeiture the superintendent of insurance shall enforce by proceedings in quo warranto; and it is hereby made the duty of the attorney-general of the state to institute such proceedings, upon his request, in writing. No such corporation, company, or association issuing endowments, certificates or policies, or undertaking, or promising to pay to members during life any sum of

Mutual Aid Associations, §§ 3630d, 3630e.

money, or thing of value, or certificate, or policy guaranteeing any fixed amount to be paid at death, except such fixed amount or endowments shall be conditioned upon the same being realized from the assessments made on members to meet them, shall be permitted to do business in this state, until they shall comply with the laws regulating regular mutual life insurance companies. (April 12, 1880, 77 v. 178, 180.)

See State ex rel. v. Ins. Co., 47 Oh. St. 167, 171 (1890).

§ 3630d. **SUPERINTENDENT OF INSURANCE MAY CAUSE EXAMINATION TO BE MADE.**—The superintendent of insurance may, whenever he has good reason to believe that the business of any such corporation, company or association is not being legally and honestly conducted, or that such corporation, company or association is exercising powers or franchises not conferred by law, cause an examination of its affairs to be made; and, if upon such examination, it shall appear that such corporation, company or association is exercising powers or franchises contrary to law, the superintendent of insurance shall institute proceedings in quo warranto against the same, in the manner provided in section 3630c of the Revised Statutes of Ohio; and the expenses of all examinations of all companies, made under authority of this chapter, shall be paid by the state treasurer on the warrant of the state auditor upon the certificate of the superintendent of insurance; provided that the expenses of any examination, made upon the demand of the company, shall be paid by the company making such demand; and provided further, that, when, by the laws of any other state, district, territory or nation, examinations of companies or associations of this state are required or permitted to be made by the insurance department or other authority of such state, district, territory or nation at the expense of such companies, then the expenses of all examinations, made by the insurance department of this state of companies of such state, district, territory or nation, shall be charged to and collected from the companies so examined respectively. (May 12, 1902, 95 v. 549; April 12, 1880, 77 v. 178, 180.)

§ 3630e. **RULES UNDER WHICH FOREIGN ASSOCIATIONS MAY DO BUSINESS IN THIS STATE; CERTIFICATE; REVOCATION; ANNUAL STATEMENT; OBLIGATIONS SIMILAR TO THOSE OF OTHER STATES.**—Any corporation, company or association organized under the laws of any other state of the United States to transact the business of life or accident or life and accident insurance on the assessment plan, shall, as a condition precedent to transacting business in this state, comply with the following conditions, to-wit: Deposit with the superintendent of insurance (1) a certified copy of its charter or articles of incorporation; (2) a certificate from the insurance commissioner, or superintendent of its own state showing its authority to do such business; (3) a certificate from said commissioner or superintendent or other like authority of its own state that corporations, companies or associations of this state engaged in life or accident insurance on the assessment plan as the case may be, are, upon complying with the laws of said state, legally entitled to do business in such state; (4) a statement under the oath of its president and secretary or like officers, in the form by the superintendent of insurance required, of its business for the preceding year; (5) a certificate under the oath of its president and secretary, or like officers, that such corporation, company or association is paying, and for the twelve months next preceding has paid the maximum amount named in its policies or certificates; (6) a copy of its policy or certificate, application and by-laws, which must show that the liabilities of the assured or members are not limited to fixed or artificial premiums; (7) evidence satisfactory to said superintendent that such corporation, company or association has accumulated and maintained a fund securely invested in securities permitted by the law of its incorporation, not less in amount than the proceeds of one periodical payment by, or an assessment on all certificate or policy holders thereof, and that such fund is held solely for the benefit of certificate or policy holders and can only be used for the purposes provided in the laws of the

Mutual Aid Associations, § 3630e.

state where incorporated; provided, that said fund in the case of accident companies or accident associations shall not be less than five thousand dollars, and need not be more than ten thousand dollars; (8) that such corporation, company or association, except it be an accident insurance corporation, company or association, does not issue certificates or policies upon the life of any person more than sixty-five years of age, or upon any life in which the beneficiary named has not a legal insurable interest; provided, license to do business in this state shall not be delivered to any such corporation, company or association until it shall have filed with the superintendent of insurance an appointment of an attorney within this state upon whom service of process may be had. The superintendent of insurance shall thereupon issue to such corporation, company or association a certificate of authority to transact its business in the state of Ohio, which said certificate of authority must be renewed annually, and it shall be the duty of the superintendent of insurance to refuse such certificate to any such corporation, company or association, when in his judgment such refusal will best promote the public interest; provided, that all decisions by him made shall be subject to review by courts of competent jurisdiction. And said authority shall be revoked whenever the superintendent of insurance on investigation or examination finds that such corporation, company or association is not paying the maximum amount named in its policies or certificates in full; that said corporation, company or association is transacting business fraudulently or illegally, or that the statement of its condition and affairs required under the provisions of this section are false and fraudulent, or for failure to file the annual statement; and upon such revocation, the superintendent shall cause notice thereof to be published for four weeks in some newspaper published in the county of Franklin, and no new insurance shall thereafter be written by such corporation, company or association or any of its agents in this state; provided, that it shall be unlawful for any agent of such corporation, company or association to transact business in this state without being first regularly appointed thereby and being licensed by a certificate of authority issued by the superintendent of insurance. Each such corporation, company or association shall, annually thereafter, and on or before the first day of March, make and file in the office of the superintendent of insurance a statement in the form by said superintendent required of its business for the twelve months next preceding the thirty-first day of December. The fees to be paid by each such corporation, company or association to the superintendent for the authority to such corporation, company or association and its agents under the license granted by him to each corporation, company or association, to transact business in the state of Ohio, shall be as follows: For filing copy of charter or articles of incorporation, twenty-five dollars; for filing each annual statement, twenty dollars; for issuing certificate of authority or license to company or association, one dollar; for issuing license to each agent, one dollar; for affixing seal and certifying any paper, one dollar. Provided, that any company or association may pay to the superintendent the sum of twenty-five dollars for licenses to its agents for the year, and by so doing shall be entitled without further charge to licenses for as many agents as it may choose to appoint; provided, also, that when any other state or country shall impose any obligations in excess of those imposed by this act upon any such corporation of this state, a like obligation shall be imposed on similar corporations, and their agents, of such state or country doing business in this state; and provided, also, that such corporation, company or association in transacting business in this state shall be subject only to section 3630 of the Revised Statutes and the section(s) supplementary thereto; and provided further, that such corporation, company or association shall be authorized to transact in this state the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such corporation, company or association as the member may direct, notwithstanding such corporation, company or association may have been organized on the assessment plan and

Mutual Aid Associations, §§ 3630f, 3630g.

authorized by the laws governing it to issue policies insuring lives on the plan of assessment upon surviving members without limitation. Whenever any officer or agent of any such corporation, company or association shall fail or neglect to comply with or violate any of the provisions of this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in a county jail for not more than thirty days or both, at the discretion of the court. (March 31, 1891, 58 v. 252; April 18, 1883, 80 v. 179, 180; April 12, 1880, 77 v. 178, 181.)

See § 3631-13. See § 3604 and notes thereto.

For construction of section before amendment (88 v. 252), see *State v. Ins. Co.*, 47 Oh. St. 167 (1890), and note thereto under § 3630.

See note to *State v. Moore*, 38 Oh. St. 7 (1882), under §§ 3630 and 3630a.

Rights of companies to admission.

Under the amendment of April 18, 1883 (80 v. 180), the insurance commissioner cannot be compelled to issue a license to a foreign corporation, doing business on the assessment plan, where by the laws of such other states, Ohio companies of a like character are not as a matter of right entitled to do business therein.—*Ohio ex rel. v. Moore*, 39 Oh. St. 486 (1883).

Foreign mutual company may do assessment business.

While life insurance companies organized in this state to do business on the mutual plan have no authority to do business on the assessment plan, yet such foreign corporation having such power should be allowed to do business in this state.—*Ohio ex rel. v. Matthews*, 58 Oh. St. 1 (1898).

What constitutes assessment insurance.

What constitutes the business of life insurance "on the assessment plan," within the meaning of that term, as used in this section (3630e), should be determined by the laws of this state; and that phrase should be held to contemplate a scheme of insurance conducted for the sole benefit of the policy holders, the principal source of revenue to arise from post-

mortem assessments intended to liquidate specific losses.—*Ohio ex rel. v. Matthews*, 58 Oh. St. 1 (1898). See note to this case under § 3587.

Rights of Ohio associations in Michigan, see *State ex rel. v. Ins. Co.*, 47 Oh. St. 167 (1890).

Limitation as to foreign companies.

A company of another state organized for "insuring lives on the plan of assessment upon surviving members," without limitation, does not come within the class of companies provided in this section. The section does not embrace companies insuring the lives of members for the benefit of other than their families and heirs.—*State v. Moore*, 38 Oh. St. 7 (1882); *Ohio ex rel. v. Moore*, 39 Oh. St. 486 (1883); *State v. Ins. Co.*, 47 Oh. St. 167 (1890). See note, supra, to *State v. Mutual Benefit Ass'n*, 42 Oh. St. 579 (1885), under § 3630.

Also note amendment to this section "and provided further, that such corporation, company, or association, shall be authorized to transact in this state, etc., notwithstanding such corporation may have been organized on the assessment plan and authorized by the laws governing it to issue policies insuring lives on the plan of assessment upon surviving members without limitation." (88 v. 252.)

Comity between states.

The law of comity is fully satisfied, when foreign companies are permitted to do business in this state upon the terms prescribed for domestic companies.—*State v. Moore*, 38 Oh. St. 7, 11 (1882).

§ 3630f. WHEN ACTION AGAINST SUCH ASSOCIATION MAY BE BROUGHT.—An action may be brought against any such corporation, company, or association, organized under the laws of Ohio, or against any such foreign corporation, company, or association doing business in Ohio, in any county of this state where such cause of action arises, and summons may be issued and service had as provided in chapter six, sub-divisions one and two, title one, part third of the Revised Statutes of Ohio, the provisions of which chapter are hereby made applicable in such cases. (April 12, 1880, 77 v. 187, 181.)

NOTE.—Chapter six, subdivisions one and two, title one, part third referred to in this section is now chapter five, sections 5032 to 5053 of the Revised Statutes.

§ 3630g. MUTUAL PROTECTION ASSOCIATIONS AND THEIR AGENTS; HOW RESTRICTED IN THE ISSUE OF POLICIES; PENALTY; ACCIDENT COMPANIES.—No such corporation, company or association shall issue a certificate or policy to any person, until such person has been first subjected to a thorough medi-

Mutual Protection and Accident Companies, §§ 3630h, 3630i.

cal examination by a regularly educated physician and found to be a good risk, nor to any person above the age of sixty-five years, nor under the age of fifteen years. Any trustees, officer, agent or employe of any such corporation, company or association, who shall knowingly insure or cause or permit to be insured any person without that person's knowledge or consent, or any fictitious person or any person over sixty-five or under fifteen years of age, or any sickly or infirm person, or who shall issue a certificate or policy of insurance for any such corporation, company or association which has not complied with the laws of this state and received from the superintendent of insurance a certificate of such compliance, or who shall knowingly violate any of the provisions of section thirty-six hundred and thirty, Revised Statutes, or the sections supplementary thereto, and any physician or other person who shall knowingly aid in or abet in any manner any such trustee, officer, agent or employe in effecting such insurance, or insurance on his own life, shall be fined not more than one thousand dollars, nor less than one hundred dollars, or imprisoned not more than six months, or both. But the provisions of this supplementary section in respect to the age and medical examination of persons to whom certificates or policies shall issue, shall not apply to such corporations, companies or associations doing a purely accident business. (April 17, 1885, 82 v. 138; 80 v. 179.)

§ 3630h. **EXPENSES: HOW PAID.**—The expenses of such corporations, companies or associations shall be met by fixed annual payments, or by assessments made and designated to be for such expenses; but such assessments shall, in no case, be made or become a part of, any assessments to pay a loss by death; and no part of the mortuary fund shall in any case be used to pay expenses. (April 18, 1883, 80 v. 179.)

§ 3630i. **AGAINST PERSONAL INJURY AND LOSS OF LIFE; AGAINST EXPENSES AND LOSS OF TIME OCCASIONED BY INJURY OR SICKNESS; EXPENSES, HOW MET; EXPENSE, LOSS, AND GUARANTY FUNDS: SEPARATION OF SUCH FUNDS; NOTICE TO PERSONS ASSESSED; BOND REQUIRED ONLY OF PURELY ACCIDENT COMPANIES.**—Companies consisting of five or more citizens of Ohio may be organized under this chapter and section for the special purpose of insuring against accidental personal injury and loss of life, sustained while traveling by railroad, steamboat or other mode of conveyance, and making all and every insurance connected with accidental loss of life and personal injury, sustained by accident, of every description whatever, and against expenses and loss of time occasioned by injury or sickness, and on such terms and conditions, and for such periods of time, and confined to such countries and localities, and to such persons as from time to time may be provided in the by-laws of the company; and the expenses of such corporations, companies or associations, shall be met by fixed annual payments, payable quarterly or otherwise, or by assessments on the members, payable as may be provided in the by-laws; and on either plan there may be included in such payments or assessments, a certain per cent. thereof, to be fixed by the by-laws, which when collected, shall be credited on the books of the company to the expense fund, and the residue thereof shall be so credited to the fund to pay losses and create a reserve or guarantee fund for the payment of losses and liabilities, and said funds shall be kept separate, and shall never be interchanged or used for purposes other than those for which they were respectively collected as aforesaid; provided, that the assessed shall be notified at the time of the collection of each payment the per cent. thereof that is collected to pay expenses, and the per cent. thereof that is collected to pay losses and create a guarantee fund; but nothing herein shall prevent the company from distributing to certificate-holders the surplus in the accident fund and the surplus arising from the reserve on lapsed and canceled certificates as provided in the by-laws of the company; and provided, that companies organized under the provisions of this section shall, before engaging in business as provided in this section,

Accident Companies, Foreign, § 3630j.

execute a bond in the sum of one hundred thousand dollars to the state of Ohio, with security to the acceptance and approval of the superintendent of insurance, for the use and benefit of all persons holding policies or certificates in such company, conditioned that such company shall credit upon the books of said company, all moneys received by them under the provisions of this section, keep the funds separate and not use or interchange them for purposes (other) than those for which they were respectively collected, and that they will apply and pay out said funds to and for the purposes provided for in this section, which bond, when so executed and approved, shall be deposited with and held by the superintendent of insurance. Provided further, that any corporation, company or association, organized for the purpose of doing a purely accident insurance business, and which corporation, company or association, creates a reserve or guarantee fund from the premiums collected by assessments or otherwise, as provided in the by-laws of the corporation, company or association, shall not be subject to the preceding part of this section, relating to the deposit of a bond in the sum of one hundred thousand dollars; but the treasurer of all such corporations, companies or associations shall, before commencing business, deposit with the superintendent of insurance a bond with approved securities, to the acceptance of said superintendent in the sum of ten thousand dollars, for the use and purposes provided in the preceding portion of this section; and every such corporation, company or association shall invest, as provided in section 3598 of the Revised Statutes of Ohio, so much of the reserve or guarantee fund, in excess of ten thousand dollars, as shall equal at least two and one-half per cent. of all premiums or assessments collected from policies or certificates in force, on the last day of June and December of each year, until said reserve or guarantee fund shall be equal to two dollars for every five thousand dollars of insurance in force; securities for said reserve, as herein provided, shall be deposited with the superintendent of insurance on the last day of June and December of each year, or within thirty days thereafter, to be held by said superintendent for the benefit and protection of policy or certificate holders. Provided, that if such corporation, company or association shall at any time cause all of its unexpired policies or certificates to be paid, canceled or reinsured, and all its liabilities under such policies or certificates thereby to be extinguished, or to be assumed by some other responsible company authorized to do business in this state, the superintendent of insurance shall, on application of such company, verified by the oath of its president or secretary, and on being satisfied by an examination of its books and of its officers, under oath, that all of its policies or certificates are so paid, canceled, extinguished or reinsured, deliver up to it such security. Any corporation, company or association, or officer thereof, violating any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the county jail where said officer resides, for not less than thirty days nor more than one year, or both, at the discretion of the court. (May 19, 1894, 91 v. 332; March 19, 1887, 84 v. 130.)

§ 3630j. FOREIGN ACCIDENT, ETC., COMPANIES; ADMISSION TO DO BUSINESS.—Companies and associations organized under the laws of the United States and of other states, territories and nations, and doing the business of insuring against accidental personal injury and loss of life, sustained while traveling by railroad, steamboat or other mode of conveyance, and making all and every insurance connected with accidental loss of life and personal injury, sustained by accident of every description whatever, and against expenses and loss of time occasioned by injury or sickness, and on such terms and conditions, and for such periods of time, and confined to such countries and localities, and to such persons as from time to time may be provided in the by-laws of the company; and where payments and expenses are met by fixed annual payments, payable quarterly or otherwise or by assessment on the members, payable as may be provided in the by-laws, or as pro-

 Mutual Protection Associations — Bonds of Agents, etc. § 3631.

vided in section 3630j of the Revised Statutes of Ohio, shall be admitted to do and transact such business in the state of Ohio, but shall, as a condition precedent to transacting business in the state, comply with the following conditions, to-wit: Deposit with the superintendent (of) insurance (1) a certified copy of its charter or articles of incorporation; (2) a certificate from the insurance commissioner, or superintendent of its own state, showing its authority to do such business; (3) a certificate from said commissioner or superintendent or other like authority of its own state that corporation(s), companies or associations of this state engaged in the same or similar business, or engaged in the business of paying benefits in the case of sickness or disability, to be derived from assessments collected from the members, are, upon complying with the laws of said state, legally entitled to do business in such state; (4) a statement under the oath of its president and secretary or like officers, in the form by the superintendent of insurance required, of its business, for the preceding year; (5) a certificate under the oath of its president and secretary, or like officers, that such corporation, company or association is paying, and for the twelve months next preceding has paid the maximum amount named in its policies or certificates; (6) a copy of its policy or certificate, application and by-laws, which must show that the liabilities of the assured members are not limited or fixed or artificial premiums; (7) evidence satisfactory to said superintendent that such corporation, company or association has accumulated and maintained a fund, securely invested in securities permitted by the laws of its corporation, not less in amount than the proceeds of one periodical payment by, or an assessment on all certificate or policy holders thereof, and that such fund is held solely for the benefit or (of) certificate or policy holders and can only be used for the purposes provided in the laws of the state where incorporated; provided, that said fund shall not be less than five thousand dollars, and need not be more than ten thousand dollars; provided, the license to do business in this state shall not be delivered to any such corporation, company, or association, until it shall have filed with the superintendent of insurance an appointment of an attorney within the state upon whom service of process may be had. The superintendent of insurance shall thereupon issue to such corporation, company or association a certificate of authority to transact its business in the state of Ohio, which said certificate of authority must be renewed annually, and it shall be the duty of the superintendent of insurance to refuse such certificate to any such corporation, company or association, when in his judgment such refusal will best promote the public interest; provided, that all decisions by him made shall be subject to review by courts of competent jurisdiction. (May 10, 1902, 95 v. 520.)

§ 3631. NO AGENT TO COLLECT DUES WITHOUT GIVING BOND; BOND OF TREASURER OF ASSOCIATION.— No agent or officer of any such corporation, company or association shall be permitted to collect or receive any dues, assessments, or donations for or on account of the same, until he executes jointly, with two responsible sureties, a bond to the corporation, company, or association, to the approval of the trustees thereof, in such sum as they shall prescribe, conditioned for the payment of all such dues, assessments, and donations over to the proper officer of the company; and all receipts of any such company or association shall be paid into the hands of the treasurer thereof, who shall, before assuming the duties of his office, give bond in the sum of not less than ten thousand nor more than fifty thousand dollars, as the said superintendent may determine, with not less than three sureties to be approved by the superintendent of insurance, and conditioned for the faithful accounting for, and proper payment and disbursement to the legitimate purposes of the company or association of all the money thereof, which comes into his hands. Said bond of the treasurer shall be examined, as to its sufficiency, annually, and shall be renewed whenever the superintendent of insurance shall require, and, with the approval of the superintendent of insurance indorsed thereon, shall be filed with the secretary of state. (April 12, 1880, 77 v. 178, 181; February 3, 1875, 72 v. 23, § 4.)

Mutual Benefit Societies — Discrimination, etc., §§ 3631a, 3631-1.

§ 3631a. **MUTUAL BENEFIT, ETC., SOCIETIES EXCEPTED.**—This act (viz.: secs. 3630a, 3630b, 3630c, 3630d, 3630e, 3630f, 3631) shall not apply to any association or (of) religious or secret societies or to any class of mechanics, express, telegraph or railroad employes, or ex-union soldiers, formed for the mutual benefit of the members thereof, and their families or blood relatives exclusively, or for purely charitable purposes; provided, that any such association or class which may [desire to] become subject to the provisions of sections 3630a, 3630c and 3630d of the Revised Statutes of Ohio, may file with the superintendent of insurance notice in writing of such desire, signed by the president of such association or class, and attested by the secretary thereof; and thereupon such association or class shall become subject to all the terms and provisions of said sections 3630a, 3630c and 3630d of said Revised Statutes; the superintendent of insurance shall thereupon immediately provide such association or class with proper blanks for furnishing the statement of the condition of such association or class, as provided in said section 3630a, and such association or class shall make such report within sixty days thereafter, and thenceforward, annually, as in case of other insurance companies, which report shall be included by said superintendent of insurance in his annual tabulated report, in the same manner as the reports of other companies and subject to the fees prescribed in section 282 of the Revised Statutes of Ohio; provided further, that the treasurer of any association or class which shall avail itself of the benefits of this enactment shall be required to give bond in the same manner as is provided in section 3631, Revised Statutes of Ohio; said bond to be conditional, approved and renewed as provided in said section. (April 16, 1900, 94 v. 354; April 11, 1890, 87 v. 170; March 14, 1889, 86 v. 89; April 12, 1880, 77 v. 178, § 8.)

Railway relief association.

An association created by a railway company for the relief of its employees is governed by this section.—*Gearen v. B. & O. Ry. Co.*, 19 W. L. B. 293 (1888).

Acceptance of benefits no bar to action for damages.

A railway employee, being a member of the company's relief association, was killed; widow accepted the benefits of the association; held not to be a bar to an action by her as administratrix for damages.—*Baltimore & Ohio R. R. Co. v. McCamly*, 12 C. C. 513 (1896).

Rule prohibiting appeal to court, not valid.

One of the rules in the relief department of

a railroad provided that the decision of an advisory committee as to claims to benefits should be final; held, that upon the rejection by the committee of a valid claim, the beneficiary could maintain an action.—*R. R. Co. v. Stankard et al.*, 56 Oh. St. 224 (1897). But see notes under § 3631-11.

Certificate payable to father before marriage; after marriage, widow entitled to same.

A member of the Brotherhood of Locomotive Firemen held, before marriage, a certificate payable to his father. The son afterward married; held, the certificate should be payable to the widow.—*Lett v. Brotherhood of Locomotive Firemen*, 44 W. L. B. 160 (1900).

§ 3631-1. **Sec. 1. INSURANCE COMPANIES FORBIDDEN TO DISCRIMINATE AGAINST PERSONS OF AFRICAN DESCENT IN PREMIUMS.**—No life insurance company now organized or doing business, or that may hereafter be organized and do business within this state, shall make any distinction or discrimination between white persons and colored, wholly or partially of African descent, as to premiums or rates charged for policies upon the lives of such persons; nor shall any such company demand or require greater premiums from such colored persons than are at that time required by such company from white persons of the same age, sex, general condition of health and hope of longevity; nor shall any such company make or require any rebate, diminution or discount upon the sum to be paid on such policy in case of the death of such colored person insured, nor insert in the policy any condition, nor make any stipulation whereby such person insured shall bind himself or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the

Discrimination as to Insurants, §§ 3631-2-3631-6.

death of such person insured, other than such as are imposed upon white persons in similar cases; and any such stipulation or condition so made or inserted shall be void. (March 28, 1889, 86 v. 163.)

§ 3631-2. Sec. 2. **WHAT SHALL BE DONE WHEN APPLICATION OF PERSONS OF COLOR IS REFUSED.**— Any such company which shall refuse the application of any such colored person for insurance upon such person's life, shall furnish such person with the certificate of some regular examining physician of such company who has made examination of such person, stating that such person's application has been refused, not because such person is a person of color, but solely upon such grounds of the general health and hope of longevity of such person as would be applicable to white persons of the same age and sex. (March 28, 1889, 86 v. 163, 164.)

§ 3631-3. Sec. 3. **PENALTY FOR VIOLATING THIS ACT.**— Any corporation, or the officer or agent of any corporation, violating any of the provisions of this act, either by demanding or receiving from such colored person such different or greater premium, or by allowing any discount or rebate upon the premium paid or to be paid by white persons of the same age, sex, general condition of health and hope of longevity, or by making or requiring any rebate, diminution or discount upon the sum to be paid upon a policy in case of the death of such colored person insured, or by failing to furnish the certificate required by section second, shall for each offense be fined not less than one hundred nor more than two hundred dollars. But nothing in this act shall be so construed as to require any agent or company to take or receive the application for insurance of any person. (March 28, 1889, 86 v. 163, 164.)

§ 3631-4. Sec. 1. **PREMIUMS FOR LIFE OR ENDOWMENT INSURANCE; UNLAWFUL TO DISCRIMINATE.**— No life insurance company doing business in Ohio, shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract it makes; nor shall any such company, or any agent thereof, make any contract of insurance, or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance. (April 27, 1893, 90 v. 345; April 10, 1889, 86 v. 220.)

§ 3631-5. Sec. 2. **PENALTY FOR VIOLATION BY CORPORATION OF PROVISIONS OF THIS ACT.**— Every corporation which shall violate any of the provisions of this act shall be fined in any sum not less than one hundred dollars nor exceeding five hundred dollars, to be recovered by action in the name of the state, and the amount so recovered shall be paid into the county treasury for the benefit of the common school fund. (April 27, 1893, 90 v. 345; April 10, 1889, 86 v. 220.)

§ 3631-6. Sec. 3. **VIOLATION BY OFFICER OR AGENT OF CORPORATION.**— Every officer or agent of any such corporation who shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars nor exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding thirty days, or both, at the discretion of the court, and shall pay the costs of prosecution. (April 27, 1893, 90 v. 345.)

Stock in other Companies — Fraternal Companies, etc., §§ 3631-7-3631-11.

§ 3631-7. Sec. 4. REVOCATION OF LICENSE FOR VIOLATION.— It shall be the duty of the superintendent of insurance, upon being satisfied that any such corporation, or any agent thereof, has violated any of the provisions of this act, to revoke the license of the company, or agent, so offending, and no license shall be granted to such company, or agent, for one year after such revocation. (April 27, 1893, 90 v. 345.)

§ 3631-8. Sec. 1. CERTAIN INCORPORATED COMPANIES MAY PURCHASE AND OWN STOCK IN OTHER COMPANIES.— Whenever any incorporated company organized under the laws of the state of Ohio, and having a capital stock including corporations organized as provided in section thirty-eight hundred and sixty-eight, Revised Statutes, and the acts amendatory and supplementary thereto, is organized for the purpose of erecting and maintaining a building, any portion of which is intended for or to be occupied by two or more incorporated companies not having a capital stock, including religious, scientific, and beneficial associations heretofore incorporated under the provisions of sections sixty-six to seventy of "an act to provide for the creation and regulation of incorporated companies in the state of Ohio," passed May 1, 1852, and the several acts supplementary and amendatory thereto, as a lodge-room, chapel, or regular place of meeting for their members, the said incorporated companies, societies or benevolent associations may each subscribe for, purchase or become the owner or owners, by donation or otherwise, of the whole or any portion of the capital stock of said incorporated company organized for the purpose of erecting and maintaining such building aforesaid. (April 18, 1883, 80 v. 177.)

§ 3631-9. Sec. 2. TO BE LIABLE IN CORPORATE CAPACITY SAME AS INDIVIDUALS.— That each of said incorporated companies, societies and associations shall be liable in its corporate capacity for and on their respective shares of said capital stock so subscribed, purchased, and owned by it the same as if the same were held and owned by an individual. (April 18, 1883, 80 v. 177.)

§ 3631-10. Sec. 3. DIRECTORS; WHEN AND HOW ELECTED.— That whenever two or more of such incorporated companies, societies, or benevolent associations shall subscribe, purchase or own all the capital stock of said incorporated company organized for the purpose of erecting and maintaining such building, each of said incorporated companies, societies or benevolent associations, shall elect three members of its company, society or association to act as directors of said incorporated company as soon as all the stock is subscribed and ten per cent. is paid, and shall thereafter at its first stated meeting in January of each year, elect three such directors. That the directors so elected and their successors in office shall comprise the board of directors of said incorporated company, and have all the powers conferred by law on the directors of incorporated companies having a capital stock, and said directors need not be the owners or holders of any of the capital stock of said corporation. (April 18, 1883, 80 v. 177.)

§ 3631-11. Sec. 1. FRATERNAL BENEFICIARY ASSOCIATION DEFINED; AS TO BENEFITS IN DETAIL.— A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members (and) their beneficiaries. Each association shall have a lodge system, with ritualistic form of work and representative form of government, and may make provision for the payment of benefits in case of death, sickness, temporary or permanent physical disability, either as the result of disease, accident or old age, provided the period of life at which payment of physical disability benefits on account of old age commences, shall not be under seventy (70) years. Each association or order may also make provision for withdrawal of those of its members unable or unwilling to continue their payments at any time after two years of membership, provided, however, that such withdrawal benefits shall not

Fraternal Beneficiary Associations, § 3631-12.

exceed the amount contributed by such members, and it may also make provisions for the payment of final benefits, at any time after ten years of membership, as may be provided by its constitutional laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of any such association shall be defrayed shall be derived from assessments, dues or other payments collected from its members. Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the members. Such associations shall be governed by this act, and shall be exempt from the provisions of the insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein. Any such society, order or association may create, maintain and disburse a reserve fund in accordance with its constitutional by-laws. Such reserve fund (if any), shall represent certain prescribed accumulations or percentages retained for the benefit of the members or their beneficiaries, and no part thereof shall be used for expenses. (April 27, 1896, 92 v. 360.)

Limitation as to beneficiary.

An association, whose charter provides that it may provide aid for its members and their dependents, is not authorized to issue a certificate payable to one not dependent upon a member.—*McGuinness v. Supreme Council*, 59 Oh. St. 531 (1898).

Not an insurance company.

A benefit association is not an insurance company.—*McGuinness v. Supreme Council*, 59 Oh. St. 531-537 (1898); *Martin v. Stubblings*, 126 Ill. 387 (1888).

Must exhaust remedies of order.

Member must exhaust his remedies in the order before he can have recourse to courts.—*Cincinnati Lodge v. Littlebury*, 6 W. L. B. 237 (1880); *State v. Knights Golden Rule*, 10 W. L. B. 2 (1883); *Myers v. Jenkins*, 44 W. L. B. 212 (1900); *Schryver v. Columbian Lodge*, 3 C. C. 422 (1888).

Determination of order conclusive.

The determination of the matter in controversy by the lodge and its tribunals, in substantial accordance with the laws of the order, will be final and conclusive.—*Myers et al. v. Jenkins*, 44 W. L. B. 212 (1900); *Cincinnati Lodge v. Littlebury*, 6 W. L. B. 237 (1880); *Pyre v. Relief Ass'n*, 90 Cal. 240 (1891); *Schryver v. Columbia Lodge*, 3 C. C. 422 (1888). But see *R. R. Co. v. Stankard et al.*, under § 3631a; *Steuve v. Grand Lodge*, 5 C. C. 471 (1891); s. c., 3 C. D. 231.

Refusal of order to determine demand.

Upon the refusal or neglect of the order to have the right to benefits determined in substantial accordance with the laws of the order,

or upon refusal to pay after the same have been awarded, then an action may be maintained.—*Myers et al. v. Jenkins, Admr.*, 44 W. L. B. 212 (1900).

Waiver of appeal to courts, void.

A contract in advance to renounce and waive one's right to appeal to the courts is void and of no effect.—*Myers et al. v. Jenkins, Admr.*, 44 W. L. B. 212 (1900); *Baltimore, etc., R. R. Co. v. Stankard*, 56 Oh. St. 224 (1897); *Myers v. Lucas*, 16 C. C. 546 (1898); s. c., 8 C. D. 431.

Members' rights subject to rules of order.

Member becomes subject to rules of order and cannot apply to courts for relief unless there has been some invasion of some property right of his, as by some breach of contract made with him, or by some action done without authority.—*Steuve v. Grand Lodge*, 5 C. C. 471 (1891); s. c., 3 C. D. 231.

Distribution of funds upon dissolution or insolvency.

Schroeder v. Iron Hall, 7 N. P. 243 (1895); s. c., 1 Dec. 408; *Mutual Aid Ass'n, In re dissolution*, 3 N. P. 145 (1895); s. c., 4 Dec. 272; *Collier v. Benf. Ass'n*, 1 W. L. B. 18 (1876).

See two recent cases, one denying, the other affirming, the right to resort to courts.—*Hemheau v. Maccabees*, 49 L. R. (Mich.) 592 (1900); *Order of Select Friends v. Raymond*, 49 L. R. A. (Kan.) 343 (1900).

As to power of expulsion, remedy for wrongful expulsion, etc., see notes to § 3630.

See generally notes to § 3630; *Steuve v. Grand Lodge*, 5 C. C. 471; s. c., 3 C. D. 231, and 10 W. L. B. 365.

§ 3631-12. Sec. 2. CONDITIONS UPON WHICH SOCIETY, ORDER OR ASSOCIATION, WHICH HAS BEEN OPERATING, MAY CONTINUE.—Any society, order or association of this, or any other state, province or territory, now operating in this state, and having lodges, councils or branches duly established or organized in this state, may continue their business, provided that they hereafter comply with the provisions of this act regulating annual reports and the designation of the superintendent of insurance as the person upon whom process may be served as herein-after provided. (April 27, 1896, 92 v. 360.)

Fraternal Beneficiary Associations, §§ 3631-13, 3631-14.

§ 3631-13. Sec. 3. CONDITIONS UPON WHICH FOREIGN ASSOCIATION ADMITTED.— Any association operating within the description as set forth in section 3631-11 of the Revised Statutes of Ohio, organized under the laws of any other state, province or territory, and not now doing business in this state, shall be admitted to do business within this state when it shall have filed with the superintendent of insurance a duly certified copy of its charter and articles of association and a copy of its constitution or laws, certified to by its secretary or corresponding officer, together with an appointment of the superintendent of insurance of this state, as the person upon whom process may be served as hereinafter provided; and provided that such association shall be shown by certificate to be authorized to do business in the state, province or territory in which it is incorporated or organized in case the laws of such state, province or territory shall provide for such authorization and in case the laws of such state, province or territory do not provide for any formal authorization, to do business on the part of any association, then such association shall be shown to be conducting its business in accordance with the provisions of this act, for which purpose the superintendent of insurance of this state may personally, or by some person to be designated by him, examine into the condition, affairs, character and business methods, accounts, books and investments of such association at its home office, which examination shall be made within thirty days after demand therefor, and the expense of such examination and of all examinations of associations of this or any other state shall be paid by the state treasurer on the warrant of the state auditor upon the certificate of the superintendent of insurance; provided, that the expenses of any examination made upon the demand of an association shall be paid by it; and provided, also, that, when the laws of any other state or district require or permit examinations of associations of this state to be made by the insurance department or any other authority of such state or district at the expense of such association, then the expense of all examinations made by the insurance department of this state of associations of such other state or district shall be charged to and collected from such associations. (May 12, 1902, 95 v. 606; April 27, 1896, 92 v. 360.)

Failure to comply with conditions does not render certificate void.

Klinekhammer Brewing Co. v. Cassman et al., 21 C. C. 465 (1900), reversing 9 Dec. 599; dismissed in Supreme Court, 44 W. L. B. 186.

§ 3631-14. Sec. 4. ANNUAL REPORT OF ASSOCIATIONS.— Every such association doing business in this state shall, on or before the first day of March of each year, make and file with the superintendent of insurance of this state, a report of its affairs and operation during the year ending on the thirty-first day of December immediately preceding, which annual report shall be in lieu of all other reports required by any other law. Such report shall be upon blank forms, to be provided by the superintendent of insurance, or may be printed in pamphlet form, and shall be verified under oath by the duly authorized officers of such association, and shall be published, or the substance thereof, in the annual report of the superintendent of insurance, under a separate part, entitled "fraternal beneficial associations," and shall contain answers to the following questions:

I. INCOME DURING THE YEAR.

Amount received for assessments.	\$
Rents, interest and dividends on stocks and bonds. . . . .	. . . . .
All other sources, viz. . . . .	. . . . .
Total amount received during the year. . . . .	. . . . .

Fraternal Beneficiary Associations, § 3631-15.

II. EXPENDITURES DURING THE YEAR.

Benefits, losses and claims paid.....	\$.....
Sick benefits paid.....	.....
Salaries and other compensation of officers and for clerical force....	.....
Paid for rent.....	.....
Paid for office expenses, lodge supplies, organization of lodges or branches; of building up the same, printing, advertising and all other expenditures.....	.....
Total amount of expenditures during the year.....	.....

III. ASSETS.

Bonds and stocks.....	\$.....
Loans on mortgages, evidenced by notes and otherwise.....	.....
Loans on other collateral and security.....	.....
Real estate.....	.....
Cash in bank.....	.....
Securities deposited in different states, if any.....	.....
Total other assets, viz.....	.....
Total assets.....	.....

IV. LIABILITIES.

Losses and claims due and unpaid.....	No.....	\$.....
Losses and claims reported but not due.....	No.....	.....
Salaries due and unpaid.....	.....	.....
Due for borrowed money.....	.....	.....
All other liabilities, viz.....	.....	.....
Total liabilities.....	.....	.....

V. EXHIBIT OF MEMBERSHIP.

Membership and amount in force at the end of the year preceding, for which this report is made.....	No.....	\$.....
Give number of members and amount of certificates issued during the year.....	No.....	.....
Total during the year.....	No.....	.....
Deduct members and amount of certificates retiring by withdrawal or suspension during the year.....	No.....	.....
Deduct members who have died during the year, and face amount of certificates paid.....	No.....	.....
Total members in good standing Dec. 31, 189.....	No.....	.....

(April 27, 1896, 92 v. 360.)

§ 3631-15. Sec. 5. AS TO PROCESS.— Each such association now doing, or here-
after admitted to do business within this state and not having its principal office
within this state, and not being organized under the laws of this state, shall appoint
in writing the superintendent of insurance or his successors in office, to be its true
and lawful attorney, upon whom all lawful process in any action or proceeding
against it may be served, and in such writing shall agree that any lawful process
against it, which is served on said attorney, shall be of the same legal force and
validity as if served upon the association, and that authority shall continue in force
so long as any liability remains outstanding in this state. Copies of such certifi-
cate, certified by said superintendent of insurance, shall be deemed sufficient evi-
dence thereof and shall be admitted in evidence with the same force and effect as the

Fraternal Beneficiary Associations, §§ 3631-16, 3631-17.

original thereof might be admitted. Service upon such attorney shall be deemed sufficient service upon such association. When legal process against any such association is served upon said superintendent of insurance, he shall immediately notify the association of such service by letter, prepaid and directed to its secretary or corresponding officer, and he shall, within two days after such service, forward in the same manner, a copy of the process served on him to such officer. The plaintiff in such process so served shall pay to the superintendent of insurance, at the time of such service, a fee of two dollars (\$2), which shall be recovered by him as a part of the taxable costs, if he prevails in the suit. Superintendent of insurance shall keep a record of all processes served upon him, which record shall show the day and hour when such service was made, and by whom made. (April 27, 1896, 92 v. 360.)

§ 3631-16. Sec. 6. PERMIT TO DO BUSINESS; FEE; ANNUAL FEE THEREAFTER.—Superintendent of insurance of this state shall, upon the application of any association having a right to do business within this state, as provided by this act, issued to such association, a permit in writing, authorizing such association to do business within this state, for which certificate and all proceedings in connection therewith, such association shall pay to said superintendent a fee of twenty-five dollars (\$25). This fee shall be paid annually thereafter when report is filed. (April 27, 1896, 92 v. 360.)

§ 3631-17. Sec. 7. PROCEDURE AND REQUIREMENTS IN FORMATION OF ASSOCIATION; ANNUAL MEETINGS FOR ELECTION OF MANAGERS OR TRUSTEES.—Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who may desire to form a fraternal beneficiary association, as defined by this act, may make, sign, seal and acknowledge before some officer competent to take the acknowledgment of deeds, a certificate in writing in which shall be stated:

- (A) The names and places of residence of applicants.
- (B) Proposed corporate name of the association, which shall not too closely resemble the name of any other similar organization.
- (C) The object or purpose for which the incorporation is sought, which shall not include more liberal powers than are granted by this act.
- (D) Location of the principal office of the corporation.
- (E) Number of trustees, directors, or similar officers and their names, who shall manage the concerns of the corporation for the first year, or until the ensuing annual meetings.

Meetings for the election of managers or trustees shall be held annually, and as far as possible during the month of January of each year, according to the regulations of the constitution and laws of the association. When the said certificate has been duly signed and acknowledged by the incorporators thereof, it shall be submitted to the attorney-general for his approval in conformity with this act, and after the said approval shall have been indorsed thereon, shall be duly recorded in the county in which the home office of the corporation is located, and a certified copy thereof immediately forwarded to the superintendent of insurance with a certified list of officers in charge of the association, with their residences and the location of the home office. In addition to this proof, satisfactory to said superintendent of insurance, shall be furnished by two of the officers of the said association, that at least one hundred subscribers for certificates of membership have been secured in said association, and that there has been deposited to the credit of said association for the payment of death and other claims, and which amount can not be used for expenses, the sum of five thousand dollars, which sum, if advanced by the trustees, officers or directors, may be repaid to them from time to time from the proceeds of an expense fund to be created for this purpose. Associations of this state of similar

Fraternal Beneficiary Associations, §§ 3631-18-3631-20.

character to those defined by this act, may by resolution of their present board of managers or trustees, incorporate under this act, as herein provided, and the corporate existence of which shall then and there continue as if such association had been originally incorporated under the same. (April 27, 1896, 92 v. 360.)

§ 3631-18. Sec. 8. **BENEFITS NOT LIABLE TO ATTACHMENT, SEIZURE, ETC.**—The money or other benefit, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under this act shall not be liable to attachment by a trustee, garnishee, or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or any person who may have any rights thereunder. (April 27, 1896, 92 v. 360.)

Construction of statute.

The exemption provided in this section is to prevent the appropriation of the funds for the payment of debts of the holder of a certificate or of any person who may have a right thereunder. But after the money comes into the possession of the person entitled to it, such person has only the same right of exemption as to such funds, which he has as to other property.—Klinckhammer Brewing Co. v. Cassman et al., 21 C. C. 465 (1900), reversing 9 Dec. 599; dismissed in supreme court, 44 W. L. B. 186.

Creditor's bills to subject certificate, brought before payment, is premature.

An action, in the nature of a creditor's bill, to subject the certificate to the payment of creditor's claim brought before the money due

on the certificate reaches the beneficiary, is improperly brought and such creditor obtains no rights thereby over other creditors. In such a case payment into court will not be regarded as payment to the beneficiary.—Klinckhammer Brewing Co. v. Cassman et al., 21 C. C. 465 (1900), reversing 9 Dec. 599; dismissed in supreme court, 44 W. L. B. 186.

Benefits from certain societies not exempt.

See Hildreth v. Endowment Rank, 8 N. P. 540 (1901).

Unconstitutional.

This section is unconstitutional because in conflict with section 2 of article I of the constitution.—Williams v. Donough, 65 Oh. St. 499 (1902).

§ 3631-19. Sec. 9. **LEGISLATIVE.**—Any such association organized under the laws of this state, may provide for the meetings of its legislative or governing body in any other state, province or territory, wherein such association shall have subordinate lodges, and all business transacted at such meetings shall be valid, in all respects, as if such meetings were held within this state, and where the laws of any associations provide for the election of its officers by votes to be cast in its subordinate lodges, the votes so cast in its subordinate bodies in any other state, province or territory, shall be valid, as if cast within this state. (April 27, 1896, 92 v. 360.)

§ 3631-20. Sec. 10. **PENALTY FOR FALSE OR FRAUDULENT STATEMENT OR REPRESENTATION.**—Any person, officer, member or examining physician who shall knowingly or willfully make any false or fraudulent statement or representation, in or with reference to any application for membership, or for the purpose of obtaining any money or benefit in any association transacting business under this act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days, or more than one year, or both, in the discretion of the court; and any person who shall willfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate-holder in any such association for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall willfully make any false statement in any verified report or declaration under oath required or authorized by this act, shall be guilty of perjury, and shall be proceeded against and punished as provided by statute of this state in relation to the crime of perjury. (April 27, 1896, 92 v. 360.)

Fraternal Beneficiary Associations — Stipulated Premium Plan, §§ 3631-21 3631-24.

§ 3631-21. Sec. 11. **EXCLUSION OF ASSOCIATION; PROCEEDINGS IN INJUNCTION; REINSTATEMENT.**— Any such association refusing or neglecting to make the report as provided in this act shall be excluded from doing business in this state. Said superintendent of insurance must within sixty days after failure to make such report, or in case any such association shall exceed its powers or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of this act, give notice in writing to the attorney-general, who shall immediately commence an action against such association to enjoin the same from issuing any new business. And no injunction against any such association shall be granted by any court, except on application by the attorney-general at the request of the superintendent of insurance. No association so enjoined shall have authority to continue to do the business of soliciting new members until such report shall be made or overt act or violations complained of shall have been corrected, nor until the costs of such action be paid by it, provided the court shall find that such association was in default as charged, whereupon the superintendent of insurance shall reinstate such association, and not until then shall such association be allowed to secure new members in this state. Any officer, agent or person acting for any association or subordinate body thereof, within the state, while such association shall be so enjoined or prohibited from doing business pursuant to this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not less than twenty-five dollars or more than one hundred dollars. (April 27, 1896, 92 v. 360.)

§ 3631-22. Sec. 12. **WHO SUBJECT TO PENALTY PROVIDED IN PRECEDING SECTION.**— Any person who shall act within this state as an officer, agent, or otherwise, for any association, which shall have failed, neglected or refused to comply with, or shall have violated any of the provisions of this act, or shall have failed, or neglected to procure from the superintendent of insurance a proper certificate of authority to transact business as provided for by this act, shall be subject to the penalty provided in the last preceding section for the misdemeanor therein specified. (April 27, 1896, 92 v. 360.)

§ 3631-23. **CONFLICTING OR INCONSISTENT LAWS REPEALED; LODGES, ETC., TO WHICH ACT IS APPLICABLE.**— All laws or part(s) of laws in conflict with or inconsistent with this act are and the same are hereby repealed, and nothing in this act shall be held to affect or apply to grand or subordinate lodges of Masons, Knights of Pythias, Odd Fellows or similar orders that do not have as their principal object the issuance of insurance certificates of membership. Nor shall anything therein contained apply to lodges or orders of a purely religious, charitable or benevolent description, paying exclusively sick, funeral or death benefits to members, their families or blood relatives, or dependents, or for purely charitable purposes, and not operating with a view to profit, nor shall any such organization be required to make any report under this or any other section of the insurance laws, and provided further, that no society, lodge or body of any secret or fraternal society or organization of employes of any particular trade, firm or corporation paying only sick benefits not exceeding two hundred and fifty dollars (\$250) in the aggregate to any person in any one year, or a funeral benefit to those dependent on a member not exceeding three hundred and fifty dollars (\$350), shall be required to make any report thereof under this article, or under other articles of the insurance laws. (April 16, 1900, 94 v. 356; April 27, 1896, 92 v. 360.)

§ 3631-24. Sec. 1. **INCORPORATION OF COMPANIES FOR LIFE INSURANCE ON THE STIPULATED PREMIUM PLAN.**— Five or more persons may, in the manner and according to the forms and requirements for the incorporation of insurance companies mentioned in sections 3588 and 3589 of the Revised Statutes and in this act, become an incorporated company for the purpose of making insur-

Companies on Stipulated Premium Plan, §§ 3631-25-3631-27.

ance upon the lives and health of individuals, and every insurance appertaining thereto or connected therewith, on the stipulated premium plan as defined and regulated herein. (93 v. 343.)

Liability of trustees.

See *Kelly v. Bender*, 22 O. C. C. 144 (1901).

§ 3631-25. Sec. 2. **COMPLETION OF ORGANIZATION.**—No such corporation, company or association shall commence the business of life insurance until at least two hundred persons eligible under the proposed plan of the organization shall have subscribed in writing to be insured therein in the aggregate amount of at least five hundred thousand dollars, and shall have each paid or become obligated to pay the amount of one annual stipulated net premium for their age at entry on the amount of insurance severally subscribed for, and which shall be held in trust for the benefit of the members of said corporation or their beneficiaries; nor until the superintendent of insurance shall have further certified that it has complied with the provisions of this act and is authorized to transact the business of insurance.

DEPOSIT OF SECURITIES.—Provided, however, that every corporation incorporating or reincorporating under the provisions of this act, shall deposit with the superintendent of insurance in such securities as are required by law to be deposited by insurance companies, the sum of five thousand dollars within one year after date of such incorporation or reincorporation, and such corporation shall each year thereafter, upon filing its annual statement, deposit in like securities with the superintendent of insurance, the sum of two thousand dollars on each million of insurance in force for the last calendar year, as shown by its said annual statement, until the sum of one hundred thousand dollars shall have been deposited. The securities deposited with the insurance department pursuant to this section shall be held by the superintendent in trust for the benefit and protection of and as security for the policy holders of such corporation, their legal representatives and beneficiaries. (April 25, 1898, 93 v. 343.)

§ 3631-26. Sec. 3. **LIFE INSURANCE ON STIPULATED PREMIUM PLAN DEFINED; CORPORATIONS SUBJECT TO PROVISION OF ACT; EXISTING STATUTES.**—Any corporation, company or association which issues any policy, certificate or other evidence of interest to, or makes any promise or agreement with its members whereby any money or other benefit is to be paid to a member, or upon his decease to his legal representative or the beneficiary designated by him, which money or benefit is derived from stipulated premiums collected from its members, or members of a class therein, or from interest or accumulations, and wherein the money or other benefits so realized is applied to, or accumulated for the use and purposes of such corporation as herein specified, and the expenses of its management and prosecution of its business, shall be deemed to be engaged in the business of life insurance upon the stipulated premium plan, and shall be subject only to the provisions of this act, excepting that the provisions of chapter 8, title 3, part 1, and of chapter 10, title 2, part 2, of the Revised Statutes shall be applicable so far as the same are not inconsistent with the provisions of this act. (April 25, 1898, 93 v. 344.)

§ 3631-27. Sec. 4. **EXISTING CORPORATIONS, ETC., MAY ACCEPT PROVISIONS OF ACT; HOW.**—Any domestic corporation, company, association or society existing or doing business under the provisions of chapter 10, title 2, part 2, of the Revised Statutes, at the time this act takes effect, may, by a vote of a majority of its board of directors or trustees, and upon obtaining the consent of the superintendent of insurance thereto, in writing, accept the provisions of this act, and amend its articles of incorporation to conform with the same, so as to cover and enjoy any and

Companies on Stipulated Premium Plan, §§ 3631-28, 3631-29.

all the provisions or privileges of this act, which might have been included and enjoyed, if it had been originally incorporated hereunder; and it shall file such amendment of its articles of incorporation and the consent required by this section, in the office of the secretary of state, and shall thereafter perpetually enjoy the same and be deemed to have been incorporated under this act.

EXISTING CONTRACT OR LIABILITY OF CORPORATION NOT AFFECTED BY ITS REINCORPORATION OR ACCEPTANCE.—The reincorporating or qualifying of any existing domestic or foreign corporation under the provisions of this act shall in no way annul, modify or change any existing contract, contracts or liabilities of such existing corporation, and any and all such contracts and liabilities shall continue in full force and effect the same as though such corporation had not reincorporated or qualified under this act.

PENDING ACTIONS OR RIGHTS UNAFFECTED.—Neither shall the reincorporating or qualifying of any such corporations under the provisions of this act, in any way prejudice, impede, or impair any pending action or proceeding, or any rights previously accrued. (April 25, 1898, 93 v. 344.)

§ 3631-28. Sec. 5. **MINIMUM PREMIUMS.**—Every such corporation, company or association doing business under the provisions of this act shall charge at least a net premium calculated upon the combined experience or actuaries' table of mortality, with interest at the rate of four per centum per annum, equal to that of a yearly term insurance at the age of entry. Such premium shall be increased by a loading of not less than twenty-five per centum, and may be paid annually, semi-annually, quarterly or bimonthly in advance. (April 25, 1898, 93 v. 345.)

§ 3631-29. Sec. 6. **RESERVE FUND.**—Every such corporation, company or association shall accumulate and at all times maintain a reserve fund not less than the net premium, according to the term of premium payment of each policy, upon all its outstanding policies, which net premium shall equal the amount called for by the combined experience or actuaries' table of mortality at the attained age of the insured, computed as specified in section 5 of this act.

IMPAIRMENT OF FUND REMEDIED.—If the amount of such reserve fund is at any time reduced to less than such net premium upon all its outstanding policies at the attained age of the insured, or to less than the reserve required by the terms and conditions thereof, such deficiency shall be made up and restored to said fund within three months thereafter.

DUTY OF SUPERINTENDENT IN CASE OF FAILURE TO REMEDY IMPAIRMENT.—Should such impairment of the reserve fund not be made good within three months, then the superintendent of insurance shall require the officers of such corporation to forthwith notify its members to pay, within thirty days from the mailing of such notice, an extra premium sufficient to meet such deficiency apportioned equitably, and any such extra premium shall not be less than the difference between the actual net premium paid, and the net premium at attained age. If any member fails to pay such extra premium within the time named, the corporation shall scale down the policy of each and every member so failing to pay to such an amount as is necessary to make the reserve fund to his credit equal to said unearned premium on his insurance remaining in force, which amount shall be the maximum for which the corporation shall be liable under said policy. Said thirty days' notice shall clearly state the proportionate amount of the impairment due from the insured and shall contain the further statement that in the event of failure to pay the same within thirty days after the mailing of such notice, said policy will be scaled down as aforesaid. (April 25, 1898, 93 v. 345.)

Companies on Stipulated Premium Plan, §§ 3631-30-3631-33.

§ 3631-30. Sec. 7. **LIMITED PAYMENT POLICIES.**—Any corporation, company or association doing business under this act may issue limited payment policies; provided such policies hereafter issued distinctly state the portion of each of the premiums to be held by, and charged against such corporation for the purpose of sustaining such policies after expiration of the term of years in which the premiums are to (be) paid, which shall not be less than the legal reserve annually according to the actuaries' or combined experience table of mortality with interest at 4 per cent. per annum and which portion at the expiration of such term of years, together with the interest accreted thereto, shall not then nor thereafter be less than the single net premium at the attained age, according to the actuaries' or combined experience table of mortality, with interest at four per centum per annum; and if any such corporation doing business under this act shall not state in its limited payment policies the portion of each of the premiums to be held by it for the purpose of sustaining the insurance after the term of years during which the premiums are to be paid, or if any such corporation shall issue any form of investment policies, then such limited payment or other form of investment policies hereafter issued shall be valued on the basis of the actuaries' or combined experience table of mortality, and interest at four per centum per annum, as provided and contemplated in section 279 of the Revised Statutes. (April 25, 1898, 93 v. 345.)

§ 3631-31. Sec. 8. **CASH VALUES.**—Any corporation, company or association authorized to do business hereunder, may pay fixed cash values, provided the amount of reserve computed and to be set apart for such cash value is plainly stated in the policy, and provided further that such cash value shall not be in excess of the portion of the premium with interest accretions thereon, collected for such purpose. (April 25, 1898, 93 v. 346.)

§ 3631-32. Sec. 9. **DISTRIBUTION OF SURPLUS.**—If the cash and invested assets of the corporation, company or association, exceed the reserve fund required by this act, or under the terms and conditions of its policy contracts, and the actual liabilities of said corporation to an amount in excess of ten per centum of such reserve fund, then the amount of such excess may, if the policy contract so provides, be apportioned by the corporation as a dividend to members, in reduction of premiums, in the purchase of paid up or extended insurance, or may be drawn in cash; or such dividend or dividends may be paid to the beneficiary of a deceased member in addition to the face of the policy. (April 25, 1898, 93 v. 346.)

§ 3631-33. Sec. 10. **WHAT POLICY SHALL SET FORTH.**—Every policy hereafter issued by any corporation, company or association doing business under this act and promising any payment to be made upon a contingency provided for in this act, shall specify the sum of money which it promises to pay upon each contingency insured against, and the number of days after satisfactory proof of the happening of same on which such payment shall be made.

OBLIGATION OF COMPANY TO BENEFICIARIES OR INSURED.—Upon the occurrence of such contingency, unless the contract shall have been avoided by fraud or breach of its conditions, the corporation shall be obligated to the beneficiaries or insured for such payment at the time and to the maximum amount due under the policy.

REFUSAL OR FAILURE TO PAY.—If the superintendent of insurance shall be satisfied, upon investigation, that any such corporation has refused or failed, after proper demand, to make such payment for sixty days after final judgment has been obtained upon such claim, he shall notify the corporation to issue no new policies

Companies on Stipulated Premium Plan, §§ 3631-34, 3631-35.

until such indebtedness is fully paid; and no officer or agent of the corporation shall make, sign or issue any policy of insurance while such notice is in force. (April 25, 1898, 93 v. 346.)

§ 3631-34. Sec. 11. **FOREIGN CORPORATIONS MUST PROCURE CERTIFICATE OF AUTHORITY.**—No corporation, company, association or society organized under the laws of any other state or territory of the United States or the District of Columbia or foreign country, shall transact business under the provisions of this act until it has received from the superintendent of insurance a certificate of authority to do business in this state, a duplicate of which shall be filed in his office.

RENEWAL CERTIFICATES.—The superintendent shall annually issue to such foreign corporation, company, association or society, renewal certificates of authority to continue business, if it shall have fully complied with the provisions of this act, and if the superintendent shall be of the opinion that any such corporation, company, association or society is not entitled to a renewal of a certificate of authority, he may in his discretion cite the same to appear, giving reasons therefor, and show cause why the certificate of authority should not be renewed; and unless the certificate of authority shall be renewed within ten days after such hearing, such foreign corporation, company, association or society shall cease to do business in this state.

SUPERINTENDENT MAY REFUSE CERTIFICATE.—The superintendent may refuse a certificate of authority or renewal of the same to any such foreign corporation, company, association or society, when such refusal will best promote the public interests.

OBLIGATIONS SIMILAR TO THOSE OF OTHER STATES.—When any state, territory or foreign country shall impose any obligations upon any such corporation of this state, or their agents, transacting business in such other state, territory or foreign country, the like obligations are hereby imposed upon similar corporations of such other state, territory or foreign country, and their agents or representatives transacting business in this state; and such corporation, company, association or society of such other state, territory or foreign country, and its agents and representatives, shall pay all licenses, fees or penalties to and make deposits with the superintendent of insurance imposed by the laws of such other state, territory or foreign country upon any corporation of this state doing business therein; and in case of failure to pay the same, the superintendent shall refuse the certificate of authority herein provided for or cancel such certificate if one shall have been previously issued.

FOREIGN COMPANY TO FURNISH EVIDENCE TO ENTITLE IT TO LICENSE.—No foreign corporation, company, association or society shall be authorized to transact any business authorized by this act within this state, unless it furnishes evidence satisfactory to the superintendent of insurance that it has a reserve fund equal in amount to that required by this act, and that the same is held for the benefit of policy holders only, and invested as required by the insurance laws of this state. Neither shall any foreign corporation, company, association or society be authorized to do business in this state unless it collects in advance for the benefit of its policy holders a net premium equal to at least that provided for by the terms of this act. (April 25, 1898, 93 v. 346.)

§ 3631-35. Sec. 12. **DISCRIMINATION PROHIBITED.**—No life insurance corporation, company or association subject to the provisions of this act shall make any discriminations in favor of individuals of the same class or of the same expectation of life, either in the amount of premiums charged or in any return of premiums, dividends or other advantages.

Companies on Stipulated Premium Plan, §§ 3631-36-3631-38.

CONTRACTS BY AGENTS.—No agent of such corporation shall make any contract for insurance or agreement as to such contract other than that which is plainly expressed in the policy issued.

REBATE OF PREMIUM PROHIBITED.—No such corporation or agent thereof shall pay or allow, or offer to pay or allow, as an inducement to any person to insure, any rebate of premium, or any special favor or advantage whatever in dividends to accrue thereon, or any inducement whatever not specified in the policy. If it shall appear to the satisfaction of the superintendent of insurance, after a hearing by him upon due notice, that any corporation is issuing policies or making contracts that are in violation of this section, he shall upon the written approval of the attorney-general, require such corporation and its officers and agents to refrain, within twenty days, from making any such policy or contract. If any such corporation or officer or agent thereof shall fail to comply with the provisions of this section the superintendent shall institute such proceedings at law as may be necessary to restrain such violation of this section. (April 25, 1898, 93 v. 347.)

Rebate of premium agreed to by sub-agent; transaction void.

"H.," a sub-agent, agreed with assured to make a rebate on the premium, the latter giving his note for the premium, less rebate.

Afterward a check dated ahead was given in place of the note. Held, both void.—*Tillinghast et al. v. Craig*, 17 C. C. 531 (1893); s. c., 9 C. D. 459.

Note amendment to this section (93 v. 347).

§ 3631-36. Sec. 13. **POLICY HOLDER NOT PERSONALLY LIABLE FOR LOSSES OF CORPORATION.**—No person shall incur any personal liability for the losses or liabilities of any corporation, company or association organized or doing business under this act by reason of being a policy holder in such corporation. (April 28, 1898, 93 v. 348.)

§ 3631-37. Sec. 14. **WITHDRAWAL OF SECURITIES UPON RELINQUISHMENT OF BUSINESS.**—When any such corporation, company or association shall desire to relinquish its business the superintendent shall, on application of such corporation under the oath of its president or principal officer and secretary or actuary, give notice of such intention at least twice a week for six months in a newspaper of general circulation published at Columbus. After such publication he shall deliver up to said corporation the securities held by him belonging to it upon being satisfied by an exhibition of the books and papers belonging to such corporation, and on examination by himself or by some competent person to be appointed examiner by him, and upon the oath of the president or principal officer and the secretary or actuary of said corporation, that all its debts and liabilities of every kind are paid and extinguished that are due or may become due upon any contract or agreement made by said corporation or its assignee any portion of such securities on being satisfied in the manner and form hereinbefore required, or upon any other competent proof, that all the debts and liabilities of every kind that are due or may become due are less than the amount or proportion of such securities which he shall still retain. (April 28, 1898, 93 v. 348.)

§ 3631-38. Sec. 15. **TAXES.**—Every corporation doing business under the provisions of this act shall be liable for and pay such taxes as other life insurance companies are liable for. (April 28, 1898, 93 v. 348.)

For an act authorizing companies to insure against burglary. see 94 v. 350.

For an act creating the office of fire marshal, etc. see 94 v. 386.

PART XV.

INSURANCE COMPANIES OTHER THAN LIFE.

- § 3632. Articles of incorporation to be approved by attorney-general.
- § 3633. To be recorded by secretary of state, and copy deposited with superintendent.
- § 3634. Capital of joint stock companies. Amount and character of subscription in mutual fire companies necessary. Annual cash premiums collectible in advance by mutual companies. Contingent mutual liability for losses and expenses. Mutual fire association not included.
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- § 3641a. Fire insurance companies may insure against lightning, explosion, and tornadoes.
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§ 3632. **ARTICLES OF INCORPORATION TO BE APPROVED BY ATTORNEY-GENERAL.** — The articles of incorporation of a company formed for the purpose of insurance, other than life insurance, must be forwarded to the secretary of state, who shall submit the same to the attorney-general for examination, and if found by him to be in accordance with the provisions of this chapter, and not inconsistent with the constitution and laws of this state and of the United States, shall certify and deliver back the same to the secretary, who may reject any name or title of any company applied for when he deems the same similar to one already appropriated, or likely to mislead the public. (April 27, 1872, 69 v. 140, § 1; S. & S. 205.)

Similarity of names.

See note under § 3589.

§ 3633. **TO BE RECORDED BY SECRETARY OF STATE, AND COPY DEPOSITED WITH SUPERINTENDENT.** — Upon the approval of the articles by the attorney-general and the secretary of state, the secretary shall cause the same to be recorded and copied in the same manner as is provided in the preceding chapter, and a copy thereof to be deposited with the superintendent of insurance, who shall withhold from the company the certificate of authority if its name is so similar to the name of any other company as to mislead the public. (April 27, 1872, 69 v. 140, § 2; May 14, 1878, 75 v. 557, §§ 1, 2.)

§ 3634. **CAPITAL OF JOINT STOCK COMPANIES; AMOUNT AND CHARACTER OF SUBSCRIPTION IN MUTUAL FIRE COMPANY NECESSARY; SUBSCRIPTIONS TO INSURANCE IN MUTUAL COMPANIES; ANNUAL CASH PREMIUMS COLLECTIBLE IN ADVANCE BY MUTUAL COMPANIES; CONTINGENT MUTUAL LIABILITY FOR LOSSES AND EXPENSES; MUTUAL FIRE ASSOCIATIONS NOT INCLUDED.** — Except as hereinafter provided, no joint stock insurance company shall be organized under this chapter, or permitted to do business in this state, with a less capital than one hundred thousand dollars, which must be fully paid up before the company shall be entitled to transact business, except, that but twenty-five per cent. of the capital stock of a live stock company must be paid up before the same shall have the right to do business; nor shall any company on the plan of mutual fire insurance be incorporated until not less than five hundred thousand dollars of insurance, in not less than two hundred separate risks, no one of which shall exceed \$5,000, have been subscribed, and the premium thereon, for one year, paid in cash, aggregating not less than \$10,000 in cash, each subscriber agreeing, in writing, to assume a liability to be named in the policy, subject to call by the board of directors in a sum not less than three nor more than five annual premiums. And the same

Stock Subscriptions — Directors, §§ 3635, 3636.

liability shall also be agreed to in writing by each subsequent subscriber or applicant for insurance who is not a merchant or manufacturer. And each subscription before incorporation shall be accompanied by a certificate of a justice of the peace of the township or city where such subscriber resides, that the subscriber is, in his opinion, pecuniarily good and responsible to the extent of the contingent liability agreed to be assumed. Mutual fire insurance companies organized under this act may thereafter charge and collect in advance upon their policies a full annual premium in cash, but such policies shall not compel subscribers, insured or assured, to renew any policy nor pay a second or further annual or term premium. Any such company must in its by-laws, and must in its policies, fix by a uniform rule the contingent mutual liability of its members for the payment of losses and expenses; and such contingent liabilities shall not be less than three nor more than five annual cash premiums as written in the policy; but such liability shall cease with the expiration of the time for which a cash premium has been paid in advance, except for liability incurred during said time; but nothing in this section shall apply to associations for the mutual protection of their members against loss by fire heretofore or hereafter organized as provided in section 3686 of the Revised Statutes. (April 16, 1900, 94 v. 301; March 16, 1891, 88 v. 102; April 18, 1890, 87 v. 224; April 14, 1888, 85 v. 273; R. S. 1880; May 14, 1878, 75 v. 561, § 3; S. & S. 205.)

Distinction between mutual companies and mutual protective associations doing business under § 3686 to § 3690.

See *State v. Mutual Fire Ass'n*, 50 Oh. St. 145, 150 (1893) *Richards, Rec'r, v. Swain & McCormick Co. et al.*, 7 N. P. 68 (1900); s. c., 9 Dec. 70. See § 3663.

Section 2 of the act of 1888, April 14 (85 v. 273), amending sections 3634, 3648, 3650, 3651, 3652, 3654, and 3663, reads as follows:

"Sec. 2. (Companies doing business on the 'premium note plan,' repeal; section to remain in force as to certain mutual companies.) This act shall not affect companies now doing business on the premium note plan, unless they elect to dispense with said notes and

embody the contingent liability in the policy as herein provided; and said original sections 3634, 3648, 3651, 3652, 3654 and 3663 are hereby repealed. Provided that said section shall remain in force as to all mutual companies now doing business, which do not elect to reorganize under said sections as amended by this act."

"Sec. 3. This act shall take effect and be in force on and after July 1st, 1888."

Taxation, what are legal bona fide debts.

See *French v. German Mutual Ins. Co.*, 12 Dec. 183 (1901).

§ 3635. **BOOKS OF SUBSCRIPTION TO STOCK.**—The persons named in the articles of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock in the company, at such times and places as they deem convenient and proper, and shall keep the same open until the full amount specified in the articles is subscribed. (April 27, 1872, 69 v. 140, § 4; S. & S. 206.)

See § 3242 and notes thereto.

Contract to take shares must be in writing.

To entitle a person to become a member of an insurance company organized under this act his contract to take shares therein must be in writing and be mutually binding on both parties.—*Fanning v. Ins. Co.*, 37 Oh. St. 339 (1881).

Recovery by company on verbal promise.

A verbal promise to take shares, while the stock is being subscribed, which is necessary to authorize an organization, does not constitute the promisor a stockholder or a member of such corporation, and a promise to pay for such shares is without sufficient consideration. A recovery on such promise cannot be had, in the absence of facts showing that the promisor is estopped from setting up such want of consideration.—*Fanning v. Ins. Co.*, 37 Oh. St. 339 (1881).

§ 3636. **ELECTION OF DIRECTORS.**—Within one month after the subscription books are filled, and the articles of incorporation filed with the secretary of state, a majority of subscribers to the stock shall hold a meeting for the election of not less than five nor more than twenty-one directors, who must be stockholders or members, and the number thereof may at any time thereafter be increased or diminished

Capital, etc., Investment of, §§ 3637-3639.

between the same limits, at the will of the stockholders representing a majority of the stock or a majority of the members; each member of a mutual company shall be entitled to one vote, and each stockholder in other companies shall be entitled to one vote for each share of stock he holds; and mutual companies may, if they so provide in their by-laws, elect directors for the term of three years, the term of office of one-third of the number elected to expire each year, and those who receive the highest number of votes at the first election to serve for the longest term. (April 28, 1873, 70 v. 180, § 5; April 10, 1863, 60 v. 75, § 1; S. & S. 217; S. & S. 206.)

§ 3637. **HOW COMPANY MUST INVEST ITS CAPITAL.** — No company organized under this chapter, or incorporated under any law of this state, for the purposes provided in section thirty-six hundred and thirty-two, shall invest its capital or any part thereof, otherwise than in: 1. United States bonds; 2. Ohio state bonds; 3. Bonds of a county, township, or municipal corporation in this state, issued in conformity with law; 4. Bonds and mortgages on unincumbered real estate within this state, worth double the amount loaned thereon; if the amount loaned shall exceed one-half the value of the land mortgaged exclusive of structures thereon, such structures shall be insured in an authorized fire insurance company other than the company making such loan in an amount not less than the difference between one-half the value of such land exclusive of structures, and the amount loaned, and the policy assigned to the mortgagee; 5. The stock of any national bank located in this state, organized under the provisions of an act of congress entitled "An act to provide a national currency, secured by the pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25, 1863, and acts amendatory thereof and supplementary thereto; or, 6. First mortgage bonds of railroads within this state, upon which default in the payment of the interest coupons has not been made within three years previous to the purchase thereof. (March 19, 1902, 95 v. 59; April 22, 1873, 70 v. 147, § 6; S. & S. 206.)

See § 3591 and notes thereto.

§ 3638. **HOW IT MAY INVEST ITS ACCUMULATIONS.** — Funds accumulated in the course of business, or surplus money over and above the capital stock of a company, may be loaned or invested in the above named securities, or, 1. Bonds and mortgages on unincumbered real estate within the state, worth fifty per cent. more than the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some company authorized to do business in this state, and the policy is transferred to a company making the investment; 2. Bonds of any state of the United States; 3. Stocks, bonds, or other evidences of indebtedness of any solvent, dividend-paying institution incorporated under the laws of this or any other state, or of the United States, except its own stock; or, 4. Negotiable promissory notes maturing in not more than six months from the date thereof, secured by collateral security through the transfer of any of the classes of securities above described in this or the preceding section, with absolute power of sale within twenty days after default in payment at maturity. (April 22, 1873, 70 v. 147, § 6.)

See notes to § 3598.

Investments must be authorized.

A company authorized by its charter to invest its funds as should be deemed best by the directors, has no power to purchase upon

credit the note of one insured by the company, and entitled to indemnity for a loss, for the purpose of setting off such note against the claim. The company cannot hold the legal title to such note.—*Straus v. Eagle Ins. Co.*, 5 Oh. St. 60 (1856).

§ 3639. **LIMITATION ON THE POWERS OF INVESTMENT.** — No company shall own more than one-fourth of the capital stock of any national bank, nor invest in nor loan on the stocks and bonds, both included, of any railroad company, to an extent exceeding one-tenth of its own capital, nor in the aggregate shall the investment in and loan on all railroad property exceed one-fourth of its capital; not more

 Examinations; Powers of Companies, etc., §§ 3640, 3641.

than one-half of its capital shall be loaned on mortgage of real estate, as above provided for the investment of capital, and not more than one-tenth of the capital actually existing of any company shall be invested in a single mortgage; the current market value of all such stocks, bonds, or other evidences of indebtedness as above mentioned, in which the accumulations or surplus money over and above the capital stock of any insurance company may be loaned or invested, shall be at all times during the continuance of such loans at least twenty per cent. more than the sum loaned thereon; and if any investment or loan be made in a manner not authorized by this chapter, the directors who make or authorize the same shall be personally liable to the stockholders for any loss occasioned thereby; but insurance companies organized under the laws of this state, now doing business, shall not be compelled to change any investment made in accordance with the acts heretofore passed regulating such companies. (April 22, 1873, 70 v. 147, § 6.)

§ 3640. EXAMINATION BY THE SUPERINTENDENT.—When a company notifies the superintendent of insurance that the proceedings required by the preceding sections have been had, he shall make an examination of the condition of the company, and if he find that the capital required of the company has been paid in and is possessed by it in money, or in such stocks, bonds, and mortgages as are required by this chapter, he shall so certify; or he may cause such examination to be made by some disinterested person specially appointed by him for the purpose, who shall certify his finding to the superintendent under oath; the signers of the articles of incorporation, or the officers of the company, shall also certify, under oath, that the capital exhibited is, bona fide, the property of the company; such certificates shall be filed in the office of the superintendent, who shall thereupon deliver to such company a certified copy thereof, which, on being placed on record in the office of the recorder of the county wherein the company is to be located, in a book provided for that purpose by him, shall be its authority to commence business and issue policies; and such certified copy of the certificates may be used in evidence for or against the company, with the same effect as the original. (April 27, 1872, 69 v. 140, § 7; S. & S. 207.)

§ 3641. POWERS OF COMPANIES; LIMITATION; GUARANTY COMPANIES MUST MAKE DEPOSIT; CORPORATE POWER CANNOT BE DENIED.—A company organized under this chapter may:

1. Insure houses, buildings and all other kinds of property against loss or damage by fire and lightning and tornadoes, in and out of the state, and make all kinds of insurance on goods, merchandise and other property in the course of transportation, whether on land or water, or on any vessel or boat wherever the same may be.

2. Make insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning; guarantee the fidelity of persons holding places of public or private trust, who may be required to, or do, in their trust capacity, receive, hold, control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies, guarantee the validity of titles to real property, and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed.

3. Make insurance on the lives of horses, cattle or other live stock against loss by death caused by accident, disease, fire or lightning, and against loss by theft and damage by accident; provided, that such company shall have a capital of one hundred thousand dollars, with at least twenty-five (25) per cent. of the capital stock paid up.

4. Receive on deposit and insure the safe-keeping of books, papers, moneys, stocks, bonds and all kinds of personal property; lend money on bottomry or respon-

Insurance against Lightning, Explosions, etc., §§ 3641a, 3641b.

dentia, and cause itself to be insured against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property by means of any loan which it may have made on mortgages, bottomry or respondentia, and generally to do and perform all other matters and things proper to promote these objects; but no company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes, and no company organized for either one of said purposes shall issue policies of insurance of any other; provided, however, that no company, organized under the laws of the state to transact the business of guaranteeing the fidelity of persons holding places of public or private trust, or of executing or guaranteeing bonds or undertakings, as aforesaid, shall commence business until it has deposited with the superintendent of insurance two hundred thousand dollars in securities permitted by sections 3637 and 3638 of the Revised Statutes, which shall be held by said superintendent for the benefit and security of all the policy holders of the company, and which shall not be received by the said superintendent at a rate above their par value; nor shall a company, organized under the laws of another state, be licensed to transact any such business in this state unless at least two hundred thousand dollars of its assets are invested in securities permitted by sections 3637 and 3638 of the Revised Statutes of this state, and such securities are deposited with the superintendent of insurance of this state, or the superintendent of insurance or other officer of the state in which such company was organized, designated by the laws of such state to receive the same; and if such securities are deposited with the superintendent of insurance or other officer of another state, the superintendent of insurance of this state shall be furnished with the certificate of such state officer under his hand and official seal that he, as such officer, holds in trust on deposit for the benefit of all the policy holders of such company the securities above mentioned, giving the items of such securities, and stating that he is satisfied such securities are worth at least two hundred thousand dollars; the securities so deposited with the superintendent of insurance may be exchanged from time to time for other like securities, and so long as the corporation depositing the securities shall continue solvent and comply with the laws of this state it shall be permitted by the superintendent of insurance to collect the interest or dividend on such deposit; provided, also, that any company which shall execute any bond as surety under the provisions of this act shall be estopped in any proceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute such instrument or assume such liability; and the superintendent of insurance and other officers of this state having the control or custody of any deposit of \$30,000 in securities heretofore required to be made by companies of other states under section 3641 of the Revised Statutes of Ohio shall deliver the same to the depositors thereof and said officers shall be and are hereby relieved from further custody control or liability for or in respect of the same or the surrender thereof from and after the passage of this act. (April 1, 1902, 95 v. 81; April 21, 1898, 93 v. 170; April 13, 1894, 91 v. 138; April 11, 1893, 90 v. 157; March 16, 1891, 88 v. 102; April 30, 1885, 82 v. 185; R. S. 1880; April 14, 1874, 71 v. 65, § 8; S. & S. 299.)

See § 3593 and notes thereto.

§ 3641a. FIRE INSURANCE COMPANIES MAY INSURE AGAINST LIGHTNING, EXPLOSION AND TORNADOES. — All companies heretofore organized, or that may hereafter be organized, for the purpose of insuring against loss or damage by fire, may insure against loss or damage by lightning, explosions from gas, dynamite, gunpowder, and other like explosions and tornadoes. (April 9, 1891, 88 v. 304; March 27, 1884, 81 v. 93; April 18, 1883, 80 v. 170.)

§ 3641b. ACCIDENT AND GUARANTY COMPANIES MAY INSURE AGAINST ACCIDENTS TO EMPLOYEES, ETC.; DEPOSIT. — A company heretofore organized

Guaranty Companies, Bonds of, etc., § 3641c.

or that may hereafter be organized to do business under clause 2 of section 3641b,* chapter 11, title 2 of the Revised Statutes of Ohio, may make insurance to indemnify employers against loss or damage for personal injury or death, resulting from accidents to employees, or persons other than employees, subject, however, to the restrictions in said section provided; and, provided, that any company incorporated by or organized under the laws of any other state, or of a foreign government that is now doing business in this state by virtue of original section three thousand six hundred and forty-one b,* shall, on or before the first day of April after the passage of this act, and any company incorporated by or organized under the laws of any other state or government that may desire to do business in this state, shall, before being authorized to transact such business, deposit with the superintendent of insurance, for the benefit and security of the policy-holders residing in this state, a sum not less than fifty thousand dollars, in bonds of the United States or the state of Ohio, or of any city, county, township or other municipality in the state of Ohio, which shall not be received by the superintendent at a rate above their par value; the securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits. Said deposit shall be held by the superintendent of insurance for the benefit, security and protection of the policy-holders of the company residing within this state; and it shall be stipulated by the company that such deposit is made, and such sum set aside from the general assets for that purpose, the same to be held until all claims of policy-holders within this state are adjusted. Provided further, that the provisions of chapter two, title two of the Revised Statutes of Ohio, so far as the same may be applicable and not inconsistent with the provisions of this section shall apply to such companies organized under or incorporated by the laws of another state or government. (April 13, 1894, 91 v. 352; April 9, 1891, 88 v. 304.)

* "Section 3641b" should be "section 3641" as will be manifest by referring to original § 3641b in 88 v. 304.

See § 3593 and notes thereto.

Immediate notice; power of agent.

In a policy which insures against liability for injuries, a stipulation requiring immediate notice and information is of the essence of the contract, and cannot be waived by an agent without authority therefor.—*Travelers' Ins. Co. v. Myers et al.*, 44 W. L. B. 17 (1900).

Agent's knowledge is not notice.

That the agent who had taken the insurance had heard of the accident is not such notice as the policy requires.—*American Acc'dt. Co. v. Card*, 13 C. C. 154 (1897); s. c., 7 C. D. 504; affd. without report, 60 Oh. St. 583 (1899).

What is "immediate notice."

This term in the policy means written notice within a reasonable time, under the circumstances of the case; and where the facts are not disputed, what is reasonable time is a question of law.—*Travelers' Ins. Co. v.*

Myers, 44 W. L. B. 17 (1900); *American Acc'dt. Co. v. Card*, 13 C. C. 154 (1897); s. c., 7 C. D. 504, affd. without report, 60 Oh. St. 45 (1899); *Crane v. Standard Life Assn.*, 3 N. P. 318 (1890), 4 N. P. 309 (1896); affd. no report, 59 Oh. St. 617 (1898).

Ignorance as to happening of accident or existence of policy, as to affecting notice to company.

American Acc'dt. Co. v. Card, 13 C. C. 154 (1897); s. c., 7 C. D. 504, affd. no report, 60 Oh. St. 583 (1899); *Crane v. Standard Life Assn.*, 3 N. P. 318 (1896), 4 N. P. 309 (1896); affd. no report, 59 Oh. St. 617 (1898); *Coldham v. Ins. Co.*, 2 N. P. 358 (1895).

Notice of agent's authority.

When such policy contains a stipulation that "no agent has authority to waive or alter anything in the policy contained," and the same is accepted by the assured, it is both notice to and an agreement by the insured that an agent has no authority to waive or alter anything contained in the policy.—*Travelers' Ins. Co. v. Myers*, 44 W. L. B. 17 (1900). See as to powers of agent, notes to § 3644.

§ 3641c. SUFFICIENCY OF BONDS, ETC., EXECUTED BY COMPANIES; OTHER BONDS.—In all cases in which any bond, recognizance or undertaking is now, or hereafter may be required or permitted by law, with one or more sureties,

Directors — By-laws — Liability under Policy, §§ 3642, 3643.

the execution of the same or the guaranteeing thereof, as the case may be, as sole surety, shall be sufficient by a company authorized to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or by law allowed; and when so executed and guaranteed, shall be in all respects, a full and complete compliance with every requirement of law, ordinance, rule or regulation that such bond, undertaking or recognizance shall be executed and guaranteed by one surety or two or more sureties, or that such sureties shall be residents or house-holders or freeholders; and any judge, court or officer, whose duty it is to pass upon the account of any assignee, trustee, receiver, guardian, executor, administrator or other fiduciary, required by law to give bond as such, and whenever any such assignee, receiver, trustee, guardian, executor, administrator or other fiduciary, has given bond with a surety company as surety thereon, shall allow, in the settlement of the account of such assignee, receiver, trustee, guardian, executor, administrator or other fiduciary, a reasonable sum paid a company authorized under the laws of this state so to do, for becoming his surety on such bond, not exceeding, however, one-half of one per cent. per annum on the amount of such bond; unless such bond shall be in double the amount of the liability of such fiduciary, when the sum so allowed shall not exceed the sum of one-fourth of one per cent. per annum; provided, however, that such company has complied and continued to comply with the laws of this state relative to such companies, and with such requirements as to justification, as may be prescribed by the head of the department, court, judge, or officer required to approve or accept the same, and provided that such bond, recognizance or undertaking be approved by the head of the department, court, judge or officer required to approve or accept the same. This section shall apply to and authorize any surety company above defined to become surety upon the bond required by law of any state officer, (except the superintendent of insurance,) and of any county, township or municipal officer. Such surety company may be accepted by the officer or officers required to approve such bond, in lieu of the sureties now required by law. (April 27, 1896, 92 v. 320; April 11, 1893, 90 v. 157; February 3, 1891, 88 v. 14.)

Applies to cases existing at the time statute was passed.

Commercial Bank Assignment, 3 N. P. 286 (1895); s. c., 4 Dec. 228.

§ 3642. **DIRECTORS OF INSURANCE COMPANY TO ELECT OFFICERS: BY-LAWS AND REGULATIONS.** — The directors shall choose from their own number by ballot, a president, and shall fill all vacancies that may arise in the board, or in the presidency thereof; the board of directors, or a majority of them, when convened at the office of the company, may appoint a secretary and any other officers or agents necessary for transacting the business of the company, and pay such salaries and take such securities as they may judge reasonable; they may ordain and establish by-laws and regulations not inconsistent with the constitution and laws of this state and of the United States, as shall appear to them necessary for regulating and conducting the business of the company; but no new by-laws or regulations shall take effect until the same has been approved by the state commissioner of insurance and a copy thereof has been filed in the office of said commissioner, and they shall keep full and correct records of their transactions, which shall, at all times, be open to the inspection of the members or stockholders. (March 5, 1883, 80 v. 41; R. S. 1880; April 23, 1872, 69 v. 140, § 10; S. & S. 208.)

§ 3643. **EXTENT OF LIABILITY UNDER POLICY OF INSURANCE.** — Any person, company, or association, hereafter insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the

Liability under Policies, § 3643.

insurer, and a full description thereof to be made, and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium shall be paid, and in case of a partial loss the full amount of the partial loss shall be paid; and in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy; but in no case shall the insurer be required to pay more than the amount mentioned in its policy. (March 5, 1879, 76 v. 26, § 1.)

See § 3691.

To what policies applicable.

Section applies to all policies issued since it went into effect, i. e., July 1, 1879, insuring any building or structure in this state against loss by fire.—*Ins. Co. v. Leslie*, 47 Oh. St. 409 (1890).

Cannot be waived by agreement.

Founded on grounds of public policy and the neglect of company's agent to make the required examination and fix the insurable value, cannot defeat the operation of the statute. It cannot be regarded as conferring upon the assured a mere personal privilege, which can be waived by agreement.—*Pennsylvania Ins. Co. v. Drackett*, 44 W. L. B. 71 (1900); *Ins. Co. v. Leslie*, 47 Oh. St. 409, 417 (1890); *Ins. Co. v. Luce*, 11 C. C. 476 (1896); *Seyk v. Ins. Co.*, 74 Wis. 67 (1889).

Rebuilding clause repugnant to this section and void.

See *Milwaukee Ins. Co. v. Russell*, 65 Oh. St. 230 (1901).

Conditions in policy inconsistent with section.

Conditions in policy providing for a different measure of liability are qualified by this section. Such are,

Submission to appraisers to decide loss.

Phoenix Ins. Co. v. Port Clinton, etc., Co., 14 C. C. 160, 167 (1898); s. c., 7 C. D. 468; affirmed, 61 Oh. St. 643; *Ins. Co. v. Leslie*, 47 Oh. St. 409, 417 (1890); *Ins. Co. v. Luce*, 11 C. C. 476 (1896); s. c., 5 C. D. 210; *Seyk v. Ins. Co.*, 74 Wis. 67 (1889).

Arbitration clause invalid even as to partial loss.

Brown v. Hartford Fire Ins. Co., 12 Dec. 358 (1902).

That loss shall be estimated according to actual value at time of fire.

Ins. Co. v. Leslie, 47 Oh. St. 409, 417 (1890); *Thompson v. Ins. Co.*, 45 Wis. 388 (1878).

That loss shall be estimated according to cost of replacing property destroyed.

Ins. Co. v. Leslie, 47 Oh. St. 417 (1890).

That policy shall be void for nonoccupancy.

Moody v. Ins. Co., 52 Oh. St. 12, 23 (1894).

That company shall have right to rebuild.

Russell v. Ins. Co., 6 N. P. 325 (1899); s. c., 8 Dec. 613.

There must be increased risk or fraud.

In the absence of any increase in the risk or intentional fraud, the measure of liability in case of total loss is the full amount named in the policy.—*Ins. Co. v. Leslie*, 47 Oh. St. 409 (1890); *Ins. Co. v. Hull*, 51 Oh. St. 270, 278. (1894); *San Mutual Ins. Co. v. Hock*, 8 C. C. 341 (1894); s. c., 4 C. D. 553; *Moody v. Ins. Co.*, 52 Oh. St. 12, 23 (1894); *German Ins. Co. v. Mirick*, 38 W. L. B. 172 (1897); *Hubbard v. Executor et al.*, 6 N. P. 249 (1899); s. c., 8 Dec. 111; *Hilliard v. Ins. Co.*, 7 N. P. 561 (1895); s. c., 5 Dec. 576.

A condition of premises reasonably apparent, no defense.

Where there has been no intentional fraud, a condition of the property at the time of insurance, which the agent by making the required examination could have reasonably discovered, cannot prevail to defeat recovery on the policy.—*Ins. Co. v. Leslie*, 47 Oh. St. 409 (1890); *United, etc., Ins. Co. v. Kukral et al.*, 7 C. C. 356 (1893); s. c., 4 C. D. 633.

Value of property or statements regarding it, immaterial.

Where there is no intentional fraud, it is not competent for the company to prove that the value of the property is less than the amount of the policy, and statements of the assured in the application, in reference to the value of the property and its condition, are immaterial.—*Ins. Co. v. Leslie*, 47 Oh. St. 409 (1890); *United Ins. Co. v. Kukral et al.*, 7 C. C. 356 (1893); s. c., 4 C. D. 633; *Schields v. Ins. Co.*, 6 N. P. 134 (1899); s. c., 8 Dec. 45; *Hilliard v. Ins. Co.*, 7 N. P. 561 (1895); s. c., 5 Dec. 576; *Hubbard v. Executor et al.*, 6 N. P. 249 (1899); s. c., 8 Dec. 111. But see *Farmers' Ins. Co. v. McCluckin*, 40 Oh. St. 42, infra.

As to election to rebuild and compromise with portion of companies upon liability of others.

Good v. Ins. Co., 43 Oh. St. 394 (1885).

Liability under Policies, § 3643.

Examination required relates to physical condition.

The examination required to be made relates to the physical condition of the premises, such as an inspection would disclose. "The change" mentioned in statute relates to some physical change.—*Webster et al. v. Ins. Co.*, 53 Oh. St. 558; affirming 7 C. C. 511 (1895); s. c., 4 C. D. 704.

Has no relation to incumbrances or title.

The examination required does not relate to incumbrances or to the title of the premises. Nor does the "change" have reference to a change in incumbrances.—*Webster et al. v. Ins. Co.*, 53 Oh. St. 558; affirming 7 C. C. 511 (1895); s. c., 4 C. D. 704.

United, etc., Ins. Co. v. Kukral et al., 7 C. C. 356; s. c., 4 C. D. 633, and *People's, etc., Ins. Co. v. Bowersox, Rec'r*, 5 C. C. 444; s. c., 3 C. D. 218, would seem, in the decisions of the circuit court, to present the doctrines that the statute applies to incumbrances. These decisions were affirmed without report in 51 Oh. St. 609 (1894), and 51 Oh. St. 567 (1894), respectively. However, in *Webster et al. v. Ins. Co.*, supra, the court says, p. 569, that its decision in this case is not in conflict with the two former cases. An explanation for this seeming conflict may be found in *Ins. Co. v. Bowersox*, supra, where it is held that a judgment of *cognovit* is not an incumbrance; and in *Sun Fire Office v. Clark*, 53 Oh. St. 414 (1895), in which it is held: "A policy containing a provision, that if any change takes place in the title, interest, or possession of the property, by sale, transfer, or conveyance, without the consent of the insurer, the policy shall become void, is not invalidated by the making of a mortgage."

See also *Henderson v. Ins. Co.*, 2 N. P. 17 (1894); s. c., 2 Dec. 189, in which it was held that the statute relates to incumbrances.

Additional insurance is increase in risk.

Additional insurance increases the risk as a matter of law, hence a condition against it does not come within the statute.—*Sun Fire Office v. Clark*, 53 Oh. St. 414, 427 (1895).

Submission to appraisal after loss, not binding.

Voluntarily submitting value of property destroyed to appraisal, or an agreement to arbitrate, does not waive the right to insist upon full payment of the policy.—*Ins. Co. v. Luce*, 11 C. C. 476 (1896); s. c., 5 C. D. 210; *Pennsylvania Ins. Co. v. Leslie*, 47 Oh. St. 409, 417 (1890); *Ins. Co. v. Drackett*, 44 W. L. B. 71 (1900); *Seyk v. Ins. Co.*, 74 Wis. 67 (1889).

Claim for less amount not an estoppel.

A claim for less amount than that to which assured is entitled will not estop assured from claiming full amount; nor will any estimate of value made by assured in his proof of loss

affect his right to the full amount.—*Schild v. Insurance Co.*, 6 N. P. 134 (1899); s. c., 8 Dec. 45.

Applies though concurrent insurance.

In case of total loss, the full amount of the policy must be paid, notwithstanding there is concurrent insurance in other companies.—*Phoenix Ins. Co. v. Port Clinton, etc., Co.*, 14 C. C. 160; s. c., 7 C. D. 468; affirmed, 61 Oh. St. 643 (1899); overruling *Cincinnati Coffin Co. v. Ins. Co.*, 7 W. L. B. 342; *Havens v. Ins. Co.*, 123 Mo. 403 (1891); *Oshkosh Co. v. Ins. Co.*, 71 Wis. 454 (1888).

Extent of loss for jury.

Phoenix Ins. Co. v. Port Clinton, etc., Co., 14 C. C. 160; s. c., 7 C. D. 468; affirmed, 61 Oh. St. 643 (1899).

What constitutes total loss.

Phoenix Ins. Co. v. Port Clinton, etc., Co., 14 C. C. 160; s. c., 7 C. D. 468; s. c., 61 Oh. St. 643 (1899); *Pennsylvania Ins. Co. v. Drackett*, 44 W. L. B. 71 (1900); *German Ins. Co. v. Eddy*, 36 Neb. 461 (1883); *Ins. Co. v. McIntyre*, 90 Texas. 170 (1896); *Corbett v. Ins. Co.*, 155 N. Y. 389 (1898); *Havens v. Ins. Co.*, 123 Mo. 403 (1894); *Lindner v. Ins. Co.*, 93 Wis. 526 (1896); *Williams v. Ins. Co.*, 54 Cal. 442 (1880).

What constitutes structure.

A boiler and engine may constitute a structure.—*Ins. Co. v. Luce*, 11 C. C. 476 (1896); s. c., 5 C. D. 210.

Judgment on cognovit not an incumbrance.

A judgment on *cognovit* does not constitute an incumbrance within the meaning of a condition which avoids the policy, if the assured suffers an incumbrance to be placed on the property.—*People's Ins. Co. v. Bowersox, Rec'r*, 51 Oh. St. 567; affirming 5 C. C. 444 (1894); s. c., 3 C. D. 218.

What constitutes occupancy.

Moody v. Ins. Co., 52 Oh. St. 12 (1894); *Eureka Ins. Co. v. Baldwin*, 62 Oh. St. 368 (1900); reversing 17 C. C. 143; s. c., 9 C. D. 118; *Ins. Co. v. Tucker*, 92 Ill. 64 (1879).

Insurance of risk is for jury.

Eureka Ins. Co. v. Baldwin, 62 Oh. St. 368 (1900); *Henderson v. Ins. Co.*, 2 N. P. 17 (1894); s. c., 2 Dec. 51.

Apparently conflicting decision.

In an application for insurance which was made a part of the policy, the assured covenanted that the insurance asked for on his dwelling did not exceed two-thirds of its value. In an action on the policy, issue was joined on the averment of the company that the covenant was untrue, as the applicant well knew when he made it. Conflicting evidence was before the jury on this point, but

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the court directed a verdict for the plaintiff for "the value of the property destroyed by fire covered by the policy, not exceeding the amount of insurance upon the part thus destroyed," and refused to give any instruction applicable to the issue on the covenant. Held, this was error.—*Farmers' Ins. Co. v. McClucklin*, 40 Oh. St. 42 (1884).

(This case was decided at the January, 1883, term, but there is no reference made to

this section, nor to the date of the policy on which the action was brought.)

Action, misjoinder.

Where arbitration is had on several policies, an action must be brought on each to recover the pro rata part of the award. All the companies cannot be joined in an action for the whole award.—*Margolis v. London, etc., Ins. Co.*, 12 Dec. 166 (1902).

§ 3644. **WHEN SOLICITOR HELD TO BE AGENT OF INSURER.**—A person who solicits insurance and procures the application therefor, shall be held to be the agent of the party hereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding. (March 5, 1879, 76 v. 26, § 2.)

Responsible for mistake of agent.

A soliciting agent, procuring for a company risks and applications on which policies are issued, is, in filling up such application, the agent of the company, and not the assured; and if the agent makes a mistake in wrongly stating facts which were correctly given him by the insured, the company is bound by and responsible for such mistake.—*Ins. Co. v. Williams*, 39 Oh. St. 584 (1883); *Phoenix Ins. Co. v. Bowersox*, 6 C. C. 2 (1892); s. c., 3 C. D. 321; *Hilliard v. Ins. Co.*, 7 N. P. 561 (1895); s. c., 5 Dec. 576; *Union Ins. Co. v. McGookey*, 33 Oh. St. 555, 566 (1878); *Phillips v. Ins. Co.*, 13 C. C. 679 (1894); s. c., 6 C. D. 266.

Company bound though agent act beyond authority.

Union Ins. Co. v. McGookey, 33 Oh. St. 555, 566 (1878); *Ohio Farmers' Ins. Co. v. Danison*, 38 W. L. B. 163 (1897). But see *Eureka Ins. Co. v. Baldwin*, 62 Oh. St. 368 (1900).

As to power to appoint sub-agents.

See *Krumm v. Jefferson Fire Ins. Co.*, 40 Oh. St. 225 (1883).

Acts of sub-agent.

A sub-agent duly appointed is the agent of the company, and his acts in this capacity are binding upon the company.—*Krumm v. Ins. Co.*, 40 Oh. St. 225 (1883).

Agent may waive payment.

An agent authorized to make contracts of insurance and issue policies may waive payment in cash of the premiums and give time for their payments, unless restricted by his

authority, of which the assured has notice.—*Machine Co. v. Ins. Co.*, 50 Oh. St. 549 (1893).

Whether statements were correctly stated by assured, question for jury.

Phillips v. Ins. Co., 13 C. C. 679 (1894); s. c., 6 C. D. 266.

Condition in policy cannot waive statute.

Where statute makes the agent of the company, no condition in the policy can make him the agent of the assured.—*Brewing Co. v. Ins. Co.*, 63 N. W. 565 (1895); *Ins. Co. v. Chamberlain*, 132 U. S. 304 (1889).

Agent applying to another agent for policy, both considered agents of company.

Central Ohio Ins. Co. v. Provision Co., 13 C. C. 661 (1894); s. c., 7 C. D. 562.

Power of agent.

See *Dayton Ins. Co. v. Kelley*, 24 Oh. St. 345 (1873); *Union Central Ins. Co. v. Hook*, 62 Oh. St. 256 (1900); *Eureka Ins. Co. v. Baldwin*, 62 Oh. St. 368 (1900); *Travelers' Ins. Co. v. Myers et al.*, 44 W. L. B. 17 (1900); *Germania Ins. Co. v. Shoemaker*, 22 W. L. B. 315 (1889), and cases under this section.

Power of agent to accept cancellation.

There is no presumption that an insurance agent authorized by a person to secure insurance has authority, after he has secured the policy, to receive notice of cancellation of the policy.—*Johnson v. North British, etc., Ins. Co.*, 66 Oh. St. 6 (1902).

§ 3645. **HOW CONTRACTS TO BE EVIDENCED.**—All policies or contracts of insurance made or entered into by the company may be made either with or without the seal of the company; and they shall be subscribed by the president or such other officer as may be designated by the directors for that purpose, and shall be attested by the secretary, and, when so subscribed and attested, they shall be obligatory on the company. (April 27, 1872, 69 v. 140, § 11; S. & S. 208.)

Stock — Branches of; Transfer of, §§ 3646, 3647.

Does not limit mode of creating liability, merely prescribes final execution.

Where the charter of a company confers upon it power "generally to do and perform all things relative to the object of the association," and provides in a subsequent section that "all policies or contracts of insurance shall be subscribed by the president or some other officer designated by the board of directors for that purpose," the latter provision does not disable the company from binding itself by contracts for policies and immediate insurance executed in other modes and by other agents, but merely prescribes the manner in which the final contract or policy shall be executed.—*Dayton Ins. Co. v. Kelley*, 24 Oh. St. 345, 364 (1873); *Franklin Ins. Co. v. Colt*, 87 U. S. 560 (1874).

Parol contract valid.

In *Cockerill v. Ins. Co.*, 16 Ohio, 148 (1847), it was held "that a policy of insurance must be in writing," and "that a verbal forfeiture of a policy is not binding." But see *Amazon Ins. Co. v. Wall*, 31 Oh. St. 628 (1877), where, on p. 633, Okey, J., says: "*Cockerill v. Ins. Co.* is virtually overruled in *Ins. Co. v. Kelley*, supra."

See, also, *Palm v. Ins. Co.*, 20 Ohio, 529 (1851), and note p. 537; *Ins. Co. v. Shaw*, 94 U. S. 574 (1876), and *Machine Co. v. Ins. Co.*, 50 Oh. St. 549 (1893), where it is held: "A valid contract of insurance may be made by parol, when not forbidden by statute or a provision of the company's charter, which has been brought to the knowledge of the other contracting party."—*Ins. Co. v. Adler*, 71 Ala. 516 (1882); *Strohm v. Ins. Co.*, 33 Wis. 650 (1873); *Walker v. Ins. Co.*, 56 Me. 371 (1868).

Same effect.

Walker v. Ins. Co., 56 Me. 371 (1868).

Policy may be altered by parol.

Halliday v. Ins. Co., 1 W. L. B. 286 (1876).

Policy may be renewed by parol.

McCabe v. Ins. Co., 47 L. R. A. (N. D.) 641 (1898).

Not within statute of frauds.

Ins. Co. v. Spiers, 87 Ky. 286 (1888); *Farnborn v. Ins. Co.*, 16 Gray, 418 (1860).

If terms of contract are complete, its delivery is immaterial.

When the terms of an executed policy have been unconditionally accepted by the assured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent.—*Machine Co. v. Ins. Co.*, 50 Oh. St. 549, 557 (1893); *Connecticut Ins. Co. v. Bennett*, 1 N. P. 71; affirmed, 56 Oh. St. 749 (1897).

Policy only evidence of contract.

Policy only evidence of contract, and the latter may be shown by parol, unless restricted by statute.—*Machine Co. v. Ins. Co.*, 50 Oh. St. 549, 555 (1893).

When risk commences.

When a contract of insurance has been completed by the party applying for insurance doing all that is required on his part, although the agent acting for the company has no power to issue the policy, the risk commences from the time of making such contract. Where such contract is mailed to the office of the company, from which the policy is to issue, the company is liable, although the loss occurs before the arrival of the contract.—*Palm, Admr., v. Ins. Co.*, 20 Oh. 529 (1851); *Krumm v. Ins. Co.*, 40 Oh. St. 225 (1883). See, also, *Machine Co. v. Ins. Co.*, 50 Oh. St. 549 (1893).

Approval not necessary.

If such contract be fair and strictly within the rules of the company, such liability will exist, although there be printed on the blank application the qualification that the policy will issue "if approved" by the company. Such qualification only saves the company the right to object to an unfair contract.—*Palm, Admr., v. Ins. Co.*, 20 Oh. 529 (1851).

Equity will compel issuance of policy where valid agreement has been entered into for it.

Ins. Co. v. Taylor, 52 Miss. 441 (1876).

§ 3646. **TRANSFERS OF STOCK.** — Transfers of stock may be made on the books of the company by any shareholder, or his legal representative, subject to such reasonable restrictions as the directors may, from time to time, make in their by-laws, and subject, also, to any provisions of the laws of this state relating to such transfers. (April 27, 1872, 69 v. 140, § 12; S. & S. 208.)

§ 3647. **HOW STOCK MAY BE INCREASED.** — When a company organized under this chapter requires, in the opinion of the directors thereof, an increased amount of capital, they shall, if authorized by the holders of two-thirds of the stock, file with the secretary of state a certificate setting forth the amount of such desired increase, and thereafter such company shall be entitled to have the increased amount of capital fixed by such certificate; and the examination of securities composing the

Dividends, etc., § 3648.

capital stock thus increased shall be made in the same manner as is provided in section thirty-six hundred and forty for capital stock originally paid in. (April 27, 1872, 69 v. 140, § 13; S. & S. 209.)

§ 3648. DIVIDENDS TO BE PAYABLE FROM SURPLUS PROFITS ONLY; RESERVATIONS THEREFROM; PENALTY FOR VIOLATIONS OF THIS SECTION; SCRIP DIVIDENDS BY PARTICIPATING OR MUTUAL COMPANIES; INTERPRETATION OF WORDS "YEAR" AND "PROFITS;" ACCUMULATION OF A PERMANENT FUND; RIGHTS OF POLICY HOLDER AFTER DETERMINATION OF POLICY.—No fire insurance company organized under any law of this state shall make any dividend except from the surplus profits arising from its business; and in estimating such profits there shall be reserved therefrom:

First. A sum equal to fifty per cent. of the whole amount of premiums on unexpired risks and policies, which is hereby declared to be unearned premiums.

Second. All sums due the company on bonds and mortgages, bonds, stocks, and book accounts, of which no part of the principal nor the interest thereon has been paid during the preceding year, and on which an action has not been commenced, or which, after judgment obtained thereon, has remained more than two years unsatisfied, and on which interest has not been paid; and

Third. All interest due or accrued, and remaining unpaid, for which the company does not hold securities as hereinbefore provided. Any dividend made contrary to the provisions of this section shall subject the company which makes the same to a forfeiture of its charter, and each stockholder who receives it to a liability to the creditors of the company to the extent of the dividend received, besides the other penalties and punishments prescribed by law; but this section shall not prevent the declaration of scrip dividends by participating or mutual companies, yet no such scrip dividend shall be declared to an amount in excess of or be paid except from profits, after reserving all sums above provided, including the whole amount of premiums on unexpired risks; and the word "year" wherever used in this section shall be construed to mean the calendar year, and the "profits" of a mutual insurance company are that portion of its cash funds not required for payment of losses and expenses nor set apart for any purpose required by law. Any such company may in its by-laws, provide for the accumulation of a permanent fund, by reserving a portion of the net profits, to be invested and be a reserve for the security of the insured. When the business of such company is confined to the state of Ohio, such reservation shall not exceed twenty-five per cent. of said net profits; and when the sum so accumulated amounts to two per cent. of the sum insured by all policies in force, the whole of the net profits thereafter shall be divided among the insured at the expiration of their policies. But, any such company doing business outside the state of Ohio may set aside and thereafter maintain a permanent fund equal to the minimum amount of net cash assets or capital required to do business in any other state or states, according to the insurance laws thereof. The permanent fund so accumulated shall be used for the payment of losses and expenses, whenever the cash funds of the company in excess of an amount equal to its liabilities are exhausted; and whenever the said fund is drawn upon, the reservation of profits as aforesaid shall be renewed or continued until the limits of accumulation as herein provided is reached, but within a reasonable time after the determination of any policy the owner thereof shall be entitled to receive, and shall be paid his pro rata share of all net profits not included in the aforesaid permanent fund, and a scrip dividend for his contribution to said fund. (April 10, 1900, 94 v. 121; April 14, 1888, 85 v. 273, 274; R. S. 1880; 70 v. 147, § 14; S. & S. 209.)

Unearned premium not a debt.

The sum set aside as unearned premiums, as provided by this section, is not a debt

within the meaning of § 2730. *Ins. Co. v. Capelar*, 38 Oh. St. 560, 568 (1883). See § 3634.

Real Estate — Municipal Companies, §§ 3649, 3650.

§ 3649. **WHAT REAL ESTATE COMPANY MAY HOLD.** — No company organized under this chapter shall purchase, hold, or convey real estate, except for the purposes and in the manner herein set forth, to wit:

1. Such as is requisite for its convenient accommodation in the transaction of its business; or,

2. Such as is mortgaged to it in good faith, by way of security for loans previously contracted, or for money due; or,

3. Such as is conveyed to it in satisfaction of debts previously contracted in its legitimate business, or for money due; or,

4. Such as is purchased at sales upon judgment, decree, or mortgages obtained or made for such debts.

No such company shall purchase, hold, or convey real estate in any other case, or for any other purpose; and all such real estate as may be acquired as aforesaid, and which is not necessary for the accommodation of the company in the transaction of its business, shall be sold and disposed of within two years after title thereto is acquired, unless the company procure a certificate from the superintendent of insurance that its interests will suffer materially by a forced sale thereof, when the sale may be postponed for such period as the superintendent shall direct in such certificate. (April 27, 1872, 69 v. 140, § 15; S. & S. 209.)

§ 3650. **LIABILITY OF MEMBERS OF MUTUAL COMPANIES TO ASSESSMENT; ASSESSMENTS, HOW MADE; FOR WHAT PURPOSES A DEBT MAY BE CREATED.** — Every person who effects insurance in a mutual company, and continues to be insured, and his heirs, executors, administrators, and assigns shall thereby become members of the company during the period of insurance, shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability; and the directors shall, as often as they deem necessary, settle and determine the sum to be paid by the several members thereof, and publish the same in such manner as they may choose, or as the by-laws prescribe, and the sum to be paid by each member shall always be in proportion to the original amount of such liability, and shall be paid to the officers of the company within thirty days next after the publication of such notice; provided, that whenever such company is not possessed of cash funds above its reinsurance reserve sufficient for the payment of incurred losses and expenses, it shall be deemed to have impaired its capital, and when such impairment shall exceed twenty-five per cent. of the reinsurance reserve required to be maintained, it shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities and to make good the reinsurance reserve; and no such company shall borrow money or create a debt unless for the purpose of necessary office buildings, to continue beyond the period when such assessment may be collected and applied to the payment thereof, and no member shall be assessed for liabilities incurred prior to his membership. (Passed April 14, 1888; took effect July 1, 1888; 85 v. 273, 275; April 15, 1882, 79 v. 133; R. S. 1880; April 27, 1872, 69 v. 140, § 16.)

No application to mutual protective associations.

Has no application to mutual associations organized under §§ 3686 to 3690. — Richards, Recr., v. Swain et al., 7 N. P. 68 (1899); s. c., 9 Dec. 70.

No authority to cancel note; liability thereunder.

There is no statute authorizing the directors of a mutual company to cancel the policy

and premium note once executed, on the ground that the risk is undesirable, if the policy does not reserve such right. But where it has been done in good faith, and the assured has accepted the returned premium note, he is relieved from liability for assessments on such note by the receiver of the insurance company. — Mansfield et al. v. Franklin Furn. Co., 12 C. C. 222 (1896); s. c., 4 C. D. 473; affirmed, 54 Oh. St. 653; Wadsworth et al. v. Davis, 13 Oh. St. 123 (1862).

Mutual Companies, Assessments of, § 3651.

Liability under canceled note; jurisdiction.

A policy holder, whose policy and premium note has been canceled, is not excused from liability incurred during the life of the policy; yet his relation to the company is not such that he is represented by the receiver of the company, and the court did not thereby acquire jurisdiction of his person in a proceeding to wind up the affairs of the company.—*Wilhelm v. Parker, Recr.*, 17 C. C. 234 (1898); 9 C. D. 724.

Loss and payment of same by company does not extinguish assured's contingent liability.

Trustees v. Houston, 35 W. L. B. 182 (1896); *Ins. Co. v. Society et al.*, 117 Mass. 199 (1875); *Machine Co. v. Partridge*, 25 N. H. 369 (1852).

Extent of liability.

No member is liable to pay assessments to pay losses occurring before he became a member, or which may have occurred after ceasing to be a member.—*State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885).

Failure to pay assessments, works forfeiture.

Where a holder of a policy leaves the payment of assessments to his bookkeeper, who proves a defaulter and fails to pay them, such act is not an unavoidable accident or mistake, for which a court will grant relief against forfeiture.—*Graveson v. Cincinnati Life Ass'n*, 8 C. C. 172 (1894); s. c., 6 C. D. 327. See *Ins. Co. v. Troy*, 20 C. C. 644 (1900); s. c., 10 C. D. 761.

Waiver of forfeiture.

The fact that the forfeiture of the policy was not declared sooner by the association than it was as it had a right to do, does not amount to a waiver of its right to forfeit the policy.—*Graveson v. Cin. Life Ass'n*, 8 C. C. 172 (1894); s. c., 6 C. D. 327; *Phoenix Ins. Co. v. Hoffler*, 2 C. C. 131 (1890); s. c., 1 C. D. 403; reversed, 23 W. L. B. 108.

Member's default will not terminate liability.

American Ins. Co. v. Sorter, 1 Clev. Rep. 133 (1878); *Susquehanna Ins. Co. v. Leavy*, 136 Pa. St. 499 (1890); *Huntley v. Perry*, 38 Barb. 569 (1860).

Insolvency or termination of company no defense.

Corey v. Sherman, 32 L. R. A. (1a.) 490 (1894); *Comm. v. Ins. Co.*, 112 Mass. 116 (1873).

Directors may compromise liability on assessments.

Wadsworth et al. v. Davis, 13 Oh. St. 123 (1862).

Assessments can only be made by authorized officers.

Assessments can only be made by officers thereto authorized, and the failure to pay any assessment otherwise made is not ground of forfeiture.—*Bates v. Benef. Ass'n*, 51 Mich. 587 (1883); *Ins. Co. v. Chase*, 56 N. H. 341 (1876).

Assessments must be borne equally.

Assessments must be borne by the members with substantial equality. It seems that only those who are insolvent can be excused from paying. If others refuse to pay, the company must enforce payment by suit.—*Planters Ins. Co. v. Comfort*, 50 Miss. 662 (1874).

Directors may exercise discretion as to amount.

Directors may exercise reasonable discretion in fixing amount of assessment. But if they make assessments in anticipation of future losses they are invalid.—*Rosenberger v. Ins. Co.*, 87 Pa. St. (1878); *Ins. Co. v. Circuit Judges*, 100 Mich. 606 (1894).

What is unequal assessment.

David v. Parcher et al., 82 Wis. 488, 492 (1892).

Statute of limitations runs from date of levy.

Statute of limitations as to assessments or deposit note does not run until levy made by the directors.—*Lycoming Ins. Co. v. Batcheller*, 62 Vt. 148 (1890); *Smith v. Bell*, 107 Pa. St. 352 (1884); *Wardle v. Hudson*, 96 Mich. 432 (1893).

But runs immediately if deposit note is intended to make up required capital.

Howland v. Edmonds, 24 N. Y. 307 (1862).

Misrepresentations of agent as to liability on policy.

It is no defense to an action to enforce the contingent liability of the assured that the policy was represented as a stock policy, that there would be no assessments and no further liability.—*Mansfield v. Ice Co.*, 28 W. L. B. 113 (1892); *Mansfield v. Randall*, 28 W. L. B. 114 (1892); *American Ins. Co. v. Sorter*, 1 Clev. Rep. 133 (1878).

See §§ 3634, 3651, 3652 and 3686, and notes thereto.

§ 3651. ENFORCEMENT OF ASSESSMENTS; PARTIAL PAYMENT OF LOSS.

—If a member neglect or refuse, for the space of thirty days after the publication of such notice, and after demand for payment, to pay the sum assessed upon him in (as his) proportion of any loss as aforesaid, the directors may sue for and recover the whole amount of contingent liability, with cost of suit; but execution shall only

Mutual Companies, Assessments — Policies — Reports, §§ 3652 3654.

issue for assessments and costs as they accrue, and every such execution shall be accompanied by a list of losses for which the assessment is made; and if the whole amount of such liability be insufficient to pay the loss occasioned by any fire or fires, the sufferers insured by the company shall receive, toward making good their respective losses a proportional share of the whole amount of such liability, according to the sums by them respectively insured; but no member shall ever be required to pay for any loss occasioned by fire, or inland navigation, more than the whole amount of such liability. (Passed April 14, 1888; took effect July 1, 1888; 85 v. 273, 275; R. S. 1880; April 27, 1872, 69 v. 140, § 16.)

Noncompliance of corporators with charter, no defense.

A member of a mutual fire insurance company, when sued upon an assessment upon his deposit note to pay a loss occasioned by fire, cannot set up as a defense that he and his

associate corporators have neglected to comply with the requirements of their charter.—*Trumbull Mutual Ins. Co. v. Horner*, 17 Oh. 407 (1848). See, also, *Richards, Recr. v. Swaine & McCormick Co. et al.*, 7 N. P. 68 (1898); s. c., 9 Dec. 70. See notes to § 3650.

§ 3652. **HOW ASSESSMENTS AND NOTICE PROVED.**—In actions for the recovery of assessments duly levied by the directors of any mutual fire insurance company of this state, or for money due on the liability of the members of any such company, the official statement of the president or secretary of such company, under seal, and sworn to, shall be received in court as evidence of the facts essential for making the same, and that such assessment, for the non-payment of which any such action is commenced, has been duly levied, and notice thereof given. (Passed April, 14, 1888; took effect July 1, 1888; 85 v. 273, 276; R. S. 1880; 39 v. 35, § 1; S. & C. 352.)

Parol proof not admissible to show assessment.

Phoenix Ins. Co. v. Bowersox, Recr., 6 C. C. 1 (1892); s. c., 3 C. D. 321.

If notice properly sent, immaterial as to its receipt.

If notice of an assessment is given in the prescribed manner, it is immaterial whether the person assessed received it or not.—*Greeley v. Ins. Co.*, 50 Ia. 86 (1878).

Waiver of prescribed manner of giving notice.

If notice is actually received by the insured, and he does not object to the manner in which he received it, though it was not served as the by-laws required, he will be deemed to have waived the informality.—*Hollister v. Ins. Co.*, 118 Mass. 478 (1875).

§ 3653. **WHAT KIND OF POLICIES COMPANY TO ISSUE.**—Every mutual company shall embody the word "mutual" in its title which shall appear upon the first page of every policy and renewal receipt, and every stock company shall express, upon the face of every policy and renewal receipt, in some suitable manner, that such policy or receipt is a stock policy or receipt; but neither class of companies doing business in this state, shall issue any policy other than that appropriate to its class, except that any mutual company now doing business in this state, having net assets not less than two hundred thousand dollars invested as provided in section thirty-six hundred and thirty-seven, may issue policies either upon the mutual or stock plan, and may continue to do such kind of business so long as its assets continue so invested, and may expose itself to loss on any risk or hazard, either by one or more policies, to an amount not exceeding five per cent. thereof. (April 27, 1872, 69 v. 140, § 17.)

Cited *Mansfield v. Ice Co.*, 28 W. L. B. 113, 115 (1892).

See *Ohio Farmers' Ins. Co. v. Maloney*, 33 W. L. B. 147 (1895).

§ 3654. **ANNUAL REPORTS OF COMPANIES; MUTUAL INSURANCE COMPANIES.**—The president or vice-president and secretary of such (each) insurance company organized under any law of this or any other state, and doing business in this state, shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the superintendent of insurance

Reports, etc., § 3654.

a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, and in the following form, namely:

First.—The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second.—The property or assets held by the company, specifying:

1. The value of the real estate owned by such company, where it is situated and the value of buildings thereon.

2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same is deposited.

3. The amount of cash in the hands of agents and in course of transmission.

4. The amount of loans secured by bonds and mortgages, which are first lien on real estate, and on which there is less than one year's interest due.

5. The amount of loans on which interest has not been paid within one year.

6. The amount due the company on which judgments have been obtained and the cash value thereof.

7. The amount of stocks in this state, the United States, of any city of this state, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market value of each kind of stock.

8. The amount of stock held as collateral security for loans, with the amount loaned on, and the par and market value of each kind of stock.

9. The amount of unpaid assessments on stock, premium notes or contingent liabilities.

10. The amount of interest due and unpaid and the amount of interest accrued but not due.

11. The amount of premium notes or contingent liabilities on which policies are issued.

12. The number of policies in force.

13. The amount insured under all policies in force.

14. The amount of premiums received thereon.

15. The amount and description of all other assets.

Third.—The liabilities of the company, specifying:

1. The amount of losses due and unpaid.

2. The amount of claims for losses resisted by the company.

3. The amount of losses incurred during the year, including those claimed and not due, and those reported to the company upon which no action has been taken.

4. The amount of dividends declared and due and remaining unpaid.

5. The amount of dividends, either cash or scrip, declared but not due.

6. The amount of money borrowed and the security given for the payment thereof.

7. The amount required for reinsurance, being in stock companies, a sum equal to fifty per cent. of the whole amount of premiums on unexpired risks and policies; and in mutual companies a sum equal to fifty per cent. of the cash premiums received on unexpired risks and policies.

8. The amount of all other existing claims against the company.

Fourth.—The income of the company during the preceding year, specifying:

1. The amount of cash premiums received.

2. The amount of notes or contingent assets received for premiums.

3. The amount of interest money received.

4. The amount of income received from other sources.

Reports, etc., § 3655.

Fifth. — The expenditure during the preceding year, specifying:

1. The amount of losses paid during the year, stating how much of the same accrued prior and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in each preceding statement.
2. The amount of dividends paid during the year.
3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.
4. The amount paid for taxes.
5. The amount of all payments and expenditures.
6. Amount of scrip dividend declared.

Every mutual fire insurance company created by or organized under any general or special law or act, and doing business in Ohio under any law of this state, upon or without the premium note plan, which shall, by its policy, by-laws or published statements of its financial affairs, claim the benefit of the guarantee fund, or the contingent liability of its policy-holders, as provided for in section 3634 of the Revised Statutes, as now in force, shall be held as having organized under the laws of this state as now in force, and be governed by all the provisions thereof as applicable to such companies; and every such mutual fire insurance company that shall neglect or refuse to make and forward to the superintendent of insurance such annual report of its affairs as is required by law, or shall refuse to allow or permit the superintendent of insurance free access to its books and papers, and investigate the financial standing of such company, the charter of every such company organized under the laws of this state as aforesaid, and so neglecting and refusing, shall thereby become forfeited, and the said superintendent of insurance shall proceed without delay to bring the affairs of such company to a close. (May 9, 1894, 91 v. 211; April 11, 1893, 90 v. 159; April 17, 1891, 88 v. 308; April 14, 1888, 85 v. 273, 276; R. S. 1880, 70 v. 147, § 18; S. & S. 211.)

Special charter does not exempt.

A company organized under a special charter, before the adoption of the present constitution, is subject to such reasonable regulations as the legislature may prescribe, which regulations serve to secure the ends for which the company was created, and not being repugnant to the franchises and privileges

granted in the charter, such a company will not be exempt from a compliance with § 3654 and § 3655, unless such exemption appears to have been clearly granted by its charter.—*State ex rel. v. Eagle Ins. Co.*, 50 Oh. St. 252 (1893); *Ins. Co. v. Ohio*, 153 U. S. 446, 453 (1894). See §§ 3634 and 3691-5.

§ 3655. SPECIAL REPORT REQUIRED OF CERTAIN INSURANCE COMPANIES; PENALTY. — The statement of any such company, the capital of which is composed in whole or in part of notes, shall, in addition to the foregoing, exhibit the amount of notes which originally formed the capital, and also what proportion of such notes is still held by the company and considered capital; and every company organized under any law of this state which fails to make and deposit such statement, or to reply to any inquiry of the superintendent, with respect to such statement, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance, to be recovered by action in the name of the state, and, on collection, paid into the state treasury for the benefit of the state common school fund; and the attorney-general, on the request of the superintendent of insurance, shall institute such action against any company so delinquent, in the court of appropriate jurisdiction in Franklin county, or in the court of appropriate jurisdiction of the county in which said company is located or has its principal place of business, as he prefers. (January 21, 1887, 84 v. 5; May 11, 1886, 83 v. 416; R. S. 1880; April 27, 1872, 69 v. 140, § 19; S. & S. 212.)

See note, § 3654.

Foreign Companies, License of, § 3656.

§ 3656. **FOREIGN COMPANIES MUST OBTAIN LICENSE OF SUPERINTENDENT.**—No company, association or partnership, incorporated, organized or associated under the laws of any other state of the United States, or of any foreign government, for any of the purposes mentioned in this chapter, which does a banking or any other kind of business in connection with insurance, shall, directly or indirectly, transact any business of insurance in this state, nor shall any such company, association or partnership do any such business in this state until it procures from the superintendent a certificate of authority so to do; nor shall any person or corporation act as agent in this state for any such company, association or partnership, directly or indirectly, either in procuring applications for insurance, taking risks or in any manner transacting the business of insurance, until it procures from the superintendent a license so to do, stating that the company, association or partnership has complied with all the requirements of this chapter applicable to such company, and depositing a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent or agents is established; nor shall any company, association or partnership organized under the laws of any other state, take risks or transact business of insurance in this state, directly or indirectly, unless possessed of the amount of actual capital required by similar companies formed under the provisions of this chapter, nor unless the capital stock of the company is paid up and invested as required by the laws of the state where it was organized, and if a live stock insurance company has deposited in such state or in this state, for the benefit of its policy-holders, securities approved by the insurance department of such state in an amount equal to one-fourth of its entire capital stock; but if the company is a mutual fire insurance company, it shall have actual cash assets of the same amount and description as is required of mutual fire insurance companies of this state, after organization, invested as required by the law of the state where such company was organized, and such companies must have either premium notes or contingent liability of the same amount as is required of similar fire insurance companies of this state, which contingent liability may be either in writing or be expressed in the policies issued by such company. (May 9, 1894, 91 v. 139; April 17, 1891, 88 v. 340; May 15, 1878, 75 v. 572, § 20; April 24, 1873, 70 v. 147, § 1.)

What is sufficient capital.

A mutual fire insurance company organized under the laws of another state, but similar to domestic companies, which has at least \$50,000 in premium notes, on which at least \$10,000 in cash has been paid before commencing the business of insuring, may, so far as capital is concerned, be admitted to do business in this state.—State ex rel. v. Moore, 42 Oh. St. 103 (1884).

Superintendent's discretion not subject to mandamus.

In considering the application of such insurance company for admission to do business in this state, the superintendent may inquire into its financial soundness, and if upon such inquiry, made in good faith, he is not satisfied, he is invested with discretion to refuse such admission, and his exercise of such discretion will not be controlled by mandamus.—State ex rel. v. Moore, 42 Oh. St. 103 (1884).

Cannot exercise discretion arbitrarily.

Superintendent has no power, however, in the exercise of a mere arbitrary discretion,

to refuse such admission.—State ex rel. v. Moore, 42 Oh. St. 103 (1884).

Incorporated as well as unincorporated associations must obtain license.

State ex rel. v. Ackerman et al., 51 Oh. St. 163 (1894).

Lloyd's policy — liability several.

Under a Lloyd's policy, under-written by fourteen parties, acting by their agent, each for a stipulated sum, the liability of the underwriters is several, not joint.—Gilchrist v. Transportation Co., 21 O. C. C. 19 (1900).

Quo warranto proper remedy against company doing business without license.

State ex rel. v. Ackerman, 51 Oh. St. 163 (1894).

Loan on note and mortgage not banking business.

Bank v. Ins. Co., 41 Oh. St. 1 (1885); Hall v. Kummer et al., 7 N. P. 394 (1898); s. c., 5 Dec. 176. See § 3604 and notes thereto.

Foreign Companies — Waivers, Statements, License, §§ 3657-3659.

§ 3657. **THE WAIVER COMPANIES MUST FILE.** — Any such company desiring to transact any business by an agent in this state, shall file with the superintendent a written instrument, duly signed and sealed, authorizing any agent of the company in this state to acknowledge service of process in this state for and in behalf of the company, consenting that service of process, mesne or final, upon any such agent, shall be taken and held to be as valid, as if served upon the company according to the laws of this or any other state or country, waiving all claim or right of error by reason of such acknowledgment of service, and consenting that suit may be brought against it in the county where the property insured was situate, or where the same was insured, and that service of process made therein by the sheriff of such county, by sending a copy thereof by mail, addressed to the company at the place of its principal office located in the state where it was organized, or, if it is a foreign company, to such company at the place of its principal office in the United States, at least thirty days prior to taking judgment in such suit, shall be as valid as if personally made upon the company according to the laws of this state, or any other state or government, and that if suit be brought against it after it ceases to do business in this state as aforesaid, and there be no agent of the company in the county in which suit is brought upon whom service of process can be had, service upon it may be had by the sheriff sending a copy thereof, mailed as aforesaid, and within the time aforesaid; but the sheriff's return shall show the time and manner of such service. (May 15, 1878, 75 v. 572, § 20.)

See § 3607 and notes.

Service by mailing as above provided, sufficient.

Mohr v. Ins. Co., 10 W. L. B. 82 (1883). See, also, Handy v. Ins. Co., 37 Oh. St. 371 (1881).

§ 3658. **MUST ALSO FILE STATEMENT.** — Every such company, association, or partnership shall also file with the superintendent a certified copy of its charter, or deed of settlement, together with a statement, under the oath of its president or vice-president, or other chief officer, and the secretary of the company, stating the name of the company, the place where it is located, and the amount of its capital, with a detailed statement of the facts and items required from the companies organized under the laws of this state by sections thirty-six hundred and fifty-three* and thirty-six hundred and fifty-four;* and they shall also file with the superintendent a copy of their last annual report, if any was made, under any law of the state by which it was incorporated. (May 15, 1878, 75 v. 572, § 20; R. S. 1880.)

* Sections 3653, 3654 should be sections 3654, | tions and the original act in 75 v. 572.
3655, as will be seen by examining these sec- |

§ 3659. **REVOCATION OF LICENSE OF FOREIGN INSURANCE COMPANY OTHER THAN LIFE.** — If any such company, association or partnership doing business within this state makes an application for a change of venue, or to remove any suit or action wherein such company has been sued by a citizen of this state, now pending, or hereafter commenced in any court of this state, to the United States district or circuit court, or to any federal court, or shall enter into any compact or combination with other insurance companies, or shall require their agents to enter into any compact or combination with other insurance agents or companies, for the purpose of governing or controlling the rates charged for fire insurance on any property within this state, or for the purpose of governing or controlling the rates per centum or amount of commission or compensation to be allowed agents for procuring contracts for fire insurance on any property within this state (provided that nothing herein shall prohibit one or more of such companies from employing a common agent or agents to supervise and advise of defective structures, suggest improvements to

Foreign Companies — Deposit, Reports, §§ 3660, 3661.

lessen the fire hazard, and to advise as to the relative value of risks), the superintendent of insurance shall forthwith revoke and recall the license or authority to it to do or transact business within this state, and no renewal of authority shall be granted to it for three years after such revocation; and it shall thereafter be prohibited from transacting any business in this state until again duly licensed and authorized. (April 14, 1900, 94 v. 165; May 1, 1891, 88 v. 485; May 4, 1885, 82 v. 231; R. S. 1880; May 15, 1878, 75 v. 572, § 20.)

See notes to § 3620.

See *Runck v. Cloud*, 8 N. P. 436 (1901).

§ 3660. CERTAIN COMPANIES MUST MAKE DEPOSIT.—A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of the policy-holders residing in this state, a sum not less than one hundred thousand dollars in stock or bonds of the United States, or the state of Ohio or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purpose of this chapter the capital of any foreign company doing fire insurance business in this state shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this state and of the other states of the United States, for the benefit of policy-holders in this state or in the United States, and its assets and investments in the United States certified according to the provisions of this chapter; but such assets and investments must be held within the United States, and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company and approved by the insurance commissioner of the state where invested, for the benefit of the policy-holders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same restrictions as companies of this state. (February 27, 1894, 94 v. 40; April 24, 1873, 70 v. 147, § 21; S. & S. 212.)

See § 3593.

§ 3661. ALL FOREIGN COMPANIES MUST MAKE ANNUAL STATEMENTS.—Every company, other than a life company, organized by act of congress, or under the laws of any other state or government, shall, annually, at the time, and in the form and manner, required of similar companies organized under the laws of this state, file a statement of its condition and affairs in the office of the superintendent of insurance; any company organized under or incorporated by any foreign government shall also furnish a supplementary statement for the year ending on the preceding thirty-first day of December, verified by the oath of the manager of such company residing in the United States, which shall comprise a report of its business and affairs in the United States, as required from companies organized in this state, together with any other information that may be required by the superintendent of insurance, and if such annual statement be satisfactory evidence to the superintendent of insurance of the solvency and ability of such company to meet all its engagements at maturity, and that the deposit is maintained as hereinbefore provided, he shall issue renewal certificates of authority to the agents of the company, certified copies of which shall be filed in the recorder's office of each county wherein an agency is located, during the month of January in each year, or within sixty days thereafter, which certificates shall be the authority of such agents to issue new policies in this state for the ensuing year. (April 27, 1872, 69 v. 140, § 22; S. & S. 213.)

Advertisements — Dividends — Cancellations, etc., §§ 3661a-3664.

§ 3661a. FIRE INSURANCE COMPANY TO INCLUDE IN ADVERTISEMENT ONLY ASSETS ADMITTED BY SUPERINTENDENT OF INSURANCE.— (No) fire insurance company, organized under the laws of this state, or admitted to do business in this state, shall, in any public advertisement, card, or circular, include in any statement of assets, any item of value, of a class or character not admitted by the superintendent of insurance of this state in the annual reports of said companies. And every such advertisement, card, or circular, containing a statement of assets, shall, in all cases contain also a full statement of all the liabilities of said company, including the reinsurance reserve, which in no case shall be less than fifty per cent. on the gross premiums received on all unpaid (unexpired) risks. (April 12, 1880, 77 v. 185.)

§ 3661b. PENALTY.— Any violation of this act, after the second notice from the superintendent of insurance of this state, shall render such company liable to a fine of one thousand dollars (\$1,000), and each subsequent violation to a similar fine, to be recovered for the benefit of the common school fund of the county, in an action to be instituted by the prosecuting attorney in the name of the state of Ohio, against said company. (April 12, 1880, 77 v. 185, 186.)

§ 3662. COMPANIES MUST APPLY DIVIDENDS TO STOCK NOTES. — Every company heretofore organized under any law of this state, for any of the purposes mentioned in this chapter, which has not called in the whole amount of its subscribed capital stock, whether the unpaid balance of such capital is secured by indorsed notes or otherwise, shall retain from each and every dividend declared to its stockholders, their heirs or assigns, fifty per cent. of such dividend, and apply the amount so withheld as a credit upon the balance remaining unpaid on the shares of such stockholders, until such balance shall be fully paid; and the dividends, from time to time so credited, with the capital previously paid in, shall be invested by the company in the manner required by section thirty-six hundred and thirty-seven; but if the dividends so credited did not, by the first of January, 1878, equal such balance in full, such company shall hereafter retain the whole amount of any and every dividend declared to its stockholders, their heirs or assigns, and shall credit and invest the same as aforesaid, until the whole subscribed capital, not less in any case than one hundred thousand dollars, shall be paid up and invested, and any company which violates any of the provisions of this section shall thereby forfeit its charter. (April 24, 1873, 70 v. 147, § 23.)

§ 3663. LIEN OF MUTUAL COMPANIES FOR PREMIUM NOTES. — All buildings insured by any mutual company shall be pledged to such company, together with the right and title of the assured in the lands upon which they are situate, to the amount of the premium note or contingent liability, and the company shall have a lien thereon to the amount of such note or liability, but the lien of the company shall not take effect until the company files with the recorder of the county in which the property insured is situate, a certificate, stating the date, number, and amount of premium note, or contingent liability, and such a description of the property insured as will enable any person readily to identify the same; the recorder shall record and index the certificate in his book of liens, for which he shall receive the sum of fifty cents; and all liens heretofore acquired by any such company shall continue in force under this chapter. (Passed April 14, 1888; took effect July 1, 1888, 85 v. 273, 278; R. S. 1880; April 27, 1872, 69 v. 140, § 24.)

See § 3634.

§ 3664. INSURED MAY REQUIRE FIRE POLICY TO BE CANCELED. — Any fire insurance company doing business under the laws of this state which hereafter issues policies of insurance covering any property located in this state, and on such

Policies — Cancellation, Rates, etc., §§ 3665-3668.

policies receives from the persons insured either cash payments of premium, or notes subject to assessment for payment of losses, or notes for the installments of premium, shall be required to insert in every policy so issued an obligation to cancel the policy at any time, upon the written request of the person insured, on conditions as provided in the following five sections. (April 4, 1878, 75 v. 88, § 1.)

Does not apply to cancellation by company.

Sections 3664 to 3667 apply only to cases in which the policy is canceled at the request of the insured, and not to cancellation by the company itself.—*Ins. Co. v. Brecheisen*, 50 Oh. St. 542 (1893).

Duty to cancel does not create legal bona fide debts under § 2730.

Debts to be deducted under § 2730 are actual debts and the obligation to refund under this section is contingent until the in-

sured exercises his option.—*French v. German Mutual Ins. Co.*, 12 Dec. 183 (1901).

Cancellation by company may be fixed by contract.

The parties to a policy are free to fix the terms and conditions upon which a policy may be canceled by the company; but when the insurance is terminated upon the request of the assured, the parties must comply with §§ 3664 to 3667.—*Ins. Co. v. Brecheisen*, 50 Oh. St. 542 (1893).

Cited in *Ins. Co. v. Cappelar*, 38 Oh. St. 560, 570 (1883).

§ 3665. **RATES FOR CANCELLATION OF CASH POLICIES.**—When a policy issued on the cash plan is canceled, in accordance with the provisions of the preceding section, the companies so issuing may retain customary short rates, as now established and charged by companies doing a cash business, for the time the policy has been in force, and return to the insured the unearned premium on the policy for unexpired time. (April 4, 1878, 75 v. 88, § 2.)

See § 3664 and notes. Cited *Ins. Co. v. Cappelar*, 38 Oh. St. 560, 571 (1883).

§ 3666. **RATES FOR POLICIES OF MUTUAL COMPANIES.**—When policies issued on the mutual plan are canceled, as provided in section thirty-six hundred and sixty-four, the companies so issuing must surrender to the insured the note or notes received from the insured for premium or payment of losses; such policies shall first be sent to the secretary or agent of the company, and within sixty days after the receipt thereof for cancellation the premium note shall be returned; but the assured must first pay his proportion of all losses which have actually occurred up to the date when the policy was received for cancellation, and the company shall not be liable for any loss under any such policy after it is returned for cancellation. (April 4, 1878, 75 v. 88, § 3.)

See § 3664 and notes.

§ 3667. **RATES WHEN PREMIUM IS PAID IN INSTALLMENTS.**—When policies issued on the installment plan are canceled, in accordance with the provisions of section thirty-six hundred and sixty-four, the companies so issuing may collect and receive of the insured customary short rates for the time the policy has been in force, to be computed on the full term of insurance mentioned in the policies as charged by such companies, and on receipt of such short rates must return all installment notes then unpaid, and refund to the insured any premium collected in excess of such short rates. (April 4, 1878, 75 v. 88, § 4.)

See § 3664 and notes.

§ 3668. **PREMIUM NOTES NOT NEGOTIABLE.**—When companies doing business under the laws of this state receive notes in consideration of premiums on their policies, they shall be required to insert on the face of each note the following words, to wit: "It is hereby understood and agreed that this note is not transferable." (April 4, 1878, 75 v. 88, § 5.)

Accident Companies — Consolidations, §§ 3669-3671.

§ 3669. SUPERINTENDENT TO ENFORCE CERTAIN PROVISIONS. — When it comes to the knowledge of the superintendent of insurance, or any officer having charge of the insurance department of this state, that any provision of the five preceding sections has been violated, he shall at once proceed to make a thorough investigation, and, upon receiving sufficient proof of such violation shall revoke the certificate of authority of the company guilty of such violation. (April 4, 1878, 75 v. 88, § 6.)

§ 3670. ACCIDENT INSURANCE COMPANIES AUTHORIZED; DEPOSIT OF SECURITIES FOR THE PURPOSE OF DOING BUSINESS IN ANOTHER STATE.— Companies may be organized for the special purpose of insuring persons against accidental personal injury or loss of life sustained while traveling by railroad, steamboat or other mode of conveyance, and making all and every insurance connected with the accidental loss of life, or personal injury sustained by accident, of every description whatever, and against expenses and loss of time occasioned by sickness or other disability, and on such terms and conditions, and for such periods of time, and confined to such countries and localities, and to such persons, as shall from time to time be provided for in the by-laws of the company; and when any company so organized desires to do business in any other state, by the laws of which to qualify it therefor, it is required to make a deposit of securities assigned in trust for the benefit of its policy-holders with an officer of this state, it shall be, and hereby is made the duty of the state treasurer to receive such deposit, and issue therefor to such company his receipt, giving a pertinent description of said securities and a certificate of the market value of the same, and he shall also issue a like certificate to the superintendent of insurance, who shall place the same on file in his office. Such company shall have the right to exchange said securities for other like securities, in whole or in part, as far as its business may require, and to wholly withdraw the same should it discontinue business in such other state; but all such changes or withdrawals of securities shall be at once duly certified by the treasurer to the superintendent of insurance. (May 1, 1885, 82 v. 210; R. S. 1880; February 7, 1865, 62 v. 12, § 1; S. & S. 230.)

§ 3671. HOW COMPANIES MAY CONSOLIDATE. — When any joint stock fire and marine insurance company of this state, heretofore organized, or that may hereafter be organized, determines by a vote of the holders of two-thirds of its stock to consolidate and make joint stock with any other like company or companies engaged in or incorporated for like business, and each of such companies agrees, by the vote aforesaid, to such consolidation, such companies may, by a vote of the holders of a majority of the stock so consolidated, choose and determine under which corporate organization or articles of association of the consolidating companies, and under what name, their future business shall be conducted; upon filing with the superintendent of insurance a certificate of such consolidation, the companies shall from thenceforth become and be consolidated under the corporate organization or articles of association and corporate name thus chosen; and thereupon all franchises, rights, equities, property, and estate, of whatever name or nature, belonging to or vested in either of the consolidating companies, shall immediately, upon and by the act of such consolidation, become the property and estate of and be vested in such consolidated company, and the corporate existence of the consolidating companies shall cease, and be merged in the consolidation from thenceforth; and such consolidated company shall have the exclusive right and power to demand, sue for, collect, convey, and dispose of the rights, equities, property, and estate aforesaid, or any part thereof, under its own name chosen as aforesaid, and all debts, liabilities, and obligations of the consolidating companies shall be assumed and paid by the consolidated company. (January 31, 1873, 70 v. 19, § 1.)

Consolidations — Mutual Companies, §§ 3672-3684.

§ 3672. **DISTRIBUTION OF THE STOCK OF CONSOLIDATED COMPANY.**— Upon such consolidation of companies the just and true value of each outstanding share of the capital stock of each of the consolidating companies shall, by their respective directors, be ascertained through a suitable valuation of all the assets and liabilities thereof at the time of the consolidation, and new shares of the consolidated company shall be apportioned to each stockholder, equal to the sum so ascertained to be the just and true value of his shares in each or either of the consolidating companies, and the shares thus apportioned shall be substituted for his original shares, and all certificates of shares in the consolidating companies shall be surrendered when the new certificates of the shares so apportioned are issued; but any stockholder in either of the companies so consolidating who refuses to agree to such consolidation shall be entitled to receive for the stock by him owned the just market value of the same at the time of such consolidation, to be paid to him previous to such consolidation. (January 31, 1873, 70 v. 19, § 2.)

§ 3673. **ELECTION OF DIRECTORS.**— Immediately upon the consideration (consolidation) of such companies the directors of the several companies so consolidating shall proceed to elect, from their members, the directors for the consolidated company, who shall serve until their successors are elected and qualified. (January 31, 1873, 70 v. 19, § 3.)

§ 3674. **CAPITAL STOCK LIMITED.**— The capital stock of such consolidated company may be equal to, but shall not, by virtue of such consolidation, exceed, the aggregate authorized capital of the consolidating companies. (January 31, 1873, 70 v. 19, § 4.)

§ 3675. **CERTIFICATE OF CONSOLIDATION MUST BE FILED WITH SECRETARY OF STATE.**— Within thirty days after such consolidation a certificate, setting forth the fact of the consolidation, and the name and organization adopted thereby, shall be filed in the office of the secretary of state. (January 31, 1873, 70 v. 19, § 5.)

§ 3683. **EXAMINATION OF MUTUAL FIRE COMPANIES.**— The court of common pleas in each county in which the office of any mutual fire insurance company is situate shall, on the application of any three or more persons interested, appoint one or more suitable persons, resident in such county, to make a thorough and careful examination into the affairs and conditions of such company; the persons so appointed shall have power to require the production of all books and papers belonging to such company, or pertaining to its business, and to examine under oath all the officers, servants, or agents of the company, or any other person, touching its affairs and condition, which oath may be administered by any person appointed to make the examination, and they shall report thereon to the court, at its next regular term, in which they shall set forth in full the condition of the company, and transmit a copy of such report to the superintendent of insurance forthwith; and such examiners shall each receive two dollars per day for the time actually employed in making the examination and report, to be paid out of the treasury of the company examined; but such examination shall not be had oftener than once in six months. (March 10, 1859, 56 v. 37, § 1; S. & C. 353.)

§ 3684. **PERSONS REFUSING TO APPEAR AND TESTIFY ARE IN CONTEMPT.**— If any such officer, servant, agent, or other person, fail or refuse to appear before such examiners, or refuse to testify, or to produce before them any book or papers in his possession, and required to be produced, such failure or refusal shall be deemed a contempt, and shall forthwith be reported to such court, which shall punish the person in contempt in the same manner and to the same extent as though such contempt had been committed against the court. (March 10, 1859, 56 v. 37, § 2; S. & C. 353.)

Bonds, Approval—Mutual Protective Associations, §§ 3685, 3686.

§ 3685. **CERTAIN BONDS MAY BE APPROVED BY PROBATE JUDGE.**—Any insurance company which, by the terms of its charter, is required to have its official bonds approved by a judge of the court of common pleas, may, at its option, have the same approved by the probate judge of the county in which the office of the company is located. (February 2, 1857, 54 v. 17, § 1; S. & C. 363.)

§ 3686. **MUTUAL PROTECTION ASSOCIATIONS AUTHORIZED.**—Any number of persons of lawful age, residents of this state, or residents of an adjoining state and owning insurable property in this state, not less than ten in number, may associate themselves together for the purpose of insuring each other against loss by fire and lightning, cyclones, tornadoes or windstorms on property in this state; and may make, assess and collect upon and from each other such sums of money, from time to time, as may be necessary to pay losses which occur by fire and lightning, cyclones, tornadoes or windstorms to any members of such association, and the assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association. An association formed for the purpose of insuring against loss by fire and lightning, cyclones, tornadoes or windstorms may insure farm buildings, detached dwellings, school houses, churches, township buildings, grange buildings, farm implements, farm products, household goods and furniture in such buildings, and other property not classed as extra hazardous. (April 25, 1898, 93 v. 335; April 15, 1889, 86 v. 377, 380; February 27, 1885, 82 v. 71; April 14, 1884, 81 v. 185; R. S. 1880; March 30, 1877, 74 v. 66, § 1.)

New scheme of insurance.

This section contemplates a new system of fire insurance before unknown in this state. *Richards v. Swaine & McCormick et al.*, 7 N. P. 68 (1900); s. c., 9 Dec. 70; *State ex rel. v. Fire Ass'n*, 42 Oh. St. 555, 563 (1885).

Authority of such associations.

Such associations are empowered to make and enforce their members' contracts of indemnity, by which the members agree to be assessed specifically for such amounts as may be necessary to pay losses occurring to the members, and also to pay incidental expenses. — *State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885). *

Liability of members.

Members are liable to assessments only for losses occurring during their membership, and are not liable for losses occurring before or after such membership. — *State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885).

Cannot contract for specific sum in lieu of assessment.

A contract cannot be made with members by which they, upon an advance payment of an agreed annual amount, shall be exempt from assessments during the ensuing year, nor can a member's liability to assessment be limited, without regard to the amount that may be necessary to pay losses. — *State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885).

What is not an assessment.

Such advance payment, based upon the hazards of the risk, without reference to the amount necessary to pay losses, is in fact a

premium, and not a specific assessment authorized by this statute. — *State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885).

Does not authorize profits to be made.

This section does not authorize a corporation for profit either to its officers or members, and any scheme by which profits are made is unauthorized. — *State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885).

Assessments are trust funds; misapplication.

Funds derived from assessments to pay losses are in their nature trust funds to be applied to such losses; hence the application of such assessments or advance payments, in lieu of assessments, to the purchase of the asset of a like corporation, including real estate not necessary to its business or to the payment of losses to members of such other corporation, is a misapplication of such funds. — *State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885).

Nonresidents not eligible.

Nonresidents of this state cannot become members of such association, and persons who are not members cannot become directors. — *State ex rel. v. Mutual Fire Ass'n*, 50 Oh. St. 145 (1893).

Note amendment to this section ("or residents of an adjoining state owning insurable property in this state." 93 v. 335.)

Cannot do business on stock or mutual plan.

Such association is not authorized to do business on the "joint stock" nor on the

 Mutual Protective Associations, §§ 3687-3690.

"contingent liability" plan, as defined in § 3634, but must confine itself to insuring its members, who agree to be assessed specifically to pay losses and incidental expenses.—*State ex rel. v. Fire Ass'n*, 42 Oh. St. 555 (1885); *Richards, Rec'r. v. Swaim et al.*, 7 N. P. 68 (1900); s. c., 9 Dec. 70: *State ex rel. v. Mutual Fire Ass'n*, 50 Oh. St. 145 (1893).

Trustees not liable for loss.

The loss is not a debt for which the trustees are personally liable, even though the certificate be in part *ultra vires*, if issued in good faith.—*Manufacturers' Fire Ass'n v. Drug Mills*, 8 C. C. 112 (1894); s. c., 4 C. D. 350.

See §§ 3634, 3650 and 3690, and notes. See *State ex rel. v. Live Stock Co.*, 38 Oh. St. 347 (1882).

§ 3687. **CERTIFICATE OF ORGANIZATION.**—Such persons shall make and subscribe a certificate setting forth therein:

First. The name by which the association shall be known.

Second. The place which shall be regarded as its center or business office.

Third. The object of the association, which shall only be to enable its members to insure each other against loss by fire and lightning, cyclones, tornadoes, or wind-storms, and other casualties, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members. (April 15, 1889, 86 v. 377, 380; February 27, 1885, 82 v. 71, 72; April 14, 1884, 81 v. 185; R. S. 1880; March 30, 1877, 74 v. 66, § 2.)

See notes to § 3686.

§ 3688. **WHEN CERTIFICATE TO BE FILED.**—The certificate shall be filed in the office of the secretary of state, and a copy thereof, duly certified by the secretary of state, shall be evidence of the existence and due incorporation of the association for the purposes therein named. (March 30, 1877, 74 v. 66, § 3.)

§ 3689. **ELECTION OF OFFICERS; POWERS.**—When such certificate is so filed, and a copy thereof so certified forwarded to the association, the persons named therein shall elect their directors, and a president, secretary, and treasurer, and such other officers as may be necessary for the complete performance of all the business and objects of the association herein provided, to serve for one year; and such officers shall thereafter be chosen in such manner, and at such time as shall be fixed upon in the constitution; but directors shall not be chosen for a longer period than three years; and such association so organized shall be known and held to be a body corporate for all the purposes aforesaid, and may sue and be sued, and plead and be impleaded, in all courts of law and equity, but in no instance shall the power to insure against losses by fire or tornadoes be exercised to other than members of the association. (April 30, 1886, 83 v. 106, 107; R. S. 1880; March 30, 1877, 74 v. 66, § 4.)

Persons not members cannot become directors.

State ex rel. v. Mutual Fire Ass'n, 50 Oh. St. 145 (1893). See note to same case under § 3686.

§ 3690. **CERTAIN INSURANCE COMPANIES MUST ADOPT CONSTITUTION AND BY-LAWS; OFFICIAL STATEMENT TO BE MADE TO SUPERINTENDENT OF INSURANCE.**—Every such association shall adopt such constitution and by-laws not inconsistent with the constitution and laws of this state or the United States as will, in the judgment of its members, best subserve the interests and purposes of the association; and all persons who sign such constitution shall be considered and held to be members of the association, and shall be held in law to comply with all the provisions and requirements of the association; and the president or vice-president and secretary of every such association shall annually on the first day of January, or within thirty days thereafter, prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of such association on the

Mutual Fire Insurance Associations, § 3690-1.

thirty-first day of December then next preceding, exhibiting such facts as are enumerated in section thirty-six hundred and fifty-four (3654), and applicable to such associations, and such other information necessary to reveal the financial condition of such associations as the superintendent may require, in a printed form to be by him supplied to such association for that purpose, and every such association which fails to make and deposit such statement or to reply to any inquiry of the superintendent, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance. (April 19, 1883, 80 v. 197; R. S. 1880; March 30, 1877, 74 v. 66, § 5.)

Stipulated sum in lieu of assessment unauthorized.

This section does not authorize a regulation by which a policy may be declared forfeited for the nonpayment in advance of an annual deposit or premium, whether an assessment to pay losses during such period should be necessary or not.—State v. Monitor Fire Ass'n, 42 Oh. St. 555 (1885). See § 3686 and notes thereto.

Member must sign constitution.

To become a member of such association, the person must sign his name to the constitution.—State ex rel. v. Mutual Fire Ass'n, 50 Oh. St. 145, 149 (1893); Richards, Rec'r, v. Swain et al., 7 N. P. 68 (1900); s. c., 9 Dec. 70.

Section 3650 has no application.

Section 3650 has no application to persons obtaining insurance of such association, and such persons can become legal members of the association only by signing its constitution.—Richards, Rec'r, v. Swain et al., 7 N. P. 68 (1900); s. c., 9 Dec. 70.

Members presumed to know rules and regulations.

See Crandall v. Farmers, etc., Ass'n, 8 N. P. 632 (1891).

Waiver of regulations by agent.

See Crandall v. Farmers, etc., Ass'n, 8 N. P. 632 (1891).

Assessments.

See Crandall v. Farmers, etc., Ass'n, 8 N. P. 632 (1891).

Liability of persons not signing constitution.

A person who takes out a policy in such association, but who does not sign its constitution, is estopped in equity from denying his liability to pay assessments, made either by the directors or by the court on proceedings to dissolve the association, for the purpose of paying debts or losses occurring during the continuance of such policy.—Richards, Rec'r, v. Swain et al., 7 N. P. 68 (1900); s. c., 9 Dec. 70.

Who may change constitution.

A change in the constitution and by-laws of such association can only be made by a majority of the members of the association itself, and not by the directors merely, although the constitution provides for the latter method.—Farmers' Ins. Co. v. Bachman, 39 W. L. B. 324 (1898). See § 3634.

§ 3690-1. **MUTUAL FIRE INSURANCE ASSOCIATIONS AUTHORIZED TO ORGANIZE AS COMPANIES.**—Any mutual fire insurance association organized under section 3686, now doing business and now having the number of policies and amount of insurance in force and the amount of assets required in order to organize a mutual fire insurance company, may reorganize as such mutual fire insurance company in the following manner: The board of trustees of such association shall give notice, by publication in a newspaper of general circulation, and published in the county wherein its principal office is situated, at least three consecutive weeks before such application be made, of their intention to so organize; and shall thereupon make application to the superintendent of insurance respecting their desire to assume the requirements of all the laws governing mutual fire insurance companies organized and doing business under the laws of Ohio, setting forth the amount of insurance carried, the number of policies in force, the amount of its assets and liabilities; and if said superintendent of insurance shall be satisfied, by an examination, or otherwise, of the condition of such association, that at the date of the passage of this act it possessed the required amount of assets, and the number and amount of policies in force required to organize a mutual fire insurance company, he shall so certify, upon a certificate of incorporation, containing the requisite statements required to incorporate a mutual fire insurance company, which certificate, after having been duly executed, shall be delivered to the secretary of state, who shall record the same, and issue his

Mutual Fire Association — Salvage Companies, etc., § 3690-2-§ 1.

certificate of incorporation as in other cases for change of name, capital or location of an incorporated company, charging only such fees therefor as authorized by law in other cases for change in capital or location of company. (March 24, 1890, 87 v. 88.)

§ 3690-2. **RIGHTS OF POLICY-HOLDERS: HOW AFFECTED.**— Thereafter the business of such fire insurance association shall be conducted as and be subject to all laws governing mutual fire insurance companies; and all members of said association shall be members of said mutual fire insurance company, to the time of the expiration of (or) cancellation of their policies, and entitled to all the benefits as such, precisely as if original members of such company, without exchanging policies or contracts, and entitled to all the benefits as members of said company precisely as if original members of said company. (March 24, 1890, 87 v. 88.)

§ 3690-3. **POLICIES; BY-LAWS, ETC.**— After such change in the plan of insurance by such association, and the organization of such mutual fire insurance company, all policies thereafter issued shall be in the name and by the authority of such mutual fire insurance company, and the policies theretofore in force, and the by-laws, rules and regulations of such association, if not in conflict with the laws governing mutual fire insurance companies, shall be and remain in full force and effect until the same shall have terminated or been lawfully changed by said company or its board of directors, as authorized by law. (March 24, 1890, 87 v. 88.)

§ 3691. **CELLAR AND FOUNDATION NOT CONSIDERED PART OF STRUCTURE IN SETTLING LOSS.**— The cellar and foundation walls shall not be included or considered a part of the building or structure in settling losses, any thing in the application or policy to the contrary notwithstanding.

A boiler and engine may be a structure.

Ins. Co. v. Luce, 11 C. C. 476 (1896); s. c., 5 C. D. 210. See § 3643 and notes thereto.

*An Act to Provide for the Organization of Corporations for the Purpose of
Discovering and Preventing Fires and of Saving Property and Life
From Conflagration.*

Be it enacted by the General Assembly of the State of Ohio:

§ 1. **CORPORATIONS MAY BE CREATED FOR THE PURPOSE OF DISCOVERING AND PREVENTING FIRES AND OF SAVING PROPERTY AND LIFE FROM CONFLAGRATION.**— That corporations, not for profit, may be organized under the general corporation laws of this state, and in accordance with the provisions of this act, for the purpose of discovering and preventing fires and of saving property and life from conflagration, with power to provide a patrol of men and a competent person to act as superintendent to discover and prevent fires, with suitable apparatus and equipment to save and preserve property and life at and after fires; and to enable them so to act with promptness and efficiency, full power is hereby given to such superintendent and patrol to enter any building at any time for the purpose of inspection and any building on fire or which may be exposed to or in danger of taking fire from other burning buildings, for the purpose of protecting and saving said building and the property therein, or of removing such property or any part thereof during the fire or from the ruins after the fire; provided, however, that nothing in this act shall be so construed as will in any degree lessen, impair or interfere with the powers, privileges, duties or authority of any regular or volunteer fire department organized and maintained by any public authority within the state, but the said superintendent and the members of said patrol, while on duty at a fire, shall in all respects be subordinate to and under the control of the public authority having charge of the extinguishment and prevention of fires; and provided further

Salvage Companies, etc., §§ 2-4.

that no act of the superintendent or the patrol of men shall justify any owner of any building or property in abandoning such building or property. (April 29, 1902, 95 v. 324.)

§ 2. **POWERS OF SUCH CORPORATIONS.**—In the articles of incorporation of any such corporation shall be set forth the municipality or other subdivision of the state within which such corporation shall prosecute its business, as provided herein, and thereafter such corporation shall be confined to the municipality or other subdivision, as set forth in said articles; and for the purpose of carrying into effect the powers herein granted, any such corporation shall have authority to provide suitable rooms for the transaction of its business and to that end is hereby authorized to purchase, lease or otherwise acquire and hold such real estate and personal property as may be necessary to fulfill the purposes of its organization. All such corporations shall have power to elect such officers and make such needful by-laws as may not be contrary to the provisions of this act or the constitution or laws of this state or of the United States; and except as herein provided, shall be subject to the general corporation laws of this state. (April 29, 1902, 95 v. 324.)

§ 3. **BIENNIAL MEETING OF CORPORATION AND REPRESENTATIVES OF FIRE INSURANCE COMPANIES.**—Before any corporation organized under the terms of this act shall commence business, and in the month of March of every second year thereafter, there shall be held a meeting of such corporation, of which ten (10) days' previous notice shall be given by inserting the same in at least two newspapers published or of general circulation in the municipality or other subdivision of the state in which the said corporation is organized and established, if there be such newspapers, and if not, by posting notices thereof, at which meeting each insurance company, corporation, association, underwriter, person or persons doing a fire insurance business in said municipality or other subdivision of the state in which the corporation is organized and established, whether members of said corporation or not, shall have the right to be represented and shall be entitled to one vote. A majority of the whole number so represented shall have power to decide upon the question of sustaining the fire patrol organized by the corporation under the terms of this act and shall fix the maximum amount of expenses which shall be incurred therefor during the fiscal years next to ensue and until the next meeting, as herein provided, which amount shall in no case exceed two (2%) per centum of the aggregate premiums returned as received, as hereinafter provided in this act, and the whole of such amount, or so much thereof as may be necessary, may be assessed upon all insurance companies, corporations, underwriters, agents, person or persons who assume risks and accept premiums for fire insurance in said municipality or other subdivision, as hereinbefore mentioned, whether members of said corporation or not, in proportion to the several amounts of premiums returned as received by each, as hereinbefore provided, and such assessments shall be collectible by and in the name of the said corporation in any court of law in this state having jurisdiction thereof in such manner and at such time or times as the said corporation may determine. (April 29, 1902, 95 v. 325.)

§ 4. **QUARTERLY STATEMENT SHOWING AGGREGATE AMOUNT OF PREMIUMS RECEIVED TO BE FILED BY INSURANCE COMPANIES WITH CORPORATION.**—To insure the collection of the assessments hereinbefore provided and in order to provide for the payment of the persons employed by said corporation and to maintain suitable rooms therefor and for the purchase, lease or acquisition of such real and personal property as may be necessary, the same to be determined at the meetings hereinbefore provided, the said corporation is empowered to require a statement to be furnished quarterly by all insurance companies, corporations, associa-

Salvage Companies — Mutual Live Stock Insurance Association, §§ 5-3691-1.

tions, underwriters, agents, person or persons of the aggregate amount of premiums received by each for insuring property in the municipality or other subdivision of the state where the said corporation is organized and established for and during the three (3) months next preceding the 31st day of March, the 30th day of June, the 30th day of September and the 31st day of December of each year, which statement shall be sworn to by the president and secretary of the corporation or association, or by the agent or person so acting or effecting such insurance in said municipality or other subdivision, and shall be given to the secretary of the corporation created under the provisions of this act, within ten (10) days after the first days of April, July, October and January of each year. (April 29, 1902, 95 v. 325.)

§ 5. **WRITTEN DEMAND TO BE MADE UPON FIRE INSURANCE COMPANIES FOR THE STATEMENT ABOVE PROVIDED FOR.**—The treasurer or other appointed officer of any corporation organized under this act shall within the ten (10) days aforesaid, by written or printed demand, signed by him, require from every such insurance company, corporation, organization, underwriter, agent or person engaged in the business of fire insurance in the municipality or other subdivision of the state where said corporation is organized and established, the statement hereinbefore provided for. Such demand may be delivered personally at the office of such insurance company, corporation, association, underwriter, agent or person within such municipality or other subdivision, as hereinbefore provided, or at the residence of any officer of such corporation or association, underwriter, agent or person. Any insurance company, corporation or association, or any officer thereof, and any underwriter, agent or person within the municipality or other subdivision in which the said corporation is organized and established, engaged in the business of fire insurance, or of assuming risks and accepting premiums for fire insurance, who fails to comply with the provisions of this act by furnishing the statement herein provided for, shall forfeit for the use of the corporation herein provided the sum of twenty-five (\$25.00) dollars for every day he shall so neglect to furnish the same, which amount shall be recovered by the corporation in any court in the state having jurisdiction thereof. (April 29, 1902, 95 v. 326.)

§ 6. This act shall take effect and be in force from and after its passage. (April 29, 1902, 95 v. 326.)

Constitutionality.

Attorney-General J. M. Sheets, in an opinion rendered to superintendent of insurance, September 6, 1902, declared this law unconsti-

tutional as violating §§ 1 and 2 of article 1 of the Ohio constitution and the fourteenth amendment of the United States constitution.

§ 3691-1. **Sec. 1. MUTUAL PROTECTIVE ASSOCIATION.**—Be it enacted by the General Assembly of the State of Ohio, That any number of persons of lawful age, residents of this state, not less than five, may associate themselves together for the purpose of becoming a body corporate, and may insure themselves, and any person becoming a member of such incorporation, in accordance with the rules and regulations of such corporation, against loss, from death, of domestic animals, and may assess and collect, upon and from each other, such sums of money, from time to time, as may be necessary to pay losses which occur, from death of domestic animals, to any member of such incorporation; and incidental expenses, and the assessments and collections of such sums of money shall be regulated by the constitution and by-laws of the corporation. (April 15, 1889, 86 v. 377.)

Remedy upon failure to pay certificate.

In case of failure to pay certificate, the holder need not seek specific performance to levy assessments, but may sue at law for the

sum stipulated in certificate.—Hall v. Live Stock Ass'n, 25 W. L. B. 79 (1891). And see notes under § 3630.

Mutual Live Stock Insurance Association, §§ 3691-2-3691-5.

§ 3691-2. Sec. 2. **CERTIFICATE OF ORGANIZATION.**— Such persons shall make and subscribe a certificate, setting forth therein —

1st The name by which the corporation shall be known.

2nd The place which shall be chosen as its principal office.

3rd The object of the corporation, which shall only be to enable its members to insure each other against loss from death of domestic animals, and to enforce any contract which may be by them entered into, whereby they specifically agree to be assessed for the payment of losses and incidental expenses.

4th Shall acknowledge the signing of such certificate before a notary public, or other officer authorized to take the acknowledgments of deeds and mortgages. (April 15, 1889, 86 v. 377, 378.)

§ 3691-3. Sec. 3. **CERTIFICATE TO BE FILED WITH SECRETARY OF STATE.**— The certificate shall be filed in the office of the secretary of state, and a copy thereof, duly certified by the secretary of state, shall be evidence of the existence and due incorporation of such company for the purposes therein named. (April 15, 1889, 86 v. 377, 378.)

§ 3691-4. Sec. 4. **ELECTION OF OFFICERS.**— When such certificate is so filed, and a copy thereof, so certified, forwarded to the company, the persons named therein shall elect their directors, and a president, secretary and treasurer, and such other officers as may be necessary for the complete performance of all the business and objects of the company herein provided for, to serve for one year, or until their successors are duly elected and qualified. Such officers shall thereafter be elected annually, by the members of the association, at such time as shall be fixed upon in the constitution; and such company so organized shall be known and held to be a body corporate, for the purpose aforesaid, and may sue and be sued, and plead and be impleaded, in all courts of law and equity; but in no instance shall the power to insure against loss by death of domestic animals be exercised to others than the members of the company; and no such company shall receive applications nor issue policies to persons not bona fide residents of Ohio. (April 15, 1889, 86 v. 377, 378.)

§ 3691-5. Sec. 5. **CONSTITUTION AND BY-LAWS; ANNUAL STATEMENT TO COMMISSIONER OF INSURANCE.**— Every such company shall adopt such constitution and by-laws, not inconsistent with the constitution and laws of this state and the United States, as will, in the judgment of its members, best subserve the interest and purposes of the company; and all persons who obtain insurance in such company shall thereby become members thereof, with power to vote at all regular meetings of such members, upon all subjects, and shall be held, in law, to comply with all the provisions and requirements of the company; and the president, or vice-president, and secretary of every such company, shall annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of superintendent of insurance, a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting such facts as are enumerated in section thirty-six hundred and fifty-four of the Revised Statutes of Ohio, and applicable to such companies, and such other information as is necessary to reveal the financial condition and general management of such company, as the superintendent of insurance may require in printed form, to be, by him, supplied to such companies for that purpose; and every such company failing to make and deposit such statement, or to reply to any inquiry of the superintendent, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance, and shall

Mutual Live Stock Insurance Association, §§ 3691-6-3691-10.

forfeit its right to do the business contemplated by this act, which forfeiture the superintendent shall enforce by proceedings in quo warranto. (April 15, 1889, 86 v. 377, 378.)

§ 3691-6. Sec. 6. **EXAMINATIONS BY COMMISSIONER OF INSURANCE.**—The superintendent of insurance may, whenever he may deem it advisable, cause an examination of the affairs of such company or corporation to be made by one or more disinterested persons, at the expense of the company, such expense not to exceed five dollars per day for each person so employed; and if, upon such examination, it shall appear that such company or corporation is exercising powers or franchises contrary to law, the superintendent of insurance shall institute proceedings in quo warranto against the same, and if it be found, in such proceedings, that such company or corporation has exercised powers or franchises contrary to law, a forfeiture of its right to do business shall be declared. (April 15, 1889, 86 v. 377, 379.)

§ 3691-7. Sec. 7. **AMOUNT OF APPLICATIONS FOR INSURANCE REQUIRED BEFORE COMMENCING BUSINESS.**—No company organized under this act shall issue any certificate or policy of insurance until bona fide applications for insurance to the amount of fifty thousand dollars shall have been filed with the secretary of such company, and a statement of such fact sworn to by such secretary and president of such company, filed with and approved by the superintendent of insurance. Nor shall the treasurer of such company receive any money, as such treasurer, until he shall have filed with the superintendent of insurance, payable to the state of Ohio, for the benefit of the members of such company, his bond, in the sum of ten thousand dollars, with security, to be approved by the superintendent. Such bond shall be conditional for the faithful application of all money coming into his hands as such treasurer. (April 15, 1889, 86 v. 377, 379.)

§ 3691-8. Sec. 8. **WHEN COMPANY MAY COMMENCE BUSINESS.**—When the statement of the secretary and the president, and the bond of the treasurer, provided for by the preceding section, shall have been filed and approved by the superintendent of insurance, the superintendent shall issue, to such company, his certificate, certifying such fact, and such certificate shall constitute the authority of such company to commence business. (April 15, 1889, 86 v. 377, 379.)

§ 3691-9. Sec. 9. **WHEN CHARTER MAY BE FORFEITED.**—Should the amount at risk in such company, at any time, become reduced below fifty thousand dollars, such company shall issue no more certificates or policies of insurance until bona fide applications, sufficient to restore such insurance to said amount, shall have been secured, and a sworn statement of such fact shall have been filed with and approved by the superintendent of insurance, and by him certified to the company; and should such company fail to so restore such amount, for the period of six months, then such company shall forfeit its right to do (the) business contemplated by this act; and when the liabilities of such company shall exceed three per cent. of the amount of risk in force, as determined by the last preceding assessment, such company shall be deemed to be insolvent, and to have forfeited its charter; and such forfeiture shall be enforced by the superintendent of insurance by proceedings in quo warranto. (April 15, 1889, 86 v. 377, 380.)

§ 3691-10. Sec. 10. **BOND OF SECRETARY AND TREASURER.**—The treasurer and secretary of such companies shall give bond for the faithful performance of their duties, to the directors or trustees of the company, in such sum and with such security as shall be prescribed in the by-laws of the company, the security to be approved by such directors or trustees. (April 15, 1889, 86 v. 377, 380.)

Re-insurance — Credit Guaranty Companies, etc., §§ 3691-11 3691-18.

§ 3691-11. Sec. 11. DIRECTORS. — The directors or trustees of such company shall, before qualified, take an oath, to be administered by any officer authorized to take acknowledgments of deeds, to faithfully perform the duties required of them as such officers. (April 15, 1889, 86 v. 377, 380.)

§ 3691-12. Sec. 12. STATEMENT OF SECRETARY AND BOND OF TREASURER TO BE FILED WITH COMMISSIONER OF INSURANCE. — Any company or association, organized under sections three thousand six hundred and eighty-six and three thousand six hundred and eighty-seven of the Revised Statutes of Ohio, as amended February 27, 1885, for the purpose of insuring its members against loss from death of domestic animals, and still doing business, shall, within ninety days after the passage of this act, file the statement, and the treasurer shall file his bond as provided in section seven of this act, and, failing so to do, shall forfeit the right to do the business contemplated by this act. (April 15, 1889, 86 v. 377.)

§ 3691-13. Sec. 1. COMPANIES MAY RE-INSURE THEIR RISKS. — Be it enacted by the General Assembly of the State of Ohio, That any fire, marine, fidelity, accident, plate glass, boiler, or other insurance company, now or hereafter organized or existing, under or by virtue of the laws of Ohio, shall have authority by and with the consent and approval of the commissioner of insurance, to re-insure any and all risks undertaken by it, in any company authorized by law to transact a similar class of insurance business in this state. (April 14, 1884, 81 v. 179.)

See §§ 3597 and 2745a.

§ 3691-14. Sec. 2. CREDIT GUARANTY COMPANIES; ORGANIZATION. — Any number of persons, not less than five, may associate and form a company to guarantee and indemnify merchants, manufacturers, traders and those engaged in business, and giving credit from loss and damage by reason of giving and extending credit to their customers and those dealing with them, by making, acknowledging and filing articles of incorporation pursuant to, and by complying with section 3588, 3589 and 3590 of the Revised Statutes of Ohio. (May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

§ 3691-15. Sec. 3. CAPITAL STOCK. — No such company shall be organized with a less capital than one hundred thousand dollars (\$100,000), and the whole capital shall, before proceeding to business, be paid in and invested in treasury notes, in stocks or bonds of the United States, in stocks or bonds of the state of Ohio, or of any municipality or county thereof or in mortgages on unincumbered real estate within the state of Ohio, worth double the amount loaned thereon at the time such loan is made. (May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

§ 3691-16. Sec. 4. INCREASE OF CAPITAL STOCK. — Any such company may increase its capital stock as provided in section 3592 of the Revised Statutes of Ohio. (May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

§ 3691-17. Sec. 5. INVESTMENT OF CAPITAL; DEPOSIT. — Any such company may invest its capital stock and change such investment as provided in section 3593 of the Revised Statutes of Ohio; but no such company shall commence business until it has made the deposit of securities provided for in said section, which shall be held and controlled by the superintendent of insurance for the purpose and in the manner provided in said section 3593 and in section 3594 of the Revised Statutes of Ohio. (May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

§ 3691-18. Sec. 6. CERTIFICATE OF DEPOSIT; RIGHT TO TRANSACT BUSINESS. — When such company is fully organized and has deposited the requisite amount of securities as hereinbefore provided, together with a certified copy of the

Credit Guaranty Companies, §§ 3691-19, 3691-20.

papers required by this act, the superintendent of insurance shall, unless he find the name assumed by such company so nearly similar to the name of another company organized in this state as to lead to uncertainty or confusion on the part of the public, furnish such company with a certificate of such deposit and of authority to commence and transact business. (May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

§ 3691-19. Sec. 7. **POWERS OF COMPANIES.**—No such company shall undertake any business or risk except as provided in clause 2 of section 3641 and 3641b of the Revised Statutes of Ohio, and as herein provided, and such companies shall have the right, power and authority to agree to pay to merchants, manufacturers, dealers and persons engaged in business and giving credit, the debt or debts, or such part thereof as may be agreed upon, owing to them, or which may be thereafter owing to them, and to indemnify them from loss on account thereof in such an amount or per cent. as may be agreed upon, and to charge and receive therefor such a sum or per cent. as the consideration for such an agreement, guaranty or indemnity, as shall be agreed upon between such corporation and the person guaranteed or indemnified, and to buy, hold, own and take an assignment of any and all claims, accounts and demands so guaranteed, and to hold, own and collect the same, and to enforce the collection thereof by action the same as the original holder and owner thereof might or could do; and such corporation may also guarantee the payment of money for personal services under contract of hiring. Any such corporation may use its capital stock or its funds accumulated in the course of its business to purchase or pay for any claim or demand, the payment of which it has guaranteed; or against the loss of which it has indemnified the holder; and such of its capital stock or accumulated funds as may not be so used shall be invested in the same classes of securities in which the deposit to be made with the superintendent of insurance is required by the provisions of this act to be invested; provided, that when, on account of losses or otherwise, the amount of the funds of any such corporation shall fall below such sum as is required to be deposited by this act, no further guaranty of indemnity shall be issued until the deficiency has been made good. (May 2, 1902, 95 v. 345; May 21, 1894, 91 v. 415.)

§ 3691-20. Sec. 8. **ANNUAL STATEMENTS.**—The president or vice-president of each company organized under this act, or under the laws of any other state, or the general manager for the United States of any company organized for like purposes under the laws of a foreign government, and doing business in this state, shall, annually, on the first day of January, or within thirty days thereafter, prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, and in the following form, to wit:

First. The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second. The property or assets held by the company, specifying:

1. The value of the real estate owned by such company, where it is situated, and the value of the buildings thereon.
2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same is deposited.
3. The amount of cash in the hands of agents and in course of transmission.
4. The amount of loans secured by bonds and mortgages which are first liens on real estate and on which there is less than one year's interest due.
5. The amount of loans on which interest has not been paid within one year.
6. The amount due the company on which judgments have been obtained, and the cash value thereof.

Credit Guaranty Companies, § 3691-21.

7. The amount of stocks in this state, the United States, of any city in this state, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market value of each kind of stocks.

8. The amount of stock held as collateral security for loans, with the amount loaned on, and the par and market value of each kind of stock.

9. The amount of unpaid assessments on stock, premium notes or contingent liabilities.

10. The amount of interest due and unpaid, and the amount of interest accrued but not due.

11. The amount of premium notes or contingent liabilities on which policies or bonds of guaranty or indemnity are issued.

12. The number of policies or bonds of guaranty or indemnity in force.

13. The amount of premiums received thereon.

14. The amount and description of all other assets.

15. The amount guaranteed under all policies in force.

Third. The liabilities of the company, specifying:

1. The amount of losses due and unpaid.

2. The amount of claims for losses resisted by the company.

3. Gross losses in process of adjustment or in suspense, including all reported and supposed losses.

4. The amount of dividends declared and due and remaining unpaid.

5. The amount of dividends, either cash or scrip, declared, but not due.

6. The amount of money borrowed, and the security for the payment thereof.

7. The amount of all other existing claims against the company.

Fourth. The income of the company during the preceding year, specifying:

1. The amount of cash premiums received.

2. The amount of notes or contingent assets received for premiums.

3. The amount of interest money received.

4. The amount of income received from other sources.

Fifth. The expenditure during the preceding year, specifying:

1. The amount of losses paid during the year, stating how much of the same accrued prior and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement.

2. The amount of dividends paid during the year.

3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

4. The amount paid for taxes.

5. The amount of all payments and expenditures.

6. The amount of scrip dividend declared. (May 2, 1902, 95 v. 346; May 21, 1894, 91 v. 415.)

§ 3691-21. Sec. 9. REQUIREMENTS OF COMPANIES OF OTHER STATES.—

Any corporation, company or association organized under the laws of any other state of the United States or of a foreign government to transact a like business as that provided for in this act, may be admitted and licensed to do business in this state; but as a condition precedent to being admitted to, and transacting business in this state, shall comply with the following conditions, to wit: Deposit with the superintendent of insurance (1) a certified copy of its charter or articles of incorporation; (2) if the applicant be a corporation, company or association organized under the laws of any other state of the United States, a certificate from the insurance commission,

Credit Guaranty Companies — Burglary Insurance, §§ 3691-22-3691-24a.

commissioner or superintendent of insurance of its own state showing its authority to do such business; also a certificate from said commissioner or superintendent or like authority of its own state, that corporations, companies or associations of this state engaged in a like business, are, upon complying with the laws of said state legally entitled to do business in such state; (3) a statement under oath of its president and secretary, or like officers, or of the general manager for the United States of a company organized under the laws of a foreign government, in the form provided for in this act of its business for the preceding year; (4) a copy of its policy, bond or guaranty, application and by-laws; (5) if the applicant be a corporation, company or association organized under the laws of any other state of the United States, a certificate from the insurance commissioner, superintendent of insurance or other proper officer of its own state, that such company has invested at least one hundred thousand dollars of its assets in the interest-paying bonds or stocks of the United States or of this state, or of some other state of the United States, of the market value of one hundred thousand dollars in the city of New York, or in bonds and mortgages on unincumbered real estate in this state, or in the state under the laws of which it is organized, of at least double the value of the amount loaned thereon; that such securities are held under the laws of such state by such officer for the benefit of all its policy, bond or guaranty-holders; and such certificate shall also state the character of the securities held by such officer and their value; (6) a duly certified copy of the resolution of its board of directors or authority, duly acknowledged before a notary public by the general manager for the United States of a company organized under the laws of a foreign government, appointing an attorney in this state upon whom service of summons or other process in all actions begun in this state may be made. (May 2, 1902, 95 v. 348; May 21, 1894, 91 v. 415.)

§ 3691-22. Sec. 10. **WHEN COMPANY FROM OTHER STATE EXEMPTED FROM MAKING DEPOSIT.** — No deposit in this state shall be required of any corporation, company or association of another state, if such company, corporation or association has made the deposit in its own state, referred to in the last preceding section, and has filed with the superintendent of insurance of this state the certificate mentioned in the last preceding section, as evidence of such deposit. Provided, however, that any corporation doing the credit guaranty business in this state, which is incorporated by or organized under the laws of a foreign government, shall make the deposit with the superintendent of insurance of such securities, and in such amount and for the purpose required by section 3660 of the Revised Statutes of Ohio. (May 2, 1902, 95 v. 349; May 21, 1894, 91 v. 415.)

§ 3691-23. Sec. 11. **FORFEITURE OF RIGHT TO DO BUSINESS.** — Any corporation organized under this act, or doing business in this state hereunder, which shall fail or refuse to file a statement or report, shall forfeit its right to do business under this act, which forfeiture the superintendent shall enforce by proceedings *in quo warranto*; and it is hereby made the duty of the attorney-general of the state to institute such proceedings upon his request in writing. (May 2, 1902, 95 v. 349; May 21, 1894, 91 v. 415.)

§ 3691-24. Sec. 12. **EXAMINATION.** — Any such corporation, association or company shall be subject to examination by the superintendent of insurance of this state under and pursuant to the provisions of the laws of this state relative to the examination of life insurance companies. (May 2, 1902, 95 v. 349; May 21, 1894, 91 v. 415.)

§ 3691-24a. Sec. 1. **LICENSING OF COMPANIES ORGANIZED FOR INSURING AGAINST BURGLARY, ROBBERY, ETC.** — That any insurance company organized or incorporated on the mutual plan under the laws of this state (or any

Burglary Insurance Companies, §§ 3691-24b-3691-24d.

other state) for the purpose of insuring against loss or damage from burglary and robbery or attempt thereat, and securing against the loss of money and securities in course of transportation shall be authorized, admitted and licensed to do business in this state, as hereinafter provided. (April 16, 1900, 94 v. 350.)

§ 3691-24b. Sec. 2. REQUISITES FOR BEGINNING BUSINESS. — Before any such company shall be authorized to transact business in this state, except to solicit and receive applications for insurance and portions and premiums thereof, as hereinafter provided, it shall have in force five hundred or more policies on which premiums shall have been paid in cash, or shall be evidence(d) by the written contracts or (of) the policy holders, on which not less than one-fifth of the amount shall have been paid in cash, the cash and contracts for premiums shall amount in the aggregate to a sum not less than one hundred thousand dollars. The premium contracts so held shall constitute a part of the valid assets of the company. (April 16, 1900, 94 v. 351.)

§ 3691-24c. Sec. 3. COPY OF CHARTER, AND STATEMENT TO BE FILED WITH SUPERINTENDENT OF INSURANCE; WHAT STATEMENT SHALL CONTAIN.— And every such company, association or partnership shall also file a certified copy of its charter, articles of incorporation or deed of settlement, together with a statement under the oath of the president or vice-president and secretary of the company for which he or they may act, stating the name of the company and the place where located, a detailed statement of its assets, showing the number of policy holders, aggregate amount of premium contracts, the amount of cash on hand, in bank, or in the hands of agents, the amount of real estate, and how the same is incumbered by mortgage, the number of shares of stock of every kind owned by the company, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other securities, stating the kind and amount loaned on each, and the estimated value of the whole amount of such securities, and other assets or property of the company; also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; and for a company organized under the laws of any other state, a copy of the last annual report, if any, made under any law of the state by which such company was incorporated and no agent shall be allowed to transact business for any such company who(se) reinsurance reserve, as required by this act, as (is) impaired to the extent of twenty per cent. thereof, while such deficiency shall continue. Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this act, directly or indirectly, in taking risks or transacting the business of burglary and robbery insurance or the insurance of the safe shipment of money and securities, without procuring from the superintendent of insurance a certificate of authority, stating that such company has complied with all the requirements of this act which apply to such companies, and as to companies organized under the laws of any other state there shall be added the name of the attorney appointed to act for the company. (April 16, 1900, 94 v. 351.)

§ 3691-24d. Sec. 4. CHARACTER OF BUSINESS TO BE CONDUCTED IN THIS STATE. — Any company organized, admitted and licensed to transact business in this state under this act shall confine its line of business to that stated in the first section of this act, and shall confine its business in this state to banks, bankers, loan companies, trust companies, city and county treasurers, and shall not issue any policy or policies to (any) person, firm or corporation in this state other than banks, bankers, loan companies, trust companies, city and county treasurers. Every such company shall set aside a reinsurance reserve of fifty per cent. of its premiums for

Burglary Insurance Companies, §§ 3691-24e-3691-24g.

unexpired term, whether collected in cash or represented by the obligations of the policy holders, as written in its policies. (April 16, 1900, 94 v. 351.)

§ 3691-24e. Sec. 5. **LIABILITY OF POLICY-HOLDERS.**— Policy-holders of any company organized and admitted to transact business in this state under this act, shall be held liable to pay the membership fee and premium on their insurance as paid or contracted to be paid at the time the policy is taken out, and shall not be held liable for any further or other assessment or claims on the part of the company or its policy-holders. The membership fees and premiums agreed upon may be collected in cash at the time the policy is issued or evidenced by written obligation of the policy-holder, as may be agreed upon by the company and the policy-holder. Such payment or obligation shall be the limit of the liability of the policy-holder to the company for premium on their insurance. (April 16, 1900, 94 v. 352.)

§ 3691-24f. Sec. 6. **APPOINTMENT OF ATTORNEY.**— It shall not be lawful for any insurance company, association or partnership incorporated by or organized under the laws of another state of the United States for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this state by any agent or agents in this state, until it shall first appoint an attorney in this state, who shall be the superintendent of insurance on whom process of law can be served, and file in the office of the superintendent of insurance a written instrument duly signed and sealed, certifying such appointment, and any process issued by any court of record in this state, and served upon such attorney by the proper officer of the county in which such attorney may reside or be found, shall be deemed a sufficient service of the process upon such company. (April 16, 1900, 94 v. 352.)

§ 3691-24g. Sec. 7. **ANNUAL STATEMENTS.**— The statement and evidence of membership assets and investments required by section three of this act, shall be renewed from year to year in such a manner and form as may be required by said superintendent of insurance with an additional statement of the amount of premiums received in this state during the preceding year, so long as such agency continues, and the said superintendent of insurance, on being satisfied that the membership, assets, securities and investments remain secure, as hereinbefore mentioned, shall furnish a renewal of the certificate as aforesaid. Any corporation organized under this act doing business in this state hereunder, which shall violate any of the provisions of this act, the superintendent of insurance shall revoke its authority to do business in this state, and no renewal of authority shall be granted to it for a period of one year after such revocation. (April 16, 1900, 94 v. 352.)

PART XVI.

AGRICULTURAL CORPORATIONS.

- § 3691-25. Incorporation.
- § 3691-26. Number of board; quorum.
- § 3691-27. Names of members.
- § 3692. Annual meeting of board. Election of members; term.
- § 3693. Annual report of board to general assembly.
- § 3694. State board of agriculture; real estate acquired by; auditing of expenses; annual report; legal adviser.
- § 3695. How state agricultural fund at disposal of board.
- § 3696. Secretary of state authorized to furnish stationery to board of agriculture.
- § 3697. Organization of district or county agricultural societies; Cuyahoga county.
- § 3698. For what premiums may be offered by agricultural societies.
- § 3699. Must publish a list of awards, etc.
- § 3700. County societies erected into a corporation.
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 State Board of Agriculture, §§ 3691-25-3692.

- § 3706a. When county commissioners shall complete and carry out societies' contracts.
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- § 3713-9. Prosecutions hereunder.
- § 3713-10. Proceedings for appropriation of lands for enlargement of fair grounds.
- § 3713-11. Board of directors to prosecute proceedings.

§ 3691-25. **INCORPORATION.**—That Michael L. Sullivant, * * * be and they are hereby created a body corporate, with perpetual succession, in the manner hereafter described, under the name and style of the "Ohio state board of agriculture." (S. & C. 63; February 28, 1846, 44 v. 70.)

§ 3691-26. **Sec. 1. NUMBER OF BOARD; QUORUM.**—The Ohio state board of agriculture shall consist of ten members, five of whom shall constitute a quorum. (February 8, 1841, 45 v. 49.)

§ 3691-27. **Sec. 2. NAMES OF MEMBERS.**—That Allen Trimble, M. L. Sullivant, Samuel Medary, Darius Lapham, A. E. Strickle, Arthur Watts, M. B. Bateham, John Coddington, Jared P. Kirtland, and Isaac Moore, be continued members of the board; their term of service and the mode of appointing their successors to remain unaltered by this act. (February 8, 1847, 45 v. 49.)

§ 3692. **ANNUAL MEETING OF BOARD.**—There shall be held in the city of Columbus on the first Thursday after the second Monday in January, an annual meeting of the Ohio state board of agriculture, together with the president of each county agricultural society or the duly authorized delegate therefrom who shall for the time being be ex-officio members of the state board of agriculture for the purpose of deliberation and consultation as to the wants, prospects and conditions of agriculture throughout the state; and at such meeting the several reports from the societies shall be delivered to the president of the state board of agriculture; provided that in any county having no agricultural society, the presidents of the farmers' institutes of the county, and holding meetings under the auspices and by the direction of the state board of agriculture, or a majority thereof, are hereby authorized and empowered to choose a representative to the annual meeting, who shall upon presentation of the proper certificates be entitled to all the privileges conferred on ex-officio members by this section.

State Board — County and District Societies, §§ 3693-3697.

ELECTION OF OFFICERS. — At this annual meeting there shall be elected two members of the state board of agriculture whose term shall be five years and until their successors are elected. Only the presidents of county agricultural societies or the duly authorized delegates therefrom and representatives chosen by the president of farmers' institutes not members of the board shall be entitled to vote for members of the board. (April 23, 1902, 95 v. 243; January 13, 1898, 93 v. 3; April 24, 1890, 87 v. 258; April 5, 1882, 79 v. 70; R. S. 1880; February 20, 1861, 58 v. 22, § 2; S. & S. 4.)

§ 3693. **ANNUAL REPORT OF BOARD TO GENERAL ASSEMBLY.** — The board may elect such officers as may by it be deemed necessary. It shall hold an annual exhibition of the agricultural and general productive industries of the state; shall make an annual report to the general assembly, embracing its proceedings for the past year, and an abstract of the proceedings of the several county agricultural societies, as well as a general view of the condition of agriculture throughout the state, accompanied by such recommendations as it may deem interesting and useful. (April 5, 1882, 79 v. 70; R. S. 1880; February 28, 1846, 44 v. 70, § 7; S. & S. 64.)

§ 3694. **STATE BOARD OF AGRICULTURE: REAL ESTATE ACQUIRED BY; AUDITING OF EXPENSES; ANNUAL REPORT; LEGAL ADVISER.** — The board may hold in fee simple such real estate as it may have heretofore purchased, or may hereafter purchase, as sites whereon to hold its annual fairs, and all such lands held by the board for said purpose shall be exempt from taxation, but when any such real estate as may have heretofore been purchased or may hereafter be purchased, shall cease to be used by the board as sites whereon to hold such annual fairs, then such real estate with the improvements thereon, belonging to the board, shall revert to the state of Ohio; and no portion of any such real estate shall be disposed of except by act of the legislature. The board shall have the power to audit and pay its ordinary expenses, including the necessary personal expenses of the members in their attendance on the meetings of the board, out of any funds in its possession or out of the state agricultural fund, and shall, in its annual report, make a complete showing of its financial transactions; and the attorney-general shall act as the legal adviser of the board, the same as for other state departments. (May 4, 1885, 82 v. 248; March 25, 1884, 81 v. 82; R. S. 1880; February 18, 1848, 46 v. 53, § 1; S. & C. 66.)

§ 3695. **HOW STATE AGRICULTURAL FUND AT DISPOSAL OF BOARD.** — The state agricultural fund shall be at the disposal of the board for the improvement of the agricultural interests of the state; and when escheated property is legally reclaimed by any heir, it shall be held subject to the payment, to the purchaser of the state, of so much of the original purchase money as it received, and legal interest to the time of such reclamation. (February 8, 1847, 45 v. 43, § 6; S. & C. 65.)

§ 3696. **SECRETARY OF STATE AUTHORIZED TO FURNISH STATIONERY TO BOARD OF AGRICULTURE.** — The secretary of state is authorized to furnish the board with such stationery as may be requisite to the proper discharge of its duties, together with such blank books as may be necessary to keep the records of the transactions of the board. (February 11, 1885, 82 v. 64; R. S. 1880; March 30, 1864, 61 v. 83, § 1; S. & S. 5.)

§ 3697. **ORGANIZATION OF DISTRICT OR COUNTY AGRICULTURAL SOCIETIES; CUYAHOGA COUNTY.** — When thirty or more persons, residents of any county of the state, or of a district embracing one or more counties, organize themselves into an agricultural society, and adopt a constitution and by-laws and select the usual and proper officers, and otherwise conducts its affairs in conformity to the statutes of Ohio and to the rules of the state board of agriculture, and when such county or district agricultural society shall have held an annual exhibition

County and District Agricultural Societies, §§ 3698, 3699.

in accordance with section 3698 of the Revised Statutes of Ohio, and made proper report to the state board of agriculture, then, upon presentation to the county auditor, of a certificate from the president of the state board of agriculture, attested by the secretary of said board, that the laws of the state and the rules of the state board of agriculture have been complied with, the county auditor of each county wherein such agricultural societies are organized, shall annually draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant of the county, upon the basis of the last previous national census, but the total amount thereof shall not exceed in any county the sum of eight hundred dollars (\$800); and the treasurer of the county shall pay the same. Provided, that where in any county containing a city of the second grade of the first class, the site for holding county fairs is situated so far from the geographical center of said county that, in the opinion of the commissioners of said county the agricultural interests of said county will best be promoted by the establishment of another and additional society and site whereon to hold fairs; upon the organization of such additional society in the manner provided herein, said additional society shall be entitled to receive out of the county treasury the sum provided in this section and also be entitled to the provisions of other sections of the statutes in reference to county agricultural societies. (May 6, 1902, 95 v. 403; April 16, 1900, 94 v. 395; April 21, 1896, 92 v. 205; April 13, 1893, 90 v. 173; April 16, 1886, 80 v. 142; R. S. 1880; February 28, 1846, 44 v. 70, § 1; S. & C. 61.)

Liable for negligence.

A society organized under this section is liable for damages at the suit of one who is	injured in consequence of the negligent construction of its seats.—Dunn v. Agricultural Society, 46 Oh. St. 93 (1888).
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§ 3698. **FOR WHAT PREMIUMS MAY BE OFFERED BY AGRICULTURAL SOCIETIES.**—The several county or district societies which may be formed under the provisions of the preceding section shall, annually, offer and award premiums for the improvement of soils, tillage, crops, manures, implements, stock, articles of domestic industry, and such other articles, productions, and improvements, as they deem proper, and may perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests of the district and of the state, and shall regulate the amount of premiums, and the different grades of the same, so that it shall be competent for small as well as large farmers to have an opportunity to compete therefor; and in making their awards special reference shall be had to the profits which accrue, or are likely to accrue, from the improved mode of raising the crop, or of improving the soil, or stock, or of the fabrication of the articles thus offered, so that the premium shall be given for the most economical mode of improvement; and all persons offering to compete for premiums on improved modes of tillage, or the production of any crops or other articles, shall be required, before such premium is adjudged to deliver to the awarding committee a full and correct statement of the process of such mode of tillage or production, and the expense and value of the same, with a view of showing accurately the profits derived or expected to be derived therefrom. Provided, that during any year, when the state board of agriculture shall hold its fair upon the grounds of any county or district agricultural society, such society shall be excused if its board of directors so decides from complying with the provisions of this section, and shall incur no forfeiture of its rights as such agricultural society, by reason of not holding such fair. (April 9, 1880, 77 v. 143; R. S. 1880; February 28, 1846, 44 v. 70, § 2; S. & C. 63.)

§ 3699. **MUST PUBLISH A LIST OF AWARDS, ETC.**—County and district societies shall publish, annually, a list of awards, and an abstract of the treasurer's account, in a newspaper of the district, and make a report of their proceedings during the year, and a synopsis of the awards for improvements in agriculture and house-

County Agricultural Societies, §§ 3700-3702-1.

hold manufactures, together with an abstract of the several descriptions of these improvements, and also make a report of the condition of agriculture in their county or district, which report shall be made in accordance with the rules and regulations of the state board of agriculture, and shall be forwarded to the state board at its annual meeting in January in each year; and no subsequent payment shall be made from the county treasury unless a certificate be presented to the auditor, from the president of the state board, showing that such reports have been made. (February 20, 1861, 58 v. 22, § 1; S. & S. 4; S. & C. 63.)

§ 3700. COUNTY SOCIETIES ERECTED INTO CORPORATIONS.—All county societies which have been or may hereafter be organized are declared bodies corporate and politic, and as such shall be capable of suing and being sued, and of holding in fee simple such real estate as they have heretofore purchased or may hereafter purchase as sites whereon to hold their fairs. (February 15, 1853, 51 v. 333, § 1; S. & C. 66.)

§ 3701. CONVEYANCES TO SUCH SOCIETIES DECLARED VALID.—All deeds, conveyances, and agreements in writing, made to and by such county societies, for the purchase of real estate as sites whereon to hold their fairs, shall be good and valid in law and equity, and shall vest a title in fee simple in such societies to the real estate, without words of inheritance. (February 15, 1853, 51 v. 333, § 2; S. & C. 67.)

§ 3702. COMMISSIONERS MAY ASSIST AGRICULTURAL SOCIETIES IN PURCHASING, ETC., SITES FOR FAIRS; LEVY OF TAX.—When a county society has purchased, or leased for a term of not less than twenty years, real estate as a site whereon to hold fairs, or where the title to the grounds is vested in fee in the county, but the society has the control and management of the lands and buildings, the county commissioners may, if they think it for the interests of the county, and society, pay out of the county treasury the same amount of money for the purchase or lease and improvement of such site as is paid by such agricultural society or individuals for such purpose; and such commissioners may levy a tax upon all the taxable property of the county sufficient to meet the provisions of this section. (March 21, 1887, 84 v. 230; R. S. 1880; March 30, 1871, 68 v. 50, § 3; S. & S. 6.)

§ 3702-1 Sec. 1. SUBMISSION OF QUESTION OF ISSUING BONDS TO LIQUIDATE DEBT OF COUNTY AGRICULTURAL SOCIETY.—In all counties in which there may be a county agricultural society which has purchased a site whereon to hold fairs, or where the title to such grounds is vested in fee in the county, and such society has become indebted to an extent of not less than fifteen thousand dollars upon the presentation of a petition signed by not less than five hundred resident electors of the county praying for the submission to the electors of the county of the question whether or not the bonds of the county shall be issued and sold for the purpose of liquidating the indebtedness of such society, it shall be the duty of such county commissioners within ten days thereafter, by resolution, to fix a date which shall be within thirty days, upon which the question of issuing and selling such bonds, in amount and denomination such as may be necessary for the purpose in view, shall be submitted to the electors of the county, and shall cause a copy of such resolution to be certified to the deputy state supervisors of elections of the county, and such deputy state supervisors of elections shall, within ten days thereafter, proceed to prepare the ballots and make all other necessary arrangements for the submission of such question to the electors of such county, at the time fixed by such resolution. Such election shall be held at the regular places of voting in such county and shall

County Agricultural Societies, §§ 3702-2-3702a.

be conducted, canvassed and certified in the same manner, except as otherwise provided by law, as elections for the election of county officers. Fifteen days' notice of the submission shall by the deputy state supervisors of election, be given by publication in one or more newspapers published in the county once a week for two consecutive weeks, stating the amount of bonds to be issued, the purpose for which they are to be issued and the time and places of holding such election; and if the majority of the voters voting upon the question of issuing the bonds vote in favor thereof, then and not otherwise the bonds shall be issued, and the tax hereinafter mentioned shall be levied. Those who vote in favor of the proposition shall have written or printed on their ballots "for the issue of bonds" and those who vote against the same shall have written or printed on their ballots "against the issue of bonds." (April 25, 1898, 93 v. 358.)

§ 3702-2. Sec. 2. BONDS.—In the event that a majority of the voters of such county voting upon the question of issuing the bonds vote in favor thereof, it shall be the duty of the board of county commissioners, for the purpose of liquidating such indebtedness, to issue and sell the bonds of the county according to law, in such amount as may be necessary, and bearing interest not to exceed six per cent. per annum, payable semi-annually;

LEVY.—Said bonds to be issued for a period of not less than ten nor more than twenty years; and such county commissioners shall thereupon levy a tax upon all the taxable property upon the duplicate of the county to pay such bonds as they may mature and the interest thereon, at such rate and for such length of time as may be necessary for the purpose. (April 25, 1898, 93 v. 359.)

§ 3702-3. Sec. 3. PROCEEDS USED IN LIQUIDATION OF DEBT.—The county commissioners, upon the sale of such bonds, shall, from the proceeds arising from such sale, pay off and liquidate the indebtedness for which they were so sold. (April 25, 1898, 93 v. 359.)

§ 3702-4. Sec. 1. MONEY RAISED FOR COUNTY AGRICULTURAL SOCIETIES APPLIED TO PURPOSES INTENDED BY ACT THOUGH LIFE OF ACT EXPIRED.—Where money has been raised by taxation in any county for the purpose of leasing lands for county fairs, or for the purpose of erecting buildings for county fair purposes, or for making any improvements on county fair grounds, or for any purpose connected with the use of county fair ground or the management thereof by any county agricultural society, shall be used for such purpose only, notwithstanding the law under which money was raised by taxation may have expired by limitation; such moneys shall be used for the purposes intended by the act under which such moneys were levied and collected by taxation. (April 25, 1898, 93 v. 316.)

§ 3702a. COMMISSIONERS IN CERTAIN COUNTIES MAY ASSIST AGRICULTURAL SOCIETIES IN PURCHASING, LEASING OR IMPROVING SITES FOR FAIRS.—When a county society in a county containing a city of second grade of the first class has purchased or leased for a term of not less than twenty years, real estate as a site whereon to hold fairs, or when the title to the grounds is vested in fee in the county, but the society has the control and management of the lands and buildings the county commissioners may if they think it for the interests of the county and society, pay out of the county treasury the same amount of money for the purchase or lease and improvement of such site or either of them as is paid by such agricultural society or individuals for such purpose or either of them, and such

County Agricultural Societies, §§ 3702b-3705.

commissioners may levy a tax upon all the taxable property of the county sufficient to meet the provisions of this section. (March 8, 1889, 86 v. 69.)

§ 3702b. COMMISSIONERS MAY LEVY TAX FOR ENCOURAGEMENT OF AGRICULTURAL FAIRS.—When a county has purchased or leased for a term of not less than twenty years, real estate as a site whereon to hold fairs, or where the title to the grounds is vested in fee in the county agricultural society, or in the county the agricultural society has the control and management of the lands and buildings, or when such lands and buildings are held by lease from any such society by another society, association or incorporated company, the county commissioners are authorized for the purpose of encouraging agricultural fairs, to annually levy taxes of not exceeding one-tenth of one mill upon all the taxable property of the county, for the purpose of raising not to exceed one thousand dollars in any county, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, except in case of such lease by such society when such sum shall be paid to the treasurer of such lessee society, association, or incorporated company upon an order from the county auditor duly issued therefor;

PAYMENT IN ANTICIPATION OF LEVY.—And the county commissioners, prior to the levy of any such tax, may, if they think it for the interest of the county and society, pay out of the treasury any sum not exceeding one thousand dollars, as herein provided, out of the money in the general fund not otherwise appropriated. (April 10, 1902, 95 v. 122; April 25, 1898, 93 v. 292.)

§ 3703. COUNTY COMMISSIONERS MAY PURCHASE FAIR GROUNDS.—If a county society and the county commissioners decide that the interests of the society and county demand an appropriation from the county treasury for the purchase and improvement of county fair grounds greater than that authorized by the preceding section, or without any action of or purchase by the society, the commissioners may levy a tax upon all the taxable property of the county, the amount of which shall be fixed by the commissioners, but shall in no event exceed one-half of one mill on the dollar of the taxable property of the county in addition to the amount authorized in the last section to be paid for such purpose. (March 30, 1871, 68 v. 50, § 3.)

§ 3704. THE TAX MUST BE SUBMITTED TO THE ELECTORS.—No such additional tax shall be levied until the question as to the amount to be levied has been submitted by the commissioners to the qualified electors of the county at some general election, and a notice of which, specifying the amount to be levied, has been given at least thirty days previous to such election, in one or more newspapers published and of general circulation in the county; those voting at such election in favor of such tax shall have written or printed on their ballots "Agricultural tax, Yes," and those voting against the same, "Agricultural tax, No," and if a majority of the votes cast be in favor of paying such tax, the same may be levied and collected as other taxes; and when such tax is collected by the county treasurer, the auditor shall issue his order for the amount so collected to the treasurer of the county agricultural society, on his filing with the auditor an undertaking, in double the amount so collected, with good and sufficient sureties to be approved by the auditor, conditioned for the faithful paying over and accounting to such society for such funds. (March 30, 1871, 68 v. 50, § 3.)

§ 3705. WHEN REAL ESTATE VESTS IN THE COUNTY.—When a society is dissolved or ceases to exist, in any county where payments have been made for real estate, or improvements upon such real estate, or for the liquidation of indebted-

County Agricultural Societies — Parks, etc., §§ 3705a-3705-4.

ness, for the use of such society, all such real estate and improvements shall vest in fee simple in the county by which such payments were made. (April 25, 1898, 93 v. 360; February 15, 1853, 51 v. 333, § 4; S. & C. 67.)

§ 3705a. **INSURANCE ON FAIR GROUND PROPERTY.**—That the county commissioners of any county are hereby authorized to keep insured all buildings owned by the county agricultural society, or by the county, for the benefit of the county agricultural society, or the county, as the case may be, if deemed proper by said commissioners. (April 10, 1902, 95 v. 123; March 10, 1898, 93 v. 40.)

§ 3705-1. **Sec. 1. FRANKLIN COUNTY FAIR GROUNDS.**—In counties in which there are located cities of the first grade of the second class, when agricultural societies are dissolved or cease to exist, when payments have been made for real estate, or improvements upon such real estate, for the use of such societies by such counties, such real estate and improvements may vest in fee simple in the counties by which such payments were made, and such real estate shall be held for the use of a public park for the people of said county, anything in section three thousand seven hundred and five, to the contrary notwithstanding. (March 17, 1886, 83 v. 192.)

§ 3705-2. **Sec. 2. PARK COMMISSION TO BE APPOINTED BY COUNTY COMMISSIONERS.**—Such real estate so held shall be under the supervision and control of a park commission, consisting of five persons, two of whom shall be appointed from the country by the county commissioners, and two from the city to be appointed by the mayor. Said commissioners shall be appointed for the term of three years, and shall serve until their successors, who shall be appointed in the same manner, shall be appointed. The mayor shall be ex-officio a member of said commission and entitled to vote on all questions coming before it. Any fund under the control of said agricultural society, when it shall cease to exist as aforesaid, shall be turned over to such park commissioners. (March 23, 1891, 88 v. 372; March 17, 1886, 83 v. 192.)

§ 3705-3. **Sec. 1. AUTHORIZING FRANKLIN PARK IMPROVEMENT.**—When real estate which has heretofore been purchased by any county, and improvements made thereon, for the use of a county agricultural society, and such real estate is situate within the corporate limits of a city, and has been abandoned for such use, and, by authority of the act to which this act is supplementary, the title to such real estate is vested in fee simple in such county, and the premises devoted to the purposes of a public park for the use of the people of the county and of such city, and the supervision and control of the same vested in a park commission, consisting in part of residents of such city, and in part of persons who reside in the county but are not residents of such city, and their successors in office, and the city council of such city deems it advisable to enlarge such park by the purchase of land adjoining it, such council may, by ordinance, duly passed, provide for the investment of not more than nine thousand five hundred dollars for such purpose of enlargement; provided, that when any land is purchased by such city for the purpose aforesaid, the title thereto shall vest in the city, and it shall be controlled and managed by the park commission aforesaid for public park purposes, in connection with the other premises under its control and supervision for the same purposes; and the care, improvement and embellishment of such park shall be at the expense of such city. (April 12, 1889, 86 v. 252.)

§ 3705-4. **Sec. 2. COUNCIL MAY BORROW MONEY.**—That for the purpose of providing the money with which to pay for any real estate that may be purchased in pursuance of the preceding section, and the care, improvement and embellishment mentioned therein, the city council of any such city is hereby authorized and empow-

County Agricultural Societies — Parks, etc., §§ 3705-5-3705-9.

ered to borrow such sum of money, not exceeding twenty-five thousand dollars, as it may deem necessary, at a rate of interest not exceeding six per cent. per annum; and after paying for the land so purchased, the remainder of the money so borrowed shall be placed in the custody of the treasurer of the city, and be disbursed as other money of the city, but for the purposes mentioned in this section only. (April 12, 1889, 86 v. 252.)

§ 3705-5. Sec. 3. **BONDS.**—That for any money so borrowed the city council shall issue bonds of the city, which shall be signed by its president and attested by the city clerk, who shall keep a record thereof, and also of the coupons attached thereto. Such bonds shall be in sums of not less than one hundred dollars each, and be payable to bearer, at such place as the council may designate therein; and they shall specify distinctly the purpose for which they are issued. The payment of the principal of such bonds shall not be deferred beyond a period of ten years, and shall be payable at the pleasure of the city council after five years. Such bonds shall not be sold for less than their par value, and the interest thereon shall be payable semi-annually. (April 12, 1889, 86 v. 252.)

§ 3705-6. Sec. 4. **LEVY.**—The city council of any city which borrows money and issues bonds for the purposes aforesaid shall levy annually for park purposes, and for the purpose of paying the principal of the outstanding bonds issued under the authority of this act, and the interest thereon as it shall become due, a tax of not more than one-tenth of one mill on the dollar. (April 12, 1889, 86 v. 252.)

§ 3705-7. Sec. 5. **QUALIFICATION OF PARK COMMISSIONERS.**—The members of any such park commission as is referred to in this act, or the act to which this is supplementary, except the member ex-officio, shall each, before entering upon the duties of his office, take and subscribe an oath, before some officer authorized by law to administer oaths, that he will honestly and faithfully discharge the duties of his office, and also give a bond, payable to such city, with at least two good and sufficient sureties, in the sum of ten thousand dollars, to be approved by the mayor of the city, and conditioned for the faithful performance of his duties as a member of such commission; and if any person who has been or may hereafter be appointed a member of any such commission fail or neglect for ten days to qualify as herein provided, his office shall be deemed vacant, and another suitable person shall be appointed in his stead. (April 12, 1889, 86 v. 252.)

§ 3705-8. Sec. 6. **MEETINGS, DUTIES, ETC., OF COMMISSIONERS.**—Such park commission shall hold meetings as often as once a month, and adopt all necessary rules for the regulation of its business. It shall elect a president and a secretary; it shall keep a complete record of all its proceedings, which record, or a copy thereof, duly certified by its secretary, shall be competent evidence of its transactions in all the courts of this state; and the yeas and nays shall be taken upon the passage of every resolution or order, and entered upon the journal. Three members of the board shall constitute a quorum for the transaction of all business; but no resolution or order shall be adopted unless three members vote in its favor. (April 12, 1889, 86 v. 252.)

§ 3705-9. Sec. 7. **MAY APPOINT SUPERINTENDENT AND OTHER EMPLOYEES.**—Such park commission shall adopt rules for the care, protection and government of any park under its charge; and it may appoint or employ such superintendent and employes as it may deem necessary, and fix their salaries or compensation, and may remove any of such persons at any time. It shall annually make a full report to the county commissioners of such county, and to the city council of

County Agricultural Societies — Protection Against Criminals, §§ 3705-10-3705-11.

such city, in respect to such park, with a detailed account of its receipts and expenditures. (April 12, 1889, 86 v. 252.)

§ 3705-10. **FRANKLIN PARK COMMISSION MAY PURCHASE CERTAIN PROPERTY.**— When real estate, which has heretofore been purchased by any county and improvements made thereon for the use of a county agricultural society, and such real estate is situate within the corporate limits of the city and has been abandoned for such use, and, by authority of the act of which said act of April 12, 1889, was supplementary, the title to such real estate is vested in fee simple in such county, and the premises devoted to the purposes of a public park for the use of the people of the county and of such city, and the supervision and the control of the same vested in a park commission, consisting in part of the residents of such city, and in part of persons who reside in the county, but not residents of said city, and their successors in office, and the council of such city has deemed it advisable to enlarge such park by the purchase of land adjoining it and has provided for the investment of money therefor by ordinance duly passed, and when such council for the purpose of providing money with which to pay for such real estate and for the care, improvement and embellishment of such park, and when a court of record of this state by decree has found any person owning an estate in any of the real estate composing such park, said park commission is hereby authorized to purchase such estate, the title whereof shall vest in such city; and the treasurer of said city be and he is hereby authorized out of the moneys so borrowed to pay upon warrants properly drawn therefor, any sum of money not exceeding four thousand (\$4,000) dollars for the purpose of purchasing such estate and to pay claims arising by the reason of the purchase of land adjoining said park under and by virtue of such ordinance. (March 16, 1891, 88 v. 104.)

An Act to Authorize Agricultural Societies to Dispose of Real Estate to be Used for the Purpose of Erecting and Maintaining Thereon an Engine or Hosehouse.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. **COUNTY AGRICULTURAL SOCIETY MAY DONATE LAND TO MUNICIPALITY FOR CERTAIN PURPOSES.**— When a county agricultural society has purchased real estate, as a site whereon to hold fairs, or where the title to the grounds is vested in fee simple, in the county, but the society has the control and management of the lands and buildings; and all or a part of said real estate is situated within the corporate limits of any city or village, such agricultural society may, with the consent and approval of the county commissioners, give to such city or village, by deed, a lot or strip of ground, not more than fifty feet in width by two hundred feet in length, to be held by such city or village, in fee simple, for the purpose of erecting and maintaining thereon a fire engine or hose house, to be used in connection with the fire department of such city or village. The lot, so donated, shall abut on a public street or highway and shall be located in such part of the fair grounds as the society may direct. (February 4, 1902, 95 v. 6.)

§ 2. This act shall take effect from and after its passage. (February 4, 1902, 95 v. 6.)

§ 3705-11. **Sec. 1. CORPORATIONS FOR THE APPREHENSION AND CONVICTION OF CRIMINALS, ETC.**— That any number of persons, not less than fifteen, a majority of whom shall be residents of the state of Ohio, are hereby authorized to become incorporated for the purpose of apprehending and convicting any person or persons accused of either felony or misdemeanor. (April 29, 1902, 95 v. 299; March 21, 1887, 84 v. 169.)

Company to Protect Against Criminals, etc., §§ 3705-12-3705-14.

§ 3705-12. Sec. 2. SEAL; CONSTITUTION; OFFICERS; OATH OF OFFICE; CERTIFICATE OF APPOINTMENT OR ELECTION; POWERS OF OFFICERS AND MEMBERS.—Any association so incorporated may make and use a common seal with the name of the corporation thereon. A majority of the members of such association shall have the power to adopt a constitution and by-laws for their government; and may elect or appoint such officers as they may deem proper, who shall hold their office during the term provided, by the constitution and by-laws thereof, and who shall perform the duties required of them by said constitution and by-laws, and the provisions of this act; and the presiding officer of any such association or corporation may administer the proper oaths of office to any of its officers or members, and certify the appointment or election thereof under the seal of said corporation. The presiding officer may also appoint deputies, not exceeding one in each township, in any county or counties where such corporation is located, who may administer said oath of office or membership, and certify the appointment or election thereof, which shall be valid when approved by said presiding officer under the seal of said corporation, and the officers or members of said association or corporation, upon the proper certificate of the presiding officer thereof, when so elected or appointed, shall have full power and authority, when a felony has been committed, to pursue and arrest, without warrant, any person or persons whom they believe or have reasonable cause to believe guilty of the offense, and arrest and detain such alleged criminal or criminals in any county in the state to which they have fled, and return such accused person or persons to any officer of the county in which the offense was committed, and there detain such accused person or persons until a legal warrant can be obtained for his or their arrest. And any officer or member of any such association or corporation, may under the certificate of authority aforesaid, apply for and obtain a warrant for the arrest of any person or persons accused of felony or misdemeanor, which shall be issued to said member of any such association or corporation by any justice of the peace or police magistrate of any city or village under the same conditions as warrants, are now issued to constables, and under said warrant any such officer or member shall have the same powers to arrest and detain offenders as is now vested in constable. (April 29, 1902, 95 v. 299; April 28, 1890, 87 v. 339; March 21, 1887, 84 v. 169.)

§ 3705-13. Sec. 3. ASSESSMENTS; INDEMNITY FOR LOSSES; EXPENDITURES.—Any association may make and collect from its members such assessments as may be authorized by its constitution or by-laws, and may if so provided in its constitution, indemnify its members for losses caused by horse thieves or other felons, and expend such moneys as may be deemed necessary in the pursuit and arrest, and procuring the conviction of felons. (April 29, 1902, 95 v. 299; April 28, 1890, 87 v. 340; March 21, 1887, 84 v. 169.)

§ 3705-14. Sec. 4. REIMBURSEMENT OF EXPENSES BY COUNTY. — Upon the apprehension and conviction of any person or persons charged with felony by any such associations or corporation, the commissioners of the county in which the crime was committed, may reimburse said association in any sum not exceeding one hundred dollars, for necessary expenses, not otherwise provided for by law, incurred in the apprehension and conviction of any such criminal; and upon the apprehension and conviction by such association of any person or persons accused of misdemeanor, the commissioners of the county in which the crime was committed may reimburse said association in any sum not exceeding seventy-five dollars for necessary expenses incurred, not otherwise provided for by law, in the apprehension and conviction of such criminals. (April 29, 1902, 95 v. 300; April 28, 1890, 87 v. 340; March 21, 1887, 84 v. 169.)

County Agricultural Societies, §§ 3706-3706b.

§ 3706. **SOCIETIES MAY SELL, AND PURCHASE OTHER SITES.** — When a county society desires to sell its site for holding county fairs, for the purpose of purchasing another site, it may sell or lease the same in such manner and on such terms as it may deem proper, and the money arising from the sale or lease shall be paid by the purchaser to the county treasurer, who shall pay it out only upon the certificate of the president and secretary of the society that the same is to be used in the purchase, lease or improvement of another site, which site the certificate shall show to have been leased or purchased, and in cases where the county has paid any portion of the purchase money for the site proposed to be sold or leased, the written consent of the county commissioners shall first be given to such sale or lease. That whenever the site for holding county fairs belonging to or occupied by any agricultural society organized under the laws of this state, shall have for any reason become unfit or inefficient for the purpose for which it is intended and used, and the board of directors of such agricultural society shall, at a regular meeting thereof, by a vote of at least a majority of all the members of said board, upon a call of the yeas and nays, pass a resolution for the purpose of securing the benefits of this act, declaring that such site has become unfit and inefficient as aforesaid, and that it is necessary, for the best interests of such agricultural society and such county, that such site be sold or leased, and a new site purchased or leased, for holding county fairs in such county, it shall be lawful for such agricultural society to sell or lease such unfit or inefficient site for holding county fairs, and to purchase or lease a new site as hereinafter provided. Within thirty days after the passage of such resolution said board of directors shall give notice in writing to the county commissioners of such county of the passage and adoption of said resolution, declaring the necessity of selling or leasing such site and of purchasing or leasing a new site, which notice shall contain or have annexed thereto a certified copy of said resolution, signed by the president and secretary of said board of directors. (May 10, 1902, 95 v. 503; March 28, 1859, 56 v. 76, § 1; S. & C. 69.)

§ 3706a. **WHEN COUNTY COMMISSIONERS SHALL COMPLETE AND CARRY OUT CONTRACTS BY SUCH SOCIETY.** — That whenever such agricultural society shall have given notice to the county commissioners as above provided, and shall have selected, or secured options for the purchase or lease of a new site for holding county fairs in such county, the board of directors of such society shall immediately give notice of all of such facts to the county commissioners, which said notice shall, in the event such old site is sold or leased before the purchase or lease of the new site, state the amount for which such old site was sold or leased, and shall also state the amount of money necessary to acquire by purchase or lease such new site, and the terms and conditions of the purchase or lease thereof, together with a full description of the tracts or parcels of land and improvements thereon, included in such new site. After the filing of the several notices herein provided for, the county commissioners shall proceed to complete and carry into effect any contract or contracts which such agricultural society may have made for the purchase or lease of said new site. (May 10, 1902, 95 v. 504.)

§ 3706b. **PROVISION FOR PAYMENT FOR SUCH PURCHASE OR LEASE OF LANDS.** — That the payment for the purchase or lease of the parcels or tracts of land included in such new site, and the improvements, buildings and structures thereon, shall be made by the county commissioners from any unappropriated funds in the county treasury at the time said payments are to be made, and if no such funds are in the county treasury at such times, then the county commissioners are hereby authorized to issue the bonds of the county for such amounts as may be necessary for the purchase or lease of said land and the improvements thereon; provided, that in the event such old site is sold or leased before such new site is purchased or leased, said agricultural society shall, in making said payments, first apply the moneys real-

County Agricultural Societies, etc., §§ 3706c, 3707.

ized from the sale or lease of such old site to the purchase or lease of new site; and in the event such old site is sold or leased after the purchase or lease of such new site, the amounts realized from such sale or lease shall be placed to the credit of the sinking fund for the redemption of the bonds to be issued as hereinafter provided. Such bonds shall bear interest at a rate not to exceed three and one-half (3 1-2) per cent. per annum, payable semi-annually, and shall not be sold at less than their par value, and shall be payable at such place as said county commissioners shall determine, not less than ten years from the date thereof; and to provide for the payment of said bonds and the interest thereon the said county commissioners are hereby authorized to levy such annual taxes on all the taxable property of the county, as may be necessary to create and provide a sinking fund for the redemption of such bonds at maturity and the interest accruing thereon. Said levy shall be collected and accounted for to the county treasurer of the county in the manner provided for the collection of other taxes. Before issuing such bonds, the commissioners shall, by resolution, submit to the qualified electors of the county at the next general election for county officers held not less than thirty days after receiving from such agricultural society the notice provided for in section 3706, the question of issuing and selling such bonds, in amount and denomination as may be necessary for the purpose in view, and shall cause a copy of such resolution to be certified to the deputy state supervisors of elections of the county, and such deputy state supervisors of elections shall place the question of issuing and selling such bonds upon the ballot and make all other necessary arrangement for the submission of such question to the qualified electors of such county, at the time fixed by the resolution. The votes cast upon such question shall be counted, canvassed and certified in the same manner, except as otherwise provided by law, as votes cast for county officers. Fifteen days' notice of such submission shall be given by the deputy state supervisors of elections, by publication once a week for two consecutive weeks in two or more newspapers published in the county, stating the amount of bonds to be issued, the purpose for which they are to be issued, and the time and places of holding such elections. Said question shall be stated on the ballot as follows: "For the issue of county fair bonds, yes;" "For the issue of county fair bonds, no," and if the majority of the voters voting upon the question of issuing the bonds in favor thereof, then and not otherwise shall such bonds be issued, and the tax hereinbefore mentioned be levied. (May 10, 1902, 95 v. 504.)

§ 3706c. CONTROL AND MANAGEMENT OF LANDS WHERE TITLE IS VESTED IN COUNTY COMMISSIONERS. — That where the title to the grounds and improvements occupied by agricultural societies is vested in the county commissioners, the control and management of such lands and improvements shall be vested in the board of directors of such agricultural society so long as the same shall be occupied and used by such society for holding agricultural fairs, and all moneys realized by said agricultural society in the holding of county fairs and derived from renting or leasing said grounds and buildings, or portions thereof, in the conduct of said county fairs or otherwise, over and above the necessary expenses thereof, shall be paid into the county treasury of said society to be used as a fund for keeping said grounds and buildings in good order and repair, and in making such other improvements as may from time to time be deemed necessary by the directors of said society. (May 10, 1902, 95 v. 505.)

§ 3707. HOW CONVEYANCES TO BE EXECUTED. — Conveyances of grounds sold under the preceding section, which are owned exclusively by any society, may be executed by the president of the society as such president; and grounds owned partly by the society and partly by the county may be conveyed by deed executed by the president of the society, as such president, and by the county commissioners. (March 28, 1859, 56 v. 76, § 2; S. & C. 69.)

Township Agricultural Societies — Fairs, Regulations as to, §§ 3708-3712.

§ 3708. **SOCIETY CAN NOT INCUMBER ITS GROUNDS.** — When the commissioners of any county have paid, or hereafter pay, any money out of the county treasury for the purchase of real estate as a site for any agricultural society whereon to hold its fairs, such society shall not incumber such real estate with any debt, by mortgage or otherwise, without the consent of the commissioners. (February 26, 1875, 72 v. 42, § 1.)

§ 3709. **INCORPORATION OF TOWNSHIP SOCIETIES.** — When any number of natural persons of any township form a society for the promotion of agriculture in such township, and under their hands and seals make a certificate, and acknowledge the same before a justice of the peace, in which shall be specified the name of the society, the objects of its formation, and the township in which it shall be located, and file the same in the office of the secretary of state, such society shall be deemed a body corporate, with succession, and with power to sue and be sued, defend and be defended, and contract and be contracted with, may make and use a common seal, and the same alter at pleasure, and may purchase, and hold in fee simple, or rent or lease, such real estate as may be required as a site for holding fairs, not exceeding forty acres, and establish all necessary rules and regulations for the management of such fairs and the legitimate business of the society. (February 11, 1877, 74 v. 30, § 1; S. & S. 5.)

§ 3709a. **AUTHORIZING TOWNSHIP SOCIETIES TO INCORPORATE FOR DETECTION OF HORSE THIEVES AND OTHER CRIMINALS AND FOR MUTUAL PROTECTION OF PROPERTY AGAINST SUCH.** — When any number of natural persons of any township, form a society, for the detection and arrest of horse thieves and other criminals, and for the mutual protection of the property of its members, such society may become a body corporate in the manner prescribed in section thirty-seven hundred and nine of the Revised Statutes, to which this is supplementary, with the right of succession, and the right to make and use a common seal, and with power to sue and be sued, to contract and be contracted with, to levy and collect, by suit, if necessary, such assessments not exceeding three dollars annually from each member, as may be required to carry out the objects of the society, and to make for such society needful rules and regulations not in conflict with the laws of this state. (February 10, 1885, 82 v. 63.)

§ 3710. **JUSTICES OF THE PEACE MAY APPOINT SPECIAL CONSTABLES.** — A justice of the peace may, on the application of a state, county, township, or an independent agricultural society, or industrial association, appoint a suitable number of special constables to assist in keeping the peace during the time when such society is holding its annual fair, and shall make an entry in his docket of the number and names of all such persons so appointed. (April 11, 1856, 53 v. 141, § 1; S. & C. 67.)

§ 3711. **POWERS OF SUCH CONSTABLES.** — Constables so appointed shall have all the power of constables to suppress riots, disturbances, and breaches of the peace; they may, upon view, arrest any person guilty of a violation of any of the laws of the state, and may pursue and arrest any person fleeing from justice in any part of the state; and they may apprehend any person in the act of committing an offense, and, upon reasonable information, supported by affidavit, procure process for the arrest of any person charged with a breach of the peace, and forthwith bring such person before the competent authority, and enforce all the laws for the preservation of good order. (April 11, 1856, 53 v. 141, § 2; S. & C. 68.)

§ 3712. **DUTIES OF CERTAIN OFFICERS TO SUPPRESS SALE OF LIQUOR AT FAIRS.** — A judge of any court, sheriff, coroner, justice of the peace of the proper county, a constable of the proper township, or the constables specially appointed, shall, upon view or information, without warrant, apprehend any person selling

Fairs, Regulations as to — Farmers' Institutes, §§ 3713 3713-3.

intoxicating liquors in violation of law at or within two miles of the place where an agricultural fair is being held, and seize the booth, tent, wagon, carriage, stand, vessel, or boat at or from which such liquors are being sold, and convey the same to a place of safe keeping, and take the person so offending before some officer having competent jurisdiction, together with an inventory of the things so seized, and the officer before whom such offender is brought shall proceed forthwith to inquire into the truth of the accusation, and proceed as provided by law. (April 11, 1856, 53 v. 141, § 4; S. & C. 68.)

See § 6946 providing for arrest for sale of intoxicating liquor within two miles of agricultural fair, and the following cases applicable thereto. — *Heck v. State*, 44 Oh. St. 536 (1886); *Theis v. State*, 51 Oh. St. 215 (1896); *State v. Long*, 48 Oh. St. 509 (1891).

§ 3713. HOW ARTICLES SEIZED TO BE DISPOSED OF. — The articles so seized shall be bound for the payment of all fines and costs assessed against the accused in the proceeding, including the necessary expenses of seizing and detaining the same, and shall remain in the possession of the officer who makes the seizure until the determination of the prosecution, and may be sold on process issued therein against the accused. (April 11, 1856, 53 v. 141, §§ 5, 6; S. & C. 68.)

§ 3713-1. Sec. 1. WHEN FARMERS' INSTITUTE SOCIETY DEEMED BODY CORPORATE. — That when twenty or more persons, residents of any county in the state, organize themselves into a farmers' institute society, for the purpose of teaching better methods of farming, stock raising, fruit culture and all branches of business connected with the industry of agriculture, and adopt a constitution and by-laws agreeable to rules and regulations furnished by the state board of agriculture; and when such society shall have elected proper officers and performed such other acts as may be required by the rules of the state board of agriculture, such society shall be deemed a body corporate. (April 27, 1896, 92 v. 330.)

§ 3713-2. Sec. 2. NUMBER, TIMES AND PLACES OF ANNUAL MEETINGS. — Not to exceed four farmers' institute societies organized under the provisions of this act, shall hold annual meetings under the auspices of the state board of agriculture in any one county in the state, and the state board of agriculture shall have power to determine the number and name the times and places for holding such institute meetings. (April 27, 1896, 92 v. 330.)

§ 3713-3. Sec. 3. COUNTY PAYMENTS TO SOCIETIES AND STATE BOARD OF AGRICULTURE. — When a society organized under the provisions of this act shall have held an annual farmers' institute meeting in accordance with the rules of the state board of agriculture, the secretary of said board shall issue certificates, one to the president of the farmers' institute society and one to the president of the state board of agriculture, setting forth these facts and, on the presentation of these certificates to the county auditor, he shall each year draw orders on the treasurer of the county as follows: Based on the last previous national census, a sum equal to three mills for each inhabitant of the county in favor of the president of the state board of agriculture, and a sum equal to three mills for each inhabitant of the county in favor of the president of the farmers' institute society, where but one society is organized, but in counties where there are more than one farmers' institute society organized under the provisions of this act, and holding meetings under the auspices and by direction of the state board of agriculture, the said three mills for each inhabitant shall be equally apportioned among such societies, and warrants in the proper amounts issued to the respective presidents, and the treasurer of the county shall pay the same from the county fund; provided that in no county shall the total annual sum exceed two hundred and fifty dollars; and provided further, that the payment to any institute society shall not exceed the expenses, as per detailed statement, provided in section four (§ 3713-4) of this act. (April 27, 1896, 92 v. 330.)

Farmers' Institutes — Trespassing on Fair Grounds, §§ 3713-4-3713-8.

§ 3713-4. Sec. 4. **SOCIETY'S STATEMENT OF EXPENSES; WHAT SECRETARY'S CERTIFICATE TO INDICATE.**—With each certificate of the secretary of the state board of agriculture to the county auditor, which certificate shall indicate the number of societies organized in the county and holding meetings by direction of the state board of agriculture, and before the auditor issues his order upon the treasurer there shall be filed with the auditor a detailed statement of the expenses of the institute for the current year, no part of which shall be for salaries of officers of the institute society; but this provision shall not apply to the order in favor of the president of the state board of agriculture, which board shall issue statement as required in section six (§ 3713-6) of this act. (April 27, 1896, 92 v. 330.)

§ 3713-5. Sec. 5. **LECTURERS AT ANNUAL MEETINGS.**—At the annual farmers' institute meetings, held under the provisions of this act and under the auspices of the state board of agriculture, the said board shall furnish lecturers or speakers whose compensation and expense shall be paid by the board. (April 27, 1896, 92 v. 330.)

§ 3713-6. Sec. 6. **PUBLICATION AND DISTRIBUTION OF LECTURES AND PAPERS.**—At the close of each season's institute work, the state board of agriculture shall publish in pamphlet or book form, such lectures and papers delivered at the several institute meetings, as may seem of general interest and importance to the farmers, stock breeders and horticulturists of the state, copies of which shall be furnished the secretary of each institute society, and the balance issued to be for general distribution; the cost of preparing the matter and the distribution of the pamphlet or book to be paid by the state board of agriculture. Said board shall also publish, in such pamphlet or book, a detailed statement of its receipts under the provisions of this act and the disbursements on account of institute work. (April 27, 1896, 92 v. 330.)

§ 3713-7. Sec. 1. **TRESPASS.**—That whenever any person or persons, corporation or association, whether incorporated or otherwise, shall be possessed of, as owners, or shall have the lawful custody of any tract or parcel of land within this state, for the purpose of an agricultural or other fair grounds, or for the purpose of meetings of pioneers, or for public or private entertainments or other lawful assemblages, or for the protection of trees, plants and shrubs, or either of them, or the fruits and products thereof, or for any one or all of said purposes, it shall be unlawful for any person or persons to enter or go upon said grounds, either through or over any fence, or in any manner, without the consent and permission of the owner or owners thereof, or other person having lawful control of the same, or in violation of the regulations of the same; and in case of the holding a state, county, township, or independent fair, it shall be unlawful for any person or persons to injure, molest, remove or in any way to disturb any exhibits or property of any kind contrary to the rules of the state, county, township or independent board or society, or industrial association, under the control and management of which said fair may be held. (April 23, 1902, 95 v. 241; April 15, 1889, 86 v. 302; May 1, 1885, 82 v. 208.)

§ 3713-8. Sec. 2. **PENALTY.**—Whoever shall willfully, and in violation of the provisions of section 3713-7 of the Revised Statutes of Ohio, enter or go upon any lands referred to in said section, or shall injure or destroy any tree, plant, shrub or other property thereon, or shall take or carry away any fruit, nut or other thing of value, or shall willfully damage or destroy any fence enclosing said lands, or shall injure, molest, remove or in any way disturb any exhibit or property of any kind contrary to rules, shall on conviction thereof be fined in any sum not exceeding three hundred dollars nor less than five dollars, or be imprisoned in the jail of the proper county, or in any city, town, or village prison or lockup (when the offense shall have been committed within the corporate limits thereof) for any period not exceeding

Fair Grounds, Trespassing on; Appropriations for, §§ 3713-9 3713-11.

three months, and until said fine and costs are paid, or both fine and imprisonment, at the discretion of the court; and shall moreover be liable, in a civil action to the party damaged thereby, in double the value of the property taken, carried away or destroyed, and in double the amount of the damage thereto, to be recovered before a justice of the peace or other court of competent jurisdiction. (April 23, 1902, 95 v. 242; April 15, 1889, 86 v. 302; May 1, 1885, 82 v. 208.)

§ 3713-9. Sec. 3. PROSECUTIONS HEREUNDER. — Prosecutions under and by virtue of this act, may be by indictment in the court of common pleas in the county where the offense shall have been committed, or before a justice of the peace of such county, or before the mayor of a city, town, or village, when the offense shall have been committed within the corporate limits of the same. (May 1, 1885, 82 v. 208.)

§ 3713-10. Sec. 1. PROCEEDINGS FOR APPROPRIATION OF LANDS FOR ENLARGEMENT OF FAIR GROUNDS. — When it shall be deemed necessary by the board of directors of any county agricultural society to enlarge the fair grounds under the control of such society, and the owner or owners of the proposed addition to said grounds and the said board of directors are unable from any cause to agree upon the sale and purchase of said additional grounds, the board shall make an accurate plat and description of the land which it desires for said purpose and file the same with the probate judge of the proper county; and thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations, said board to act for such society therein as the council would for the municipal corporation. (March 2, 1892, 89 v. 52; April 8, 1880, 77 v. 128.)

§ 3713-11. Sec. 2. BOARD OF DIRECTORS TO PROSECUTE PROCEEDINGS. — That if, under any existing law, it is made the duty of the county commissioners to purchase any such additional grounds for the use of any such society, said board of directors shall prosecute the said proceedings of appropriation to their final conclusion, except so far as relates to payment, or any part of the purchase money, before said commissioners shall be called upon to act in the matter. All such payments or deposits, not exceeding fifteen thousand dollars (\$15,000) in amount, shall be made by said commissioners when required so to do by said board of directors, or by the court, and no delay on the part of said commissioners shall defeat or prevent the purchase or appropriation aforesaid. (April 8, 1880, 77 v. 128.)

PART XVII.

HUMANE SOCIETIES.

- § 3714. "Ohio Humane Society;" powers, etc.; representatives; the objects of; power to acquire property; board for management of bequests, etc.; officers and rules; agents; powers of agents; branch societies; societies now organized may become branches.
- § 3715. Other societies authorized.
- § 3716. How incorporated.
- § 3717. May elect officers, and make regulations.
- § 3718. Societies to prevent cruelty to animals may appoint agents to enforce law.
- § 3718a. In prosecutions for adulteration of food, etc.; for cruelty to animals; judicial proceedings in such cases before justices; costs, how paid; as to attorney.
- § 3719. Magistrate may authorize certain inspections.
- § 3719a. Duties of police officer; penalty.
- § 3720. Police powers of officers and agents.
- § 3721. Interpretation of certain words.
- § 3722. Members may require police officer to act.
- § 3723. A person guilty is liable in damages.
- § 3724. Conviction of agent no bar to action against principal.
- § 3725. Any person may protect an animal from neglect.
- § 3725a. Animal may be ordered killed.
- § 3725-1. Removal of child from possession of parent by officer of humane society. Notice.
- § 3725-2. Order of probate court making general agent of society guardian of child. Guardian may provide home for child.

§ 3714. "OHIO HUMANE SOCIETY" POWERS, ETC., REPRESENTATIVES; THE OBJECTS OF; POWER TO ACQUIRE PROPERTY; BOARD FOR MANAGEMENT OF BEQUESTS, ETC.; OFFICERS AND RULES; AGENTS; POWERS OF AGENTS; BRANCH SOCIETIES; SOCIETIES NOW ORGANIZED MAY BECOME BRANCHES. — The Ohio state society for the prevention of cruelty to animals, heretofore incorporated, shall be and remain a body corporate, under the name of "the Ohio humane society" with all the powers, privileges, immunities, and duties heretofore possessed by said Ohio state society for prevention of cruelty to animals, hereinafter specified, as to county associations, and may appoint any person, in any county in this state where there is no such active association, to represent the state society, and to receive and account for all funds coming to the society, from fines or otherwise. The objects of said society and all societies heretofore, or hereafter organized under sections three thousand seven hundred and fifteen and three thousand seven hundred and sixteen of the Revised Statutes shall be the inculcation of humane principles, and to secure the enforcement of laws for the prevention of cruelty, especially to children and animals, to promote which objects the said societies may respectively acquire property, real and personal, by purchase or gift. All property acquired by gift, devise, or bequest, for special purposes shall be vested in a board of trustees consisting of three members elected by the society, which board shall manage said property, and apply the same in accordance with the terms of the gift, devise, or bequest, with power to sell the same and re-invest the proceeds. Said society may elect such officers, and make such rules and regulations and by-laws as may be deemed necessary or expedient by their members for their own government and the proper management of their affairs. Said society may appoint agents in any county

Local Societies, Incorporation, etc., of, §§ 3715-3718.

of this state, where no active society exists under sections three thousand seven hundred and fifteen and three thousand seven hundred and sixteen of the Revised Statutes to represent the society, and receive and account for all funds coming to the society from fines or otherwise, and may also appoint agents at large to prosecute the work of said society throughout the state. The agents of said society and of all societies heretofore or hereafter organized under sections three thousand seven hundred and fifteen and three thousand seven hundred and sixteen of the Revised Statutes whose appointment has been approved as hereinafter provided, shall have power to arrest any person found violating any law for the protection of persons or animals, or the prevention of cruelty thereto, and upon making such arrest shall forthwith convey the person arrested before some court or magistrate having jurisdiction of the offense, and there make complaint against them, but said agents shall not be authorized to make such arrests within any municipal corporation unless their appointment has been approved by the mayor thereof, nor within any county beyond the limits of a municipal corporation, unless their appointment has been approved by the probate judge of said county, and the mayor or probate judge shall keep a record of all such appointments. Branches of the society consisting of not less than ten members may be organized in any part of the state to prosecute the work of the societies in their several localities, under rules and regulations prescribed by the society. Societies for the prevention of acts of cruelty to animals organized in any county under section three thousand seven hundred and fifteen may become branches of said society by resolution adopted at a meeting thereof called for that purpose, a copy of which resolution shall be forwarded to the secretary of state. (March 21, 1887, 84 v. 207; R. S. 1880; March 29, 1875, 72 v. 129, § 21.)

§ 3715. OTHER SOCIETIES AUTHORIZED. — Societies for the prevention of acts of cruelty to animals may be organized in any county, by the association of not less than seven persons, and the members thereof shall, at a meeting called for the purpose, elect not less than three of their members directors, who shall continue in office until their successors are duly chosen. (March 29, 1875, 72 v. 129, § 12.)

§ 3716. HOW INCORPORATED. — The secretary or clerk of the meeting shall make a true record of the proceedings thereat, which he shall certify, and forward to the secretary of state, who shall record the same; the record shall contain the name by which such association shall have determined to be known, and from and after the filing of the same the directors and associates, and their successors, shall be invested with the powers, privileges, and immunities incident to incorporated companies; and a copy of the record, duly certified by the secretary of state, shall be deemed and taken, in all courts and places in this state, as evidence that such association is a duly organized and incorporated body. (March 29, 1875, 72 v. 129, § 13.)

§ 3717. MAY ELECT OFFICERS, AND MAKE REGULATIONS. — Such associations may elect such officers, and make such rules, regulations, and by-laws, as may be deemed necessary or expedient by their members for their own government, and the proper management of their affairs. (March 29, 1875, 72 v. 129, § 15.)

§ 3718. SOCIETIES TO PREVENT CRUELTY TO ANIMALS MAY APPOINT AGENTS TO ENFORCE LAW. — Such associations may appoint agents for the purpose of prosecuting any person guilty of any act of cruelty to persons or animals within this state, who shall have power to arrest any person found violating any of the provisions of this chapter, or any other law for the purpose of protecting persons or animals, or preventing any act of cruelty thereto; and, upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, within the municipal corporation or county wherein the offense was committed, and there forthwith make complaint, on oath or affirmation,

Humane Societies, Suits by, etc., § 3718a.

of the offense; but all appointments by such associations under this section must have the approval of the mayor of the city or village in which the association exists, and if it exists outside of any city or village the appointment must be approved by the probate judge of the county; and the mayor or probate judge shall keep a record of all such appointments. (April 14, 1884, 81 v. 181; R. S. 1880; March 29, 1875, 72 v. 129, § 6 [§ 16].)

§ 3718a. JURISDICTION OF JUSTICES, POLICE JUDGES AND MAYORS IN PROSECUTIONS FOR ADULTERATION OF FOOD, ETC., AND FOR CRUELTY TO ANIMALS OR CHILDREN. -- Any justice of the peace, police judge, or mayor of any city or village, shall each have jurisdiction within his county, in all cases of violation of the laws to prevent the adulteration of food and drink, the adulteration or deception in the sale of dairy products, or any other foods, and drugs and medicines, and any violation of the law for the prevention of cruelty to animals or children, or under section 3140-2, 4364-24, 4364-25, 6984, 6984a of the Revised Statutes of Ohio.

JUDICIAL PROCEEDINGS IN SUCH CASES BEFORE JUSTICES. -- In any such prosecution where imprisonment may be a part of the punishment, if a trial by jury be not waived, the said justice of the peace shall, not less than three nor more than five days before the time fixed for trial, certify to the clerk of the court of common pleas of his county that such prosecution is pending before him. Thereupon said clerk shall proceed to draw, in the presence of representatives of both parties, from the jury wheel or box containing the names of persons selected to serve as petit jurors in the court of common pleas in said county, twenty ballots or names, which shall be drawn and counted in the same manner as for jurors in said court of common pleas. Said clerk shall forthwith certify the names so drawn to said justice of the peace, who, upon receipt thereof, shall issue to any constable of the county a venire containing such names to serve as jurors to try such case and make due return thereof. The jurors shall be subject to the same challenges as jurors are subject to in criminal cases, except capital cases, in the court of common pleas. If the venire of twenty names be exhausted without obtaining the required number to fill the panel, the justice shall fill the panel with talesmen in the manner provided for criminal cases in said court of common pleas.

COSTS. -- In all cases prosecuted under the provisions of this act, no costs shall be required to be advanced or be secured by any person or persons authorized under the law to prosecute such cases; and if the defendant be acquitted or discharged from custody, by nolle or otherwise, or if he be convicted and committed in default of paying fine and costs, all costs of such case shall be certified by said justice of the peace under oath to the county auditor, who, after correcting any errors in the same, shall issue a warrant on the county treasury, in favor of the person or persons to whom such costs and fees shall be paid.

ATTORNEY IN PROSECUTING FOR CRUELTY TO ANIMALS OR CHILDREN. -- And in cases brought for any violation of law for the prevention of cruelty to animals or children, or under section 3140-2, 6984, 6984a or (7017-3) Revised Statutes of Ohio, any humane society or their agents may employ an attorney to prosecute the same, who shall be paid for his services out of the county treasury in such sum as any judge of the court of common pleas or probate judge, within said county, or the county commissioners, may approve as just and reasonable.

JURISDICTION AND POWER OF CONSTABLE IN SUCH CASES; FEES. -- In pursuing or arresting any defendant and in subpoenaing the witnesses, the jurisdiction and powers of the constable or other court officer acting in such capacity, in all such cases, shall be the same as that of the sheriff of the county in criminal cases in the common pleas court, and he shall receive the same fees therefor as are allowed said sheriff.

Police Powers, etc., §§ 3719, 3719a.

FEES OF JURORS AND WITNESSES. — Jurors in all such cases and witnesses subpoenaed in all such cases shall be entitled to like mileage and fees, as are allowed in criminal cases in the court of common pleas, and in all other respects, in so far as the same may be applicable, the procedure provided for in criminal cases in the common pleas court not otherwise inconsistent herewith, shall be followed.

AFFIDAVIT; WHAT TO CONTAIN. — And provided further, that where, in any such laws, after the first offense, a different punishment is provided for subsequent offenses, the information or affidavit, in order to avail the state of the benefit of such additional punishment, shall so charge that it is the second or subsequent offense, and unless such special charge is so made, the punishment shall in all cases be as of the first offense. All costs and moneys which are to be paid by the county treasurer as herein provided, shall be paid out of the general revenue fund of said county.

NEW TRIAL. — And in any case prosecuted under the provisions of this section, a new trial, after a verdict of conviction, may be granted, for any of the reasons enumerated in section seventy-three hundred and fifty of the Revised Statutes, upon the written application of the defendant, filed within three days after the rendition of the verdict; provided that the causes enumerated in subdivision two, three and five of said section must be sustained by affidavits or other evidence showing their truth and may be controverted by like evidence. (May 10, 1902, 95 v. 517; April 3, 1900, 94 v. 92; May 21, 1894, 91 v. 412; April 27, 1893, 90 v. 335; April 31, 1888, 85 v. 144; April 14, 1884, 81 v. 181.)

Jury need not be waived in writing.

It is not necessary that the accused should waive a trial by jury in writing to give the magistrate jurisdiction to proceed to final judgment without a jury.—Martindale v. State, 2 C. C. 2 (1896); s. c., 1 C. D. 328.

Section 7147, R. S., does not apply to prosecutions under this statute.

Martindale v. State, 2 C. C. 2 (1896); s. c., 1 C. D. 328.

Sections 3718a and 7147, R. S., are not in pari materia.

Martindale v. State, 2 C. C. 2 (1896); s. c., 1 C. D. 328.

Jurisdiction in coloring oleomargarine.

Justices have jurisdiction in prosecutions for the introduction of coloring matter into oleomargarine.—State v. Ruedy, 57 Oh. St. 224 (1897).

Prosecuting attorney may file exceptions.

A decision of the common pleas court reversing a sentence by a justice of the peace may be the subject of an exception by the prosecuting attorney under section 7305, R. S.—State v. Ruedy, 57 Oh. St. 224 (1897).

Cited. State ex rel. v. Adkins, 18 C. C. 20, 21 (1899); s. c., 9 C. D. 373.

See Marvin v. Ohio, 5 N. P. 209 (1897).

§ 3719. MAGISTRATES MAY AUTHORIZE CERTAIN INSPECTIONS. — When complaint is made, on oath or affirmation, to a magistrate or court authorized to issue warrants in criminal cases, that the complainant believes that any of the provisions of law relating to or affecting animals are being or are about to be violated in any particular building or place, such magistrate or court shall issue and deliver immediately, a warrant directed to any sheriff, constable, police officer, or agent of such association, authorizing him to enter and search such building or place, and to arrest any person there present violating, or attempting to violate, any such law, and to bring such person before some court or magistrate of competent jurisdiction within the city, village, or county within which such offense has been committed, to be dealt with according to law, and such attempt shall be held to be a violation of such law, and shall subject the person charged therewith, if found guilty, to the penalties provided therein. (March 29, 1875, 72 v. 129, § 17.)

§ 3719a. DUTIES OF POLICE OFFICER; PENALTY. — When a sheriff, constable, marshal, police officer, or any agent for any duly incorporated society for the prevention of cruelty to animals, has reason to believe that any person within his jurisdiction is about to violate the provisions of section sixty-nine hundred and fifty-two, of the Revised Statutes, he shall forthwith arrest such person, and take him

Police Powers; Prosecution, etc., §§ 3720-3724.

before a magistrate named in section seventy-one hundred and six; upon the proper affidavit being filed, such officer shall hear the witnesses produced, on oath, and if he find the complaint true, order the accused to enter into a recognizance, with sufficient sureties, in a sum not less than one hundred dollars nor more than five hundred dollars, that he will not violate the provisions of said section sixty-nine hundred and fifty-two, within one year thereafter, within this state, and in default of such recognizance the officer shall commit the accused to jail, there to remain until such order is complied with, or he is otherwise discharged by due course of law, or until he shall make and subscribe an oath, in the presence of two witnesses, that he will not violate the provisions of said section six thousand nine hundred and fifty-two of the Revised Statutes of Ohio, nor aid or abet in so doing within said year. Upon conviction of such person for a subsequent violation of the provisions of said section within said year, he shall be fined not less than twenty-five dollars (\$25) nor more than five hundred dollars (\$500), or imprisoned not less than thirty days nor more than ninety days, or both, in the discretion of the court. (April 14, 1884, 81 v. 181, 182.)

§ 3720. POLICE POWERS OF OFFICERS AND AGENTS.—An officer, agent, or member of any such association may interfere to prevent the perpetration of any act of cruelty to animals in his presence, and may use such force as may be necessary to prevent the same, and to that end may summon to his aid any bystanders. (March 29, 1875, 72 v. 129, § 18.)

§ 3721. INTERPRETATION OF CERTAIN WORDS.—In this chapter, and in every law of the state relating to or in any manner affecting animals, the word "animal" shall be held to include every living dumb creature; the words "torture," "torment," and "cruelty," shall be held to include every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief; and the words "owner" and "person" shall be held to include corporations; and the knowledge and acts of agents and employees of corporations, in regard to animals transported, owned, employed by, or in the custody of a corporation, shall be held to be the act of such corporation. (March 29, 1875, 72 v. 129, § 19.)

§ 3722. MEMBER MAY REQUIRE POLICE OFFICER TO ACT.—A member of any such association may require the sheriff of any county, the constable of any township, the marshal or policeman of any city or village, or the agent of any such association, to arrest any person found violating the laws in relation to cruelty to persons or animals, and to take possession of any animal cruelly treated, in their respective counties, cities or villages, and deliver the same to the proper officers of such associations; and for such service, and for all services rendered in carrying out the provisions of this chapter, such officers, and the officers and agents of the association, shall be allowed and paid such fees as they are allowed for like services in other cases, which shall be charged as costs, and reimbursed to the association by the person convicted. (April 14, 1884, 81 v. 181, 183; R. S. 1880; March 29, 1875, 72 v. 129, § 20.)

§ 3723. A PERSON GUILTY IS LIABLE IN DAMAGES.—A person guilty of cruelty to an animal, the property of another, shall be liable to the owner thereof in damages, in addition to the penalties prescribed by law. (March 29, 1875, 72 v. 129, § 11.)

§ 3724. CONVICTION OF AGENT NO BAR TO ACTION AGAINST PRINCIPAL.—The conviction of an agent or employee shall not bar an action for cruelty to animals against an employer for allowing a state of facts to exist which will induce cruelty to animals on the part of such agent or employer. (March 29, 1875, 72 v. 129, § 9.)

Protection, etc., of Animals and Children, §§ 3725-3725-2.

§ 3725. ANY PERSON MAY PROTECT AN ANIMAL FROM NEGLECT. — Whenever it may be necessary, in order to protect any animal from neglect, any person may take possession of the same; and whenever an animal is impounded, yarded or confined, and continues without necessary food, water, or proper attention for more than fifteen successive hours, any person may, from time to time, and as often as it may be necessary, enter into and upon any place in which such animal is so impounded, yarded, or confined, and supply it with necessary food or water and attention, so long as it there remains, or may, if necessary or convenient, remove such animal, and shall not be liable to any action for such entry; in all cases the owner or custodian of such animal, if known, shall be immediately notified of such action, by the person taking possession of such animal; if the owner or custodian be unknown, and cannot be ascertained with reasonable effort, such animal shall be held to be an estray, and shall be dealt with as such; the necessary expense for food and attention given to any animal under the provisions of this section, may be collected of the owner of such animal, and the animal shall not be exempt from levy and sale upon execution issued upon a judgment therefor. (April 14, 1884, 81 v. 181, 183; R. S. 1880; March 29, 1875, 72 v. 129, § 3.)

§ 3725a. ANIMAL MAY BE ORDERED KILLED. — Any sheriff, constable, marshal, policeman, or agent, of any society for the prevention of cruelty to animals, may kill, or cause to be killed any animal found neglected or abandoned, and which in the opinion of three reputable citizens, is injured or diseased, past recovery or by age has become useless. (April 14, 1884, 81 v. 181, 183.)

Section unconstitutional.

This section is unconstitutional, since it provides for the taking of property without due process of law.—Brill v. Ohio Humane Society, 4 C. C. 358 (1890); s. c. 2 C. D. 594.

Ordinance providing for sale, unconstitutional.

A city ordinance providing for the sale of dogs found running at large without a license check, and which does not give due notice of such sale, is unconstitutional.—Archer v. Baertchi, 8 C. C. 12 (1892); s. c., 4 C. D. 416.

§ 3725-1. Sec. 1. REMOVAL OF CHILD FROM POSSESSION OF PARENT BY OFFICER OF HUMANE SOCIETY. — Whenever any officer or agent of a society in this state, organized under title 2, chapter 13, of the Revised Statutes, shall deem it for the best interest of any child, either by reason of cruelty inflicted upon said child or by reason of the surroundings of the child, that said child be removed from the possession and control of the parents or other person or persons having charge thereof, said officer or agent may take possession of said child summarily;

NOTICE.— and shall cause a notice to be personally served upon the person having control or possession of said child, and upon the parent or parents of said child, if within the state, that the said society will apply to the probate court of the county in which said society is situated, at a time and place named in such notice, for an order as hereinafter set forth. (April 25, 1898, 93 v. 296.)

§ 3725-2. Sec. 2. ORDER OF PROBATE COURT MAKING GENERAL AGENT OF SOCIETY GUARDIAN OF CHILD. — At the time set forth in said notice, if it shall appear to the satisfaction of the probate judge, that it is for the best interest of said child that possession and control thereof be taken from said parent or other person having control or possession thereof, said probate judge shall make an order conferring upon the general agent of said society the powers of a guardian as to such child;

GUARDIAN TO PROVIDE HOME FOR CHILD.— and, as such guardian, said general agent may, with the approval of the probate judge, provide a suitable home for such child until said child reaches the age of majority or until such time as the probate judge may be satisfied that the parent or parents of said child are in a position to properly provide and care for said child. (April 25, 1898, 93 v. 296.)

PART XVIII.

COLLEGES AND INSTITUTIONS OF LEARNING.

- § 3726. Certain corporations may appoint a faculty and confer degrees.
- § 3727. May hold donated property in trust.
- § 3728. Who constitute the faculty: its powers.
- § 3729. May teach mechanics and agriculture.
- § 3730. May change stock into scholarships.
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- § 3733. How vacancies in board filled in certain cases.
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- § 3735. Statement to be made and filed.
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- § 3737. Trustees to be divided into classes.
- § 3738. Terms of office of trustees; how vacancies filled.
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- § 3741. A conference may become a patron by consent of other bodies.
- § 3742. Patronizing bodies may appoint visitors.
- § 3743. When the right of representation shall cease.
- § 3744. What action the board must first take.
- § 3745. Quorum; how constituted.
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- § 3747. Alumni may elect trustees and appoint visitors.
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- § 3749. Returns of election, and certificates.
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- § 3751b. Incorporation of colleges under ecclesiastical patronage; what articles shall contain.
- § 3751c. Existing corporations may avail themselves of provisions of act, how. Copy of acceptance of provision to be filed with secretary of state.
- § 3752. Classes and election of trustees: president ex officio a member of board; term; vacancies: increase in board.
- § 3753. Assessments may be made against stockholders.
- § 3754. Meeting of stockholders, and notice thereof.
- § 3755. Meeting may fix the amount of assessment.
- § 3756. How much may be assessed, and collection thereof.
- § 3757. The board of military academies: how constituted, etc.
- § 3758. Board of visitors; how constituted.
- § 3759. Duties of board of visitors.
- § 3760. How the term of office of directors and trustees may be fixed.
- § 3761. Certain corporations may change location.
- § 3762. Sale and distribution of the property of certain corporations.
- § 3762a. Certain colleges, whose articles of incorporation are not on file in the office of the secretary of state, may file same there and amend.
- § 3762b. Colleges may change name and purpose, when; procedure; fees.

Faculty—Degrees—Property, §§ 3726, 3727.

- § 3763. Restrictions under which medical colleges and teachers may receive bodies for dissection. Bodies to be delivered to claimant. Interment of body after examination or dissection. Notification to relatives of deceased person. Penalty for refusal to deliver body or acceptance of consideration for same. Body of stranger or traveler. Unlawful to have unauthorized body in possession; penalty.
- § 3764. Penalty for having unlawful possession of corpse.
- § 3767. Organic rules which may be prescribed in certain articles of incorporation.
- § 3768. May add to the objects of the corporation; acceptance of statutory provisions.
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- § 3768-2. Directors not personally liable.
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- § 3770. Trustees ineligible to other office.
- § 3771. Attorney-general may, by action, enforce duties of officers.
- § 3771a. How number of trustees of certain colleges increased.
- An Act. To provide for regulation and government of Chautauqua assemblies.
- An Act. To provide for administration of educational or charitable institutions in certain cases.

§ 3726. **CERTAIN CORPORATIONS MAY APPOINT A FACULTY AND CONFER DEGREES.**—The trustees of a college, university, or other institution of learning incorporated for the purpose of promoting education, religion, morality, or the fine arts, which has acquired real or personal property of the value of five thousand dollars, and which has filed in the office of the secretary of state a schedule of the kind and value of such property, verified by the oaths of the trustees, may appoint a president, professors, and tutors, and any other necessary agents and officers, and fix the compensation of each, and may enact such by-laws, not inconsistent with the laws of this state or of the United States, for the government of the institution, and for conducting the affairs of the corporation, as they may deem necessary; and may, on the recommendation of the faculty, confer all such degrees and honors as are conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the student, as they may deem proper. (April 9, 1852, 50 v. 128, § 1; March 11, 1853, 51 v. 403, §§ 2, 3; S. & C. 266; S. & C. 270.)

Cited, *State ex rel. v. Medical College*, 60 Oh. St. 122 (1899).

Conferring degrees without merit, grounds for ousting corporation.

When the trustees of an educational institution sign diplomas in blank, and leave them

within the control of one of its officers, who sells them, and thus confers degrees without regard to merit, there is such misuser as requires the dissolution of the corporation.—*State ex rel. v. Mt. Hope College Co.*, 44 W. L. B. 339 (1900).

§ 3727. **MAY HOLD DONATED PROPERTY IN TRUST.**—Any university, college, or academy, or the trustees thereof, may hold in trust any property devised, bequeathed, or donated to such institution, upon any specific trust consistent with the objects of the corporation. (April 9, 1852, 50 v. 128, § 5; S. & C. 267.)

If liability incurred, subscription enforceable.

Subscriptions promising to pay money for the endowment of an educational institution are enforceable where work was done and expenditures made in reliance upon such promises.—*Ohio Wesleyan College v. Higgins, Exr.*, 16 Oh. St. 20 (1865); *Sturges et al. v. Colby et al.*, 3 W. L. B. 643 (1878); *Irwin, Admr. v. Webster et al.*, 7 C. C. 269 (1893); s. c., 4 C. D. 590; *Durrel v. Belding*, 9 C. C. 74 (1894); s. c., 4 C. D. 263.

If no liability incurred, not enforceable.

If no liability is incurred on the faith of a gratuitous subscription, it cannot be enforced.—*Sutton, Admr. v. Trustees*, 7 C. C. 343 (1893); s. c., 4 C. D. 627.

What constitutes new liability.

The creation of a fund with which to pay an existing indebtedness is not a consideration for a promise to contribute to such fund.—*Johnson v. University*, 41 Oh. St. 527 (1885).

Faculty — Curriculum — Scholarships — Location, §§ 3728-3731.

University receiving no state aid is a private corporation.

University that has received its charter from the state, and is exempt from paying taxes, but has received no other benefits from the state, is a private corporation.

The charity it administers may be public, but the corporation is private.—*Koblitz v. Western Reserve University et al.*, 21 C. C. 144 (1901).

§ 3728. **WHO CONSTITUTES THE FACULTY; ITS POWERS.**—The president and professors shall constitute the faculty of any incorporated literary college or university, and may enforce the rules and regulations enacted by its trustees for the government and discipline of the students, and suspend and expel offenders, as may be deemed necessary. (April 9, 1852, 50 v. 128, § 6; S. & C. 267.)

Right of state to exercise visitatorial power.

Where the corporation is private, and is not administering funds contributed to it by the state, the state will not exercise visitatorial power over its domestic affairs, and will not interfere with its management unless there has been unjust and oppressive treatment of its students, or there has been a breach of trust by the managing officers.—*Koblitz v. Western Reserve University et al.*, 21 C. C. 144 (1901).

Dismissal of student for violation of rules.

A student, though paying a tuition fee, assumes the performance of certain obligations, and the failure to perform the same may be of such a nature that the university will be justified in dismissing him.—*Koblitz v. Western Reserve University et al.*, 21 C. C. 144 (1901).

Disciplining student; what sufficient hearing.

In administering the discipline of the institution, the authorities should afford a fair opportunity of presenting evidence as to innocence, but are not under obligation to afford all the formalities of a court of justice.—*Koblitz v. Western Reserve University et al.*, 21 C. C. 144 (1901).

Power of faculty to expel.

Where a student has been guilty of various breaches of duty, and the faculty have afforded him opportunity to make explanation and present evidence of his innocence, and where the faculty, after examination of his conduct, have found his acts to be injurious to the university, it is justified in expelling him.—*Koblitz v. Western Reserve University et al.*, 21 C. C. 144 (1901). See note to same case under preceding section.

§ 3729. **MAY TEACH MECHANICS AND AGRICULTURE.**—Any incorporated university, college, or academy may connect therewith, to be used as a part of its course of education, any mechanical shops and machinery, or lands for agricultural purposes not exceeding three hundred acres, to which may be attached all necessary buildings for carrying on the mechanical or agricultural operations of such institution. (April 9, 1852, 50 v. 128, § 8; S. & C. 267.)

3730. **MAY CHANGE STOCK INTO SCHOLARSHIPS.**—Any company formed in pursuance of this title, or which now exists by virtue of any special act of incorporation, the property of which is held as stock, and not derived by donation, gift, devise, or gratuitous subscription, may change its capital stock into scholarships, when it becomes necessary for the purpose of carrying out the object for which it was formed, in the manner provided in section thirty-two hundred and sixty-two. (April 9, 1852, 50 v. 128, §§ 9, 10; S. & C. 268.)

May issue scholarships.

A college corporation has the power to receive a subscription for which the donor is to

receive instruction for one pupil perpetually free of tuition.—*College v. Cary*, 35 Oh. St. 648 (1880).

§ 3731. **LOCATION MAY BE CHANGED, AND HOW.**—A college, university, or other institution of learning, now existing by virtue of any act of incorporation, or that may hereafter become incorporated for any of the purposes specified in this chapter, may, if three-fourths of the trustees or directors thereof deem the same proper, or if the institution is owned in shares, or by stock subscribed or taken, by a vote of the holders of three-fourths of the stock or shares, change the location of such institution, convey its real estate, and transfer the effects thereof, and invest the same

Endowments, etc.—Trustee—Statements, etc., §§ 3732-3735.

at the place to which such institution may be removed; but no removal shall be ordered, and no vote taken thereon, until after publication in the manner provided in the last section, in which notice shall be fully set forth the place to which it is proposed to remove such institution, and, in case of removal, a copy of the proceedings of such meeting shall be filed with the secretary of state. (April 29, 1854, 52 v. 77, § 12; S. & C. 268.)

§ 3732. **WHEN AND HOW COLLEGE ENDOWMENT FUND DIVERTED.**—The trustees of a corporation incorporated for the purpose of creating, holding, and managing a college endowment fund, the articles of incorporation of which provide that the fund may be applied to any object not inconsistent with the purposes of education different from that particularly specified therein, may apply to the court of common pleas in the county where the corporation is located for permission to make such change, designating particularly the purposes to which it is proposed to apply the fund; and the court, on being satisfied that such change is not inconsistent with the object of the original creation and institution of the fund, shall authorize and sanction the change. (March 12, 1853, 51 v. 393, § 2; S. & C. 269.)

The property of a private eleemosynary corporation, although charged with the maintenance of a college or other "public charity" is private property, within the meaning and protection of section 19, article 1 of the constitution.—*Ohio ex rel. v. Neff*, 52 Oh. St. 375 (1895).

§ 3733. **HOW VACANCIES IN BOARDS FILLED IN CERTAIN CASES.**—Whenever there occurs a vacancy, in whole or in part, in the board of trustees of an incorporated college, seminary, or academy, by reason of an amendment of the charter in such corporation, or from any other cause, and there is no provision of law for filling such vacancy, the governor shall, within three months after receiving information thereof, appoint the required number of trustees, one-third thereof to serve for one year, one-third to serve for two years, and one-third for three years. (March 1, 1878, 75 v. 25, § 2.)

§ 3734. **CERTAIN CORPORATIONS MAY INCREASE THEIR PROPERTY; BONDS.**—A college, university, academy, seminary, or other institution devoted to the promotion of education, now existing by virtue of any special act of incorporation, or organized under the provisions of any law, whose property is derived and held by donation, gift, purchase, devise, or gratuitous subscription, and the amount of which, or the income arising therefrom, is limited by such special act, or by the articles of association adopted by such institution, may receive, acquire, possess and hold hereafter any amount of property, real, personal or mixed, which its board of directors or trustees shall deem it advisable for the institution to accept, and may, by its trustees, sell, dispose of and convey the same, but such property shall not be diverted from the express will of the donor, deviser or subscriber. The board of trustees of any such college, university, academy, seminary, or other institution devoted to the promotion of education, in anticipation of donations to be received and collections to be made, may, for the purpose of constructing, enlarging or adding to any college buildings or improvements, borrow such sum of money as they may determine necessary for such purpose, and may issue bonds therefor and secure the same by a mortgage upon the property upon which such improvement is to be made, provided such property is not held by them under some specific trust. (March 8, 1893, 90 v. 71; April 9, 1856, 53 v. 170, § 1; S. & C. 368.)

§ 3735. **STATEMENT TO BE MADE AND FILED.**—Before any such institution shall be authorized to acquire and hold such additional property, the trustees thereof, at a regular meeting of their board, or at a special meeting called for that purpose, shall from time to time, make and sign a statement specifying the amount of such

 Trustees, Board of, etc., §§ 3736-3739.

additional property which they seek to acquire and hold, and shall set forth therein the purposes to which it is to be devoted, which statement shall be entered at large upon the record book of the trustees and be filed in the office of the secretary of state. (March 8, 1893, 90 v. 72; April 9, 1856, 53 v. 170, § 2; S. & C. 368.)

§ 3736. HOW CERTAIN BOARDS MAY BE CONSTITUTED AND GOVERNED.

— The board of trustees of any university or college heretofore incorporated, and now under the patronage of four or more conferences or other religious bodies of any religious denomination, may accept the provisions of this and the nine succeeding sections, by resolution adopted at any regular meeting of the board, and entered upon the record of its proceedings; and after such acceptance the board shall in all respects be organized, constituted, regulated, and perpetuated, pursuant to and under said provisions; but no right acquired by any such board, or any such university or college, under its charter, or any law of this state, shall in any way, be affected by said provisions. (May 13, 1868, 65 v. 188, § 1; S. & C. 106.)

§ 3737. TRUSTEES TO BE DIVIDED INTO CLASSES. — At a meeting of such board held after a vacancy occurs therein it shall fill such vacancy, or if more than one vacancy has occurred, then one of them, by appointing the president of the university or college a trustee, and the president of such university or college shall, ex officio, be a trustee perpetually thereafter; the board shall also, at such meeting, divide its number, excluding the said president, and including all vacancies except the one he is so appointed to fill, into classes, corresponding in number to the number of conferences or other religious bodies at the time patronizing such university or college, such classes to have in each an equal number of trustees, as near as may be; and the board shall assign one of such classes to each of the conferences or other religious bodies, and thereafter each may fill any and all vacancies in the class so assigned to it. (May 13, 1868, 65 v. 188, § 2; S. & C. 106.)

§ 3738. THE TERM OF OFFICE OF TRUSTEES; HOW VACANCIES FILLED.—

When the classes of trustees are formed, as provided in the preceding section, the term of office of one of the trustees in each of the classes, to be selected by lot in open session of the board of trustees, shall expire each year, and the persons thereafter elected as trustees shall act as such for a term of years equal in number to the number of trustees in any class, except as hereinafter provided; but the term of office of a trustee shall not expire during any meeting of the board which does not continue for more than two weeks; and vacancies which occur in any class of trustees otherwise than by the expiration of term of office shall be filled only for the remainder of the term. (May 13, 1868, 65 v. 188, § 3; April 24, 1873, 70 v. 157, § 1; S. & C. 107.)

§ 3739. WHEN THE BOARD IS TO BE ENLARGED. — If the number of the conferences or other religious bodies patronizing any such university or college, the board of trustees of which has been divided into classes as hereinbefore provided, be increased to not exceeding six, the board of trustees shall be enlarged to the extent of one additional class of trustees for each of such additional conferences or other religious bodies, such additional classes to have in each a number of trustees equal to the number in any one of the former classes; and each of such additional conferences or other religious bodies may elect, as members of the board, the number in its class, one for one year, one for two years and one for three years, and so on to the extent of the number; and each of such additional conferences or other religious bodies may fill any vacancy in its class. And such board of trustees composed according to the foregoing provisions and the provisions of section thirty-seven hundred and forty-seven of this chapter, without regard to the number of members so composing it, may increase its own numbers by the election of trustees at large, not exceeding the number of conferences or other religious bodies coöperating with or patronizing such uni-

Trustees, Board of, etc., §§ 3740-3746.

versity or college, and may divide such trustees at large into classes, at its discretion. (March 17, 1892, 89 v. 119; May 13, 1868, 65 v. 188, § 4; S. & S. 107.)

§ 3740. WHEN THE NUMBER IN A CLASS IS TO BE REDUCED. — If the number of such patronizing conferences or other religious bodies at any time exceed six, the representation of each shall be reduced by lot, in open session of the board of trustees, to a class of three trustees, if they exceed that number, who shall thereafter be elected to serve as trustees for the term of six years, and in that case the term of office of one trustee in each class shall expire every second year. (May 13, 1868, 65 v. 188, § 5; S. & S. 107.)

§ 3741. A CONFERENCE MAY BECOME A PATRON BY CONSENT OF OTHER BODIES. — Any conference or other religious body, not patronizing any particular university or college, may become such patronizing conference or religious body, by and with the consent of the conference or other religious bodies at the time patronizing such university or college. (May 13, 1868, 65 v. 183, § 6; S. & S. 107.)

§ 3742. PATRONIZING BODIES MAY APPOINT VISITORS. — Each conference or other religious body patronizing any particular university or college may, annually, appoint two visitors, and the board of trustees of a college or university may provide, at the time of its organization, by resolution adopted and entered on its records, for the appointment of two visitors by each conference or other religious body patronizing such college or university; and such visitors shall attend the meetings of the board of trustees of such university or college, and, with the trustees, constitute a joint board for the appointment and removal of all officers, professors, and instructors of the university or college. (April 8, 1876, 73 v. 163, § 7; S. & S. 107.)

§ 3743. WHEN THE RIGHT OF REPRESENTATION SHALL CEASE. — If a conference or other religious body patronizing any university or college, and having a representation in its board of trustees, cease to exist, or cease to patronize such university or college, the right of such conference or other religious body to such representation shall cease, and its board of trustees shall be thereby and to that extent reduced in numbers. (May 13, 1868, 65 v. 188, § 8; April 8, 1876, 73 v. 163; S. & S. 107.)

§ 3744. WHAT ACTION THE BOARD MUST FIRST TAKE. — Before a conference or other religious body not represented in the board of trustees of any university or college shall be entitled to be represented therein, and before any conference or other religious body represented therein shall be deprived of such representation as provided in the preceding section, the board shall declare, and cause to be entered in the record of its proceedings, that the conditions and contingencies hereinbefore provided for in that behalf have taken place. (May 13, 1868, 65 v. 188, § 9; S. & S. 107.)

§ 3745. QUORUM: HOW CONSTITUTED. — Eleven trustees shall constitute a quorum of the board of any such university or college, whatever the number of trustees constituting the board is or may become, if the number is more than twenty; and if the number is twenty or less, a majority thereof shall constitute a quorum. (May 13, 1868, 65 v. 188, § 10; S. & S. 108.)

§ 3746. CERTAIN CORPORATIONS MAY HAVE BENEFIT OF SUBSEQUENT PROVISIONS. — The board of trustees of any university or college which has accepted or hereafter accepts the provisions of the ten preceding sections, may accept the provisions of the three succeeding sections by resolution adopted at any regular meeting of the board, and entered upon the record of its proceedings, and thereafter the board, and the university or college, shall be subject to (the) provisions thereof. (April 12, 1872, 69 v. 71, § 1.)

Trustees, Board of — Endowment Fund Companies, §§ 3747-3750.

§ 3747. ALUMNI MAY ELECT TRUSTEES AND APPOINT VISITORS. — After such acceptance by the board of any university or college, the alumni thereof (composing the alumnal association thereof) may elect as members of the board of trustees of such college or university, members of such alumnal association, in numbers equaling the numbers of the conferences coöperating with or patronizing such university or college, and may divide such alumnal trustees into classes, and perpetuate the same; and such alumni may, at the same time, elect as visitors members of their association equaling in numbers one-half of the numbers of the conferences or other religious bodies coöperating with or patronizing such university or college, and such visitors shall have the same powers and duties as visitors appointed by any conference or other religious body aforesaid; provided, that when women are members of the alumnal association so electing, they shall be eligible as visitors; provided, further, that the board of trustees shall be judge of the validity of the election and the returns thereof, of trustees and visitors elected under this section. (March 17, 1892, 89 v. 120; 81 v. 174; R. S. 1880; April 12, 1872, 69 v. 71, § 2; May 13, 1879, 76 v. 87, § 1.)

§ 3748. CONDUCT OF ELECTION. — The election of trustees and visitors by the alumni shall be by ballot, and held each year, beginning the year after such acceptance, on the secular day next before the day of commencement of such university or college, at such place in a building on its grounds as may designated by the president of the alumnal association by written notice posted the day before the election in at least two public places on such grounds; and the polls shall be opened at the hour named in said notice, which shall not be later than three o'clock p. m., and shall be kept open two hours thereafter. The election shall be conducted by three judges and two clerks, who shall be members of the association and be chosen by the members present at the place of voting at the time for opening the polls, and they shall certify to the board of trustees the result of such election, with a list of the members voting thereat; each ballot shall contain the names of the persons voted for, and the office which each is to fill and a designation of the term for which he is to serve. At such election all members of the alumnal association of such university or college shall be entitled to vote, and members not in attendance may exercise their right by sending ballots conformable to the foregoing provisions, with their names thereon indorsed, and addressed under seal to the president of such association. (March 17, 1892, 89 v. 120; April 12, 1872, 69 v. 71, § 3.)

§ 3749. RETURNS OF THE ELECTION, AND CERTIFICATES. — After the polls are closed the result shall be ascertained and certified to by the judges and clerks, and the person or persons, not exceeding the number to be elected as trustees, having received the highest number of votes for trustee or trustees, shall be declared elected as trustee or trustees as designated on the ballot, and the two persons who receive the highest number of votes for visitors shall be declared elected, but their term of office shall not begin until after the final adjournment of the regular meeting of the trustees for that year; if any two or more persons receive an equal number of votes for the same office of trustee or visitor, one of them, as may be determined by lot by the judges, in the presence of all the electors who may wish to be present, shall be the trustee or visitor, and shall be so declared; and duplicate certificates of election shall be signed by the judges and clerks, and delivered by them, one to each of the persons elected, and the other, with the poll-books duly certified by the judges and clerks, to the secretary of the board of trustees of the university or college, the next day after the election, which certificate he shall enter of record in the book containing the proceedings of the board of trustees. (April 12, 1872, 69 v. 71, § 3.)

§ 3750. ENDOWMENT FUND CORPORATIONS. — The trustees of a corporation incorporated for the purpose of creating a fund, the income of which is to be applied to the promotion of education, may receive subscriptions for membership in

 Trustees, Board of — Institutions Under Patronage, §§ 3751-3751b.

the corporation, and they, or a majority of them, by giving ten days' notice, by publication in the county where the corporation is located, may call a meeting of members to adopt by-laws, and elect not more than nine directors; each member shall have a vote for every amount by him subscribed equal to that in the articles of incorporation specified as necessary for membership, which may be cast in person or by proxy, but at no subsequent meeting may a member vote for or be eligible as a director who is in arrears to the corporation; and the trustees shall control the funds and disburse the income of the corporation as may be provided by its by-laws. (April 27, 1872, 69 v. 173, §§ 1, 2, 3, 4, 5.)

§ 3751. **HOW CERTAIN BOARD MAY BE CONSTITUTED AND GOVERNED.**—The board of trustees of any university, college or other institution of learning, incorporated, and acting under the patronage of one annual conference or other religious body of any religious denomination, may accept the provisions of this and the succeeding section, by resolution adopted at any meeting of the board, and entered upon the record or journal of its proceedings; and after such acceptance the board shall be organized, constituted, regulated, and perpetuated as therein provided; but no right acquired by any such board, university, or other institution of learning, under its charter, or any law of this state, shall in any way be impaired or affected thereby. (April 27, 1872, 69 v. 180, § 1.)

§ 3751a. **INCREASE IN NUMBERS OF TRUSTEES OF CERTAIN CORPORATIONS.**—The board of trustees of any university or college heretofore incorporated, and now under the patronage of one annual conference or synod or other religious body of any religious denomination, may increase the number of its trustees, not exceeding six; said additional trustees to be nominated by the collegiate alumni of such university or college from the collegiate alumni of three years' standing, for appointment or election by such patronizing conference or synod, under such regulations as may be prescribed by such board of trustees; provided, that the board of trustees of such university or college shall so determine to increase the number of its trustees and adopt such regulations for their nomination, by resolution adopted at any regular meeting of such board and duly entered on the record of its proceedings; and, provided further, that such patronizing or governing conference or synod shall consent to such increase of said board of trustees and the rules and regulations for the nomination of the same. And after such board of trustees is so increased by the election of any additional trustees, not exceeding six, the board of trustees shall in all respects be organized, constituted, regulated and perpetuated pursuant to and under the provisions of the charter and said provisions; but no rights acquired by any such board or any such university or college, under its charter or any law of this state, shall in any way be affected or impaired thereby. (April 19, 1894, 91 v. 155.)

§ 3751b. **INCORPORATION OF COLLEGES UNDER ECCLESIASTICAL PATRONAGE; WHAT ARTICLES SHALL CONTAIN.**—A corporation may be formed for the promotion of academic, collegiate or university education, under religious influences, and is hereby authorized and empowered to set forth in its articles, or certificate of corporation, as a part of the same, the name of the religious sect, association or denomination with which it proposes to be connected, and it is further authorized and empowered to grant any ecclesiastical body of such religious sect, association or denomination, whether the same be a conference, association, presbytery, synod, general assembly, convocation or otherwise, the right to appoint its trustees or directors, or any number thereof; and it is further authorized and empowered to set forth in its articles or certificate of corporation, such other rights as to the administration of the purpose for which it is organized, and not inconsistent with the laws of this state or of the United States, as said incorporation may desire to confer upon said ecclesiastical body of such religious sect, association or denomination and

Institutions Under Patronage, etc.—Trustees — Assessment, §§ 3751c-3753.

the said ecclesiastical body of such religious sect, association or denomination shall possess and exercise all rights and powers so set forth in said articles, or certificate of corporation. (April 16, 1900, 94 v. 331.)

§ 3751c. **EXISTING CORPORATIONS MAY AVAIL THEMSELVES OF PRECEDING SECTION; HOW.**— Any corporation formed for the promotion of academic, collegiate or university education, under religious influences, which has been incorporated under the laws of this state, whether by special act of the legislature or otherwise, may avail itself of the provisions of the preceding section, as a part of its articles or certificate of incorporation, and may confer on any ecclesiastical body of such religious sect, association or denomination, as it is now, or proposes to be connected with, whether the same be a conference, association, presbytery, synod, general assembly, convocation or otherwise, any or all of the rights, powers or privileges provided by the preceding section to be conferred on corporations hereafter organized, and may accept the provisions of such preceding section by a vote of the majority of the trustees of such corporation at any regular meeting; and when so accepted, a copy of said acceptance, certified by the secretary or clerk of its board of trustees or directors, shall be sent to the ecclesiastical body with which it is now or proposes to be connected; if such ecclesiastical body agree to accept the powers proposed to be conferred upon it, it shall certify its approval upon such certified copy sent to it, and the same shall thereupon be filed in the office of the secretary of state; and, when so filed, the same shall become and be a part of the charter of said corporation; and said ecclesiastical body of such religious sect, association or denomination, whether the same be a conference, association, presbytery, synod, general assembly, convocation or otherwise, shall possess and exercise all the rights and powers so set forth in said articles or certificate of corporation. (April 16, 1900, 94 v. 331.)

§ 3752. **CLASSES AND ELECTION OF TRUSTEES; PRESIDENT EX-OFFICIO A MEMBER OF BOARD; TERM; VACANCIES; INCREASE IN BOARD.**— After such acceptance the board shall certify the same to the patronizing conference or other religious body having the right to elect or appoint trustees of such university or other institution of learning, at the next meeting of such conference or other religious body; and thereafter the board shall consist of twenty-one trustees elected or appointed, and the president of such university or other institution of learning, who shall be ex-officio a member of the board; such elected or appointed trustees shall be divided into three classes of seven members each. At the first election or appointment after such acceptance, one of such classes shall be elected or appointed for one year, one for two years and one for three years, and in all subsequent elections or appointments each of the classes of trustees shall be elected or appointed for three years, but no term of office of any such trustee shall expire during any meeting of the board which does not continue more than two weeks. Ten members of the board shall constitute a quorum, and all vacancies which occur in any class of trustees otherwise than by expiration of the term of office shall be filled only for the remainder of the term; provided, that any such university or other institution of learning having heretofore accepted the provisions of original sections three thousand seven hundred and fifty-one and three thousand seven hundred and fifty-two may increase its board of trustees by electing or appointing two additional members in each of the classes of trustees herein provided for. (March 30, 1888. 85 v. 140, 141; R. S. 1880; April 27, 1872, 69 v. 180, §§ 2, 3; 70 v. 157, § 1.)

§ 3753. **ASSESSMENTS MAY BE MADE AGAINST STOCKHOLDERS.**— The proportion that each stockholder of any college, academy, university, seminary, or other institution for the promotion of education, shall be required to pay to meet the debts and liabilities of the corporation, may be determined and collected in the man-

Assessments — Military Academies, etc., §§ 3754-3760.

ner provided by the three succeeding sections. (February 20, 1861, 58 v. 20, § 1; S. & S. 108.)

§ 3754. MEETING OF THE STOCKHOLDERS, AND NOTICE THEREOF. — The trustees of any such corporation desiring to avail themselves of such provisions shall call a meeting of the stockholders for the purpose of determining what amount of the indebtedness of the corporation shall be paid by each stockholder; and they shall give thirty days' notice to the stockholders, in writing, or by publication in some newspaper of general circulation in the county where the corporation is located, of the time, place, and purpose of the meeting, at which the trustees shall submit a detailed statement showing the assets and indebtedness of the corporation. (February 20, 1861, 58 v. 20, §§ 2, 3; S. & S. 108.)

§ 3755. MEETING MAY FIX AMOUNT OF ASSESSMENT. — A majority in interest of the stockholders present at such meeting may determine what amount of the indebtedness of the corporation shall be paid by each stockholder, and fix the time or times, and the mode, for the payment of the amount of money assessed against each stockholder; but these provisions shall not interfere with or abridge the right of any creditor of the corporation to institute any proceedings authorized by law to enforce the liability of stockholders. (February 20, 1861, 58 v. 20, § 4; S. & S. 108.)

§ 3756. HOW MUCH MAY BE ASSESSED, AND COLLECTION THEREOF. — The assessment shall be pro rata upon the stock subscribed or otherwise acquired by each stockholder, and in no case shall exceed the amount for which each stockholder is or may be liable by law; and a stockholder who fails to pay, as required by the assessment, the amount so assessed against him, shall be liable in a civil action, to be brought in the name of the corporation, for the recovery thereof, as in other cases of indebtedness. (February 20, 1861, 58 v. 20, §§ 5, 6; S. & S. 108, 109.)

§ 3757. THE BOARD OF MILITARY ACADEMIES; HOW CONSTITUTED, ETC. — The academic board of an institution incorporated for military and polytechnical education shall consist of the superintendent of the institution, the commandant of cadets, and the professors, and may make and enforce rules and regulations for the government of cadets; but such rules and regulations must be first submitted to and approved by the governor of the state. (April 16, 1867, 64 v. 239, §§ 1, 2; S. & S. 109.)

§ 3758. BOARD OF VISITORS: HOW CONSTITUTED. — The board of visitors of such institution shall consist of the governor, who shall be ex-officio a member and the president of the board, of two other persons to be named by the governor, and such other persons as the superintendent of the institution may appoint. (April 16, 1867, 64 v. 239, § 3; S. & S. 110.)

§ 3759. DUTIES OF BOARD OF VISITORS. — The board of visitors shall meet annually at the institution, on the first day of the annual commencement exercises, and examine into the condition of the classes, quarters, and commons, and the discipline, drill, records of standing in study, and conduct of the cadets, and shall report on the same to the legislature at its next annual session; but the board of visitors, or any member thereof, may visit and inspect the institution at any time. (April 16, 1867, 64 v. 239, § 4; S. & S. 110.)

§ 3760. HOW THE TERM OF OFFICE OF DIRECTORS OR TRUSTEES MAY BE FIXED. — At a regular meeting for the election of directors or trustees of any college or other institution of learning, the authorized voters may determine, by vote, whether the election of directors or trustees shall be held annually, if the term of

Location — Sale of Property — Articles, Filing, etc., §§ 3761-3762a.

their election is for a longer period than one year, and also what proportion of the entire board shall be elected annually; at the first election held under the provisions of this section the voters shall designate upon their ballots who shall serve for one year, who for two years, and who for three years; and vacancies caused by expiration of term of office shall be filled by election annually thereafter. (April 11, 1873, 70 v. 125, § 1.)

§ 3761. CERTAIN CORPORATIONS MAY CHANGE LOCATION. — The trustees of colleges and other institutions of learning not endowed by voluntary contributions, which have been established under special acts of incorporation, and which by the provisions of such acts are located at particular places, may change the location thereof to such other places as they may deem proper, and erect and maintain academies and other schools auxiliary thereto. (April 11, 1873, 70 v. 248, § 1.)

§ 3762. SALE AND DISTRIBUTION OF THE PROPERTY OF CERTAIN CORPORATIONS. — The trustees of any university, college, or other institution of learning, incorporated by the authority of this state under special charter, owned in shares or stock subscribed or taken, may dispose of its property at public sale, upon such terms as to payment as the stockholders thereof, by a vote of three-fourths of the shares or stock of the institution, may direct, after giving public notice of the same, by publication, for six consecutive weeks in some newspaper published in the county where the institution is located, if one is published therein, and if not, then in some newspaper published in this state, and of general circulation in such county, which notice shall contain a full statement of the terms, time, and place of sale, and the action of the trustees as aforesaid; and the trustees may close up the corporate existence of such institution, and make an equitable division and distribution of the proceeds of the sale among all the holders of shares or stock, after the payment of the just debts of the corporation. (March 22, 1870, 67 v. 24, § 1.)

§ 3762a. CERTAIN COLLEGES, WHOSE ARTICLES OF INCORPORATION ARE NOT ON FILE IN THE OFFICE OF THE SECRETARY OF STATE, MAY FILE SAME THERE AND AMEND. — The trustees of any university, college or institution of learning, incorporated by the authority of this state, or under the general corporation laws thereof, owned in shares of stock subscribed and paid up in full, by a majority of the owners of such stock, for the sole purpose of promoting education, religion and morality, or the fine arts, exclusively among males or females, may, on the written petition of the owners of a majority of such stock filed before them, or on the vote of the owners of the majority of such shares of paid up stock at any general meeting of the stockholders called for such purpose, after thirty days' notice published in some newspaper published and of general circulation in the county, by the board of trustees, may change the name and enlarge the purposes and objects of any such university, college or institutions, by amendments to its charter, approved by the owners of the majority of such stock for the change of the name and the enlargement of the purpose and object of such university, college or institution of learning, so that all the educational rights and privileges thereof may be bestowed in the co-equal and co-ordinate education of both sexes. When such amendment is adopted and the original articles of incorporation of said corporation have not been filed and recorded in the office of the secretary of state, a copy of such amendment and a copy of the original articles of incorporation of said corporation, with a certificate to each of them thereto affixed, signed by the president and secretary of said corporation, and sealed with the corporate seal, if any there be, stating the fact and date of the adoption of such amendment, and that such copy of said amendment, and that such copy of said original articles of incorporation of said corporation are and is a true copy of the originals, shall be recorded in the office of the secretary of state, and when so recorded, and not until then, said amendment shall become and be in

Name and Purposes — Medical Colleges, Bodies for, §§ 3762b, 3763.

law the sole articles of incorporation of said corporation; and all the property, real and personal, and the title thereunto, and all the rights and credits, shares of stock, and rights of stockholders, corporate franchises, and all endowment fund or funds, or gift or bequest, or legacies or mortgage securities and promissory notes, and rights of every kind belonging to, vested in or claimed, or possessed by the said original corporation, shall by said amendment pass to, be assigned and transferred and vested in and held, enjoyed and exercised by the said corporation named, created and organized by said amendment for the promotion of all the objects and purposes of its creation and organization. For recording such amendments and copies of such original articles of incorporation, and for furnishing a certified copy or copies thereof, the secretary of state shall receive a fee of twenty cents per hundred words, to be in no case less than five dollars. (April 14, 1888, 85 v. 270.)

§ 3762b. COLLEGES MAY CHANGE NAME AND PURPOSE, WHEN; PROCEDURE; FEES. — That the board of trustees of any university, college or institution of learning, incorporated by the authority of this state, or under the general corporation laws thereof, for the sole purpose of promoting education, religion and morality, or the fine arts, may, at any regular or special meeting of such board of trustees, called for such purpose, after thirty days' actual notice to each and all of such trustees, change the name and enlarge the purposes and objects of any such university, college or institution of learning, by amendment to its charter, approved by a majority of such board of trustees at such regular or special meeting, so called and so notified, for the change of such name and the enlargement of the purposes and objects of such university, college or institution of learning. When such amendment is so adopted by the board of trustees of any university, college or institution of learning, already incorporated by the authority of this state, or under the general corporation laws thereof, a copy thereof, with a certificate thereto affixed, signed by the president and secretary of such board of trustees, and sealed with the corporate seal, if any there be, stating the fact and date of such amendment, and that such copy is a true copy of the original amendment, shall be filed and recorded in the office of the secretary of state, and when so filed and recorded, and not until then, said amendment shall become and be in law an integral part of the articles of incorporation of said corporation, and all the property, real and personal, the title thereto, and all the rights and credits, corporate powers and franchises, and all endowment fund or funds, gifts and bequests, legacies, mortgage securities and promissory notes, and all powers, rights and privileges of every kind belonging to, vested in, claimed or possessed by said original corporation shall, by said amendment, pass to, be assigned, transferred and vested in, and held, enjoyed and exercised by the said corporation, named, created and organized by said amendment for the promotion of all (the) objects of its creation and organization. And said new corporation shall be liable for and perform all the lawful obligations, contracts and undertakings of said original corporation. For recording such amendment and furnishing a certified copy or copies thereof, the secretary of state shall receive a fee of twenty cents per hundred words, to be in no case less than five dollars. (February 10, 1890, 87 v. 8.)

§ 3763. RESTRICTIONS UNDER WHICH MEDICAL COLLEGES AND TEACHERS MAY RECEIVE BODIES FOR DISSECTION. — All superintendents of city hospitals, directors or superintendents of city or county infirmaries, directors or superintendents of work-houses, directors or superintendents of asylums for the insane, or other charitable institutions founded and supported in whole or in part at public expense, the directors or warden of the penitentiary, township trustees, sheriffs, or coroners, in possession of bodies not claimed or identified, or which must be buried at the expense of the county or township, shall, before burial, hold such bodies not less than thirty-six hours and shall notify the professor of anatomy in any college which by its charter is empowered to teach anatomy, or the president of any county medical

Medical Colleges, Bodies for—Organic Rules, §§ 3764-3767.

society of the fact that such bodies are being so held and shall, before or after burial, by such said superintendent, director, or other officer, on the written application of the professor of anatomy, the president of any county medical society, deliver to such said professor, or president for the purpose of medical or surgical study or dissection, the body of any person who has died in either of said institutions from any disease, not infectious, if such body has not been requested for interment by any person at his own expense;

BODY TO BE DELIVERED TO CLAIMANT.—if the body of any deceased person so delivered, be subsequently claimed, in writing, by any relative or other person for private interment, at his own expense, it shall be given up to such claimant;

INTERMENT OF BODY AFTER EXAMINATION OR DISSECTION.—after such bodies shall have been subjected to such medical or surgical examination or dissection, the remains thereof shall be interred in some suitable place at the expense of the party or parties in whose keeping said corpse has been placed.

NOTIFICATION TO RELATIVES OF DECEASED PERSON.—In all cases it shall be the duty of the officer having such body under his control to notify or cause to be notified, in writing, the relatives or friends of such deceased person;

PENALTY FOR REFUSAL TO DELIVER BODY, OR ACCEPTANCE OF CONSIDERATION FOR SAME.—and any superintendent, coroner, or infirmary director, sheriff, or township trustee, failing or refusing to deliver such bodies when applied for, as herein provided, or who shall charge, receive, or accept money, or other valuable consideration for the same, shall be fined in any sum not exceeding one hundred dollars, and not less than twenty-five dollars, or be imprisoned in the county jail not exceeding six months; provided, however, that in no case shall the body of any such deceased person be delivered until twenty-four hours after death.

BODY OF STRANGER OR TRAVELER.—The bodies of strangers or travelers, who die in any of the institutions herein named, shall not be delivered for the purpose of dissection, except said stranger or traveler belong to that class commonly known as tramps; and all bodies delivered as herein provided shall be used for medical, surgical and anatomical study only, and within this state,

UNLAWFUL TO HAVE UNAUTHORIZED BODY IN POSSESSION; PENALTY.—and the possession of the body of any deceased person for the above purposes, and not authorized under this section, shall be unlawful, and the detention of the body of any deceased person, claimed by relatives or friends for interment at their expense, shall also be unlawful, and the person so detaining said body unlawfully, shall be fined in any sum not exceeding one hundred dollars, nor less than twenty-five dollars, or be imprisoned in the county jail not exceeding six months. (April 5, 1898, 93 v. 84; February 19, 1881, 78 v. 33; R. S. 1880; March 25, 1870, 67 v. 25, § 1.)

§ 3764. **PENALTY FOR HAVING UNLAWFUL POSSESSION OF CORPSE.**—Any person, association, or company, having unlawful possession of the body of any deceased person shall be jointly and severally liable with any and all other persons, associations, and companies that had or have had unlawful possession of such corpse in any sum not less than five hundred dollars and not more than five thousand dollars, to be recovered at the suit of the personal representatives of the deceased in any court of competent jurisdiction, for the benefit of the next of kin of deceased.

When section applicable.

See *Carter v. Zanesville*, 59 Oh. St. 170 (1898).

§ 3767. **ORGANIC RULES WHICH MAY BE PRESCRIBED IN CERTAIN ARTICLES OF INCORPORATION.**—An association incorporated for the purpose of receiving gifts, devises or trust funds to erect, establish, or maintain an academy in any department of fine arts or a gallery for the exhibition of paintings, or sculpture or works of art, or a museum of natural or other curiosities, or specimens of art or

Objects — Mechanics' Institutes — Accounts, etc., §§ 3768-3770.

nature promotive of knowledge, or a law or other library, or courses of lectures upon science, art, philosophy, natural history, or law, and to open the same to the public on reasonable terms, or an industrial training school, or a mechanics' institute for advancing the best interest(s) of mechanics, manufacturers and artisans, by the more general diffusion of useful knowledge in those classes of the community, or homes for indigent and aged widows and unmarried women and whose directors or trustees may be of either sex, may in its articles of incorporation prescribe the tenure of office of the trustees or directors, the mode of appointing or electing successors, the administration and management of the property, and trust and other funds of the corporation, and such other organic rules as may be deemed expedient or acceptable to donors which shall be and remain the permanent organic law of the corporation. (February 21, 1887, 84 v. 31; March 26, 1886, 83 v. 40; R. S. 1880; 75 v. 135, §§ 1, 3.)

§ 3768. **MAY ADD TO THE OBJECTS OF THE CORPORATION; ACCEPTANCE OF STATUTORY PROVISIONS.**—Such corporations may by certificate, duly acknowledged by the trustees or directors, and filed in the office of the secretary of state, add to the original objects and purposes of the corporation any of the several objects and purposes, mentioned in the preceding section which were not provided for by the articles of incorporation, and any such corporation heretofore incorporated under the laws of the state may by certificate, reciting the organic rules adopted by such corporation as its permanent organic law, and duly acknowledged by the trustees or directors, and lodged in the office of the secretary of state, accept the provisions of the preceding section. (March 26, 1886, 83 v. 41; May 7, 1878, 75 v. 135, § 3.)

§ 3768-1. **Sec. 1. AUTHORIZING CERTAIN MECHANICS' INSTITUTES TO BORROW MONEY; LIABILITY OF DIRECTORS AND TRUSTEES.**—Any mechanics' institute, incorporated under the laws of this state prior to the year eighteen hundred and fifty-one (1851), be and it is hereby authorized and empowered to borrow money, issue bonds or notes therefor, at no more than the legal rate of interest, and secure the same by mortgage upon its real estate. (April 9, 1885, 82 v. 118.)

§ 3768-2. **Sec. 2. DIRECTORS NOT PERSONALLY LIABLE.**—The directors and trustees of such corporation shall not be personally liable for debts contracted by virtue of this act. (April 9, 1885, 82 v. 118.)

§ 3769. **ACCOUNTS OF RECEIPTS AND DISBURSEMENTS.**—The officers of the corporation charged or intrusted with the receipts and disbursements of its funds or property shall make and keep like accurate and detailed accounts of such funds, and the receipts and disbursements thereof, as are required to be kept by the fund commissioners of the state; the trustees shall, on or before the third Monday in January of each year, file with the clerk of the court of common pleas of the county in which the corporation is located an abstract of their account, which abstract shall correspond in date, amount, person to whom paid, and from whom received, and on what account, with the voucher taken or given on account of such receipts and disbursements; they shall at the same time, annually, file in such clerk's office a report of the names of the donors, the kind, amount, or value of gifts of each, and a brief statement of the conditions and purposes of the gifts; and the filing of such abstract and report, and the supplying of any omission in either, may be enforced by order and attachment of the court of common pleas of the proper county, against the trustees, on motion of any respectable citizen. (May 7, 1878, 75 v. 135, § 4.)

§ 3770. **TRUSTEES INELIGIBLE TO OTHER OFFICE.**—No trustees shall be eligible to any office or agency of the corporation to which any salary or emolument is attached, nor shall the trustees be allowed any salary, emoluments, or perquisites, except the right of free ingress to the grounds, rooms, and buildings of the corporation. (May 7, 1878, 75 v. 135, § 5.)

Officers, Duties of — Trustees — Charitable Trusts, §§ 3771-1.

§ 3771. **ATTORNEY-GENERAL MAY, BY ACTION, ENFORCE DUTIES OF OFFICERS.** — On application to the attorney-general of five citizens of the proper county, in writing, verified by the oath or affirmation of one of them, setting forth specific charges against any of the fiscal or other agents or trustees of such corporation, involving a breach of trust or duty, he shall give notice thereof to the trustees or agents complained of, and inquire into the truth of such charges, and for this purpose he may receive affidavits, or enforce, by process from the court of common pleas of Franklin county, the production of papers and the attendance of witnesses before him; and if, on testimony or other evidence, he believes the charges, or any of them, to be true, he shall proceed, by action in that court, in the name of the state, against the delinquent trustee or trustees, fiscal agent or agents, and, on the hearing, the court may direct the performance of any duty, or the removal of all or any of the agents or trustees, and decree such other and further relief as may be equitable. (May 7, 1878, 75 v. 135, § 6.)

§ 3771a. **HOW NUMBER OF TRUSTEES OF CERTAIN COLLEGES INCREASED.** — The board of trustees of any university or college heretofore incorporated, but not under the patronage of conferences or other ecclesiastical bodies of any religious denomination, as described in section 3736, may increase the number of such trustees to twenty-four, exclusive of the president, or a less number, and may divide said trustees into six classes, each class to serve six years, and one class to be chosen each year, for said term; but one trustee of each class may be chosen by the votes of the alumni of such university or college, if the board of trustees shall so provide by by-laws, in which case it shall also be the duty of the board of trustees to provide, by such by-laws, a method of nominating and electing such appointee of the alumni. The president of such university or college shall, ex officio, be a trustee perpetually, and shall not be included in the classes going out in rotation. If it shall be necessary, in the first enlargement of the board of trustees, under this section, to distribute new members to the several classes, whose terms shall expire by rotation, the distribution may be made in such manner as the board may direct, so that no trustee shall be elected for a longer term than six years. (April 11, 1890, 87 v. 188; April 15, 1889, 86 v. 341.)

An Act to Provide for the Regulation and Government of Chatauqua Assemblies, So-Called, or Other Institutions or Gatherings Held for the Purpose of Dissemination or Encouragement of Religion, Art, Science, Literature, etc., Where The Grounds or the Premises are in Two or More Adjoining Counties, by Empowering Such Organization to Adopt Rules; Providing What Shall be Violations Thereof, Giving Justices of the Peace, Mayors, etc., Jurisdiction of Such Offences, and Authorizing the Appointment of Special Policemen. (April 14, 1902, 95 v. 133.)

Note.— On account of its length the text of this act is omitted, a mere reference is deemed sufficient.

An Act to Provide for the Administration of Charitable Trusts in Certain Cases.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. ADMINISTRATION OF CHARITABLE TRUSTS IN CERTAIN CASES. — Whenever, by the last will and testament of any person which has heretofore been, or shall hereafter be, duly admitted to probate in this state or elsewhere, any decedent has devised or bequeathed, or may devise or bequeath, his or her property, or any portion thereof, for charitable uses within this state, or for the establishment and maintenance of any industrial or educational school or institution to

Charitable Trusts, Corporation to Hold, etc., §§ 2 4.

be located at any place within this state; and whenever, in any such will and testament it has been, or may be, provided that the executor or executors thereof shall organize a corporation under the laws of this state for the purpose of receiving the property so devised or bequeathed, and carrying out the charitable purposes in such will expressed, or establishing and maintaining the institution or school therein provided for, and such will further provides for the management of such corporation by a board of trustees or directors, consisting, in part, of officials of this state, of the county in which such charities are to be administered or such institution or school located, the officials of any municipal incorporation in said county, and the member of congress for the district of which said county forms a part, or any of such officials, and names any other person or persons to be associated with said officials or any of them, and provides for the appointment of a successor or successors to the person or persons so appointed to act with such officials in any manner specified in said will, such executor or executors, or his or their successors in office, and the persons hereinafter named, may constitute themselves a body corporate, with the general power of benevolent incorporations. (March 19, 1902, 95 v. 61.)

§ 2. ARTICLES OF INCORPORATION TO BE FILED. — Such executor or executors, or his or their successors, shall associate with himself or themselves not more than two citizens and residents, other than the persons named in said will, of the county in which such charities are to be administered, or such institution or school located, and he or they and such associates shall execute and acknowledge and file with the secretary of state of the state of Ohio, articles of incorporation; or, in case he or they do not file such articles within sixty days from and after the passage of this act, or, in case of any will which may hereafter be so probated, within six months of such probate, then a minority of the officials for the time being named in any such will or testament may execute, acknowledge and file such articles, which shall in either case set forth:

1. WHAT SHALL BE SET FORTH THEREIN. — A copy of the will or testament for the carrying out of whose provisions the incorporation is organized.

2. The name of the corporation, which shall include the name of the maker of such will, unless otherwise therein provided; and

3. The location of such corporation. (March 19, 1902, 95 v. 61.)

§ 3. WHO MEMBERS AND DIRECTORS OF CORPORATION. — The officers or officials named in such will or testament, together with the persons therein named, and in case the articles are filed by the executor or executors as hereinbefore provided, the citizens of said county, not exceeding two in number, who execute and acknowledge the same with such executor or executors, shall thereupon become the members and directors of such corporation; and as the term of any official expires, his successor shall thereupon, by virtue of his office, become one of the members and directors of such corporation, so that the officials named in said will shall, for the time being and from time to time, be directors of said incorporation. Upon the death or resignation of the person or persons named in such will as directors associated with such officials, his or their successor or successors shall from time to time be appointed in the manner provided in such will or testament, if provision therefor be made, otherwise by the board of directors, and he or they shall thereupon become members and directors of such incorporation. Upon the death or resignation of the two citizens of the county, or either of them, who have become directors by reason of joining in said articles of incorporation, his or their successor or successors shall from time to time be chosen by the board (of) directors, and he or they shall thereupon become members and directors of such incorporation. (March 19, 1902, 95 v. 62.)

§ 4. ATTORNEY GENERAL GIVEN POWER TO BRING PROCEEDINGS TO ENFORCE SUCH DEVISE OR BEQUEST. — The attorney general of the state of Ohio shall in his official capacity have power to bring proceedings in any court of record

Charitable Trusts, Corporations to Hold, etc., §§ 5-8.

to enforce any such devise or bequest, whenever he deems such action necessary for the protection and carrying out of the purposes named in said last will and testament, without waiting for the organization of such corporation. (March 19, 1902, 95 v. 62.)

§ 5. **OFFICERS OF CORPORATION.**—The officers of such corporation shall consist of a president, secretary and treasurer, and such other officers as the board of directors may deem necessary. The president shall be a member of the board of directors. (March 19, 1902, 95 v. 62.)

§ 6. **CONSTITUTION AND BY-LAWS.**—The board of directors may adopt, and from time to time change, such organic rules, regulations and by-laws as they may deem expedient, not inconsistent with the constitution and laws of this state. (March 19, 1902, 95 v. 62.)

§ 7. **DIRECTORS TO MEET WHERE.**—Until the estate shall be finally settled, the board of directors may meet in the state of the domicile of the testator. (March 19, 1902, 95 v. 62.)

§ 8. This act shall take effect and be in force from and after its passage. (March 19, 1902, 95 v. 62.)

Bequest to unformed corporation.

See *Trustees v. Zanesville, etc., Mfg. Co.*, 9 Oh. 203 (1839).—Thomp. on Corporations, § 5829.

PART XIX.

RELIGIOUS AND OTHER SOCIETIES.

- § 3772. When language of church service may be changed.
- § 3773. When and how religious or educational corporation may sell cemetery grounds.
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Language of Church Service—Sale of Cemetery, §§ 3772-3773.

- § 3794. How charitable or religious societies may sell, incumber, etc., realty.
- § 3794a. Interconveyance of property.
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- § 3794-1. Women's christian associations empowered to procure homes for children.
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- § 3796c. Society to fix terms of trustees and define their duties, powers, etc.
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- § 3796e. Society may accept donations; may pay endowment not exceeding \$5,000.

§ 3772. WHEN LANGUAGE OF CHURCH SERVICE MAY BE CHANGED. — Any religious society incorporated under a general or special law of this state, and which act of incorporation prescribes that the public religious services of such society shall be conducted in any other than the English language, may (at) any time, by a vote of a majority of its adult members, in good and regular standing, who speak such prescribed language, decide whether its public religious services may, at any time, be conducted in any other than such prescribed language. (May 8, 1868, 65 v. 163, § 1; S. & S. 162.)

§ 3773. WHEN AND HOW RELIGIOUS OR EDUCATIONAL CORPORATION MAY SELL CEMETERY GROUNDS. — When a religious or educational corporation or society holds any lands within the limits of any city or village which has (have) been used as a cemetery, and interments in which have been prohibited by the ordinances of such municipal corporation, the trustees, wardens, vestry, or other officers intrusted with the management of the property of such corporation or society, may file a petition in the court of common pleas of the county where such property is situated, setting forth therein a description of the property, the existence of such ordinance, and the names of all persons holding burial privileges in such cemetery, so far as known to them, and if such privileges are held by persons whose names are unknown to them, the facts as to same, shall also be stated, and asking that the value, if any, of such burial privileges shall be determined by the court, and (the) direction of the court as to the removal of the bodies interred in such cemetery to other cemeteries, and for an order to sell such property free from such burial privileges. Notice of the filing of such petition shall be given by publication in some newspaper, printed and of general circulation in the county where it is filed, for four consecutive weeks, setting forth the object and prayer thereof, and that any persons claiming an interest in the subject matter of the petition, or burial privileges in such cemetery, may appear and file an answer therein, within six weeks from the date of the first publication of such notice, and after which, such case shall stand for hearing; and if, upon final hearing of the case, it shall be made to appear that such cemetery is as above described, the court shall proceed, with or without the aid of a jury, as the parties appearing may elect, and hear and determine the value, if any, of such burial privileges, and order that the corporation or society shall pay any amount so ascertained to the holder of such privilege, and the court may order said cemetery property sold, free from such burial privileges, and may direct a subdivision of same into lots for the purpose of sale, and shall direct the application of the money arising therefrom, to such uses of such corporation or society, for pious or educational purposes, as the trustees, wardens, vestry, or other officers conceive to be most for the interest of the corporation or society to which the cemetery so sold belonged; but such sale shall not be made until the bodies interred therein are removed to other cemeteries, as directed by the court on the final hearing of the case; provided, that any holder of such burial privilege who may not have appeared in such proceedings, and who has not waived his right to receive compensation for same, may assert his right to receive from such

Cemeteries, etc.—Sale of Property, §§ 3773-1-3775.

society or corporation, compensation therefor, within five years after the final entry to such proceedings. (April 11, 1890, 87 v. 189; April 13, 1889, 86 v. 294; R. S. 1880; April 3, 1867, 64 v. 103, § 1; S. & S. 164.)

§ 3773-1. **CONVEYANCE OF PUBLIC BURYING GROUND FROM RELIGIOUS OR BENEVOLENT SOCIETIES TO TOWNSHIPS USING SAME.**—Whenever any public burying-ground is located on or near a township line, and is used by the people of two or more townships for burying purposes, the title of which is vested in any religious or benevolent society, such religious or benevolent society, or the trustees thereof, may convey the same to the trustees of such townships so using the same, and their successors in office, jointly; and the trustees of such township shall accept the same and shall jointly take possession of the same, and take care and keep the same in repair, as required as to public burial-grounds in and belonging to the respective townships, and each township shall bear an equal share of the expense thereof; and the trustees of each township shall levy needful taxes in that behalf, not exceeding in any one year more than one-fourth of one per cent. (April 6, 1893, 90 v. 151.)

§ 3774. **WHEN TRUSTEES MAY APPLY TO COURT FOR ORDER TO SELL PROPERTY.**—When the title to any real estate is vested in trustees for the use of churches, or congregations of churches, and, owing to the peculiar situation of such real estate, or the nature of the trust or conditions upon which it is held, it has not been for twenty years claimed by or appropriated to the use of churches or congregations, as originally contemplated, and such trustees are in doubt as to what disposition to make of such unappropriated church property, and when any public church-site and meeting house has been abandoned by the public as a place of worship, and the trustees invested with the title of such property have sold the same, and are in doubt as to what disposition to make of the proceeds thereof, such trustees may file a petition in the court of common pleas of the county where the property is situate, setting forth all the facts in the case, and asking the direction of the court as to the proper disposition of such unappropriated property or proceeds. (April 10, 1868, 65 v. 84, § 1; S. & S. 164.)

Trustees must act as a body.

A religious corporation can only be bound by its board of trustees acting as a body, and a contract made by members of the board of trustees, constituting a majority of the board, but acting separately and not collectively as a board, at a meeting regularly called, will not bind the corporation.—*Young & Fulton Co. v. Methodist Church*, 5 N. P. 378 (1898).

As to powers of trustees and members of church corporations.

See *Wiswell v. Cong. Church*, 14 Oh. St. 31 (1863); *Mannix, Assignee, v. Purell et al.*, 46 Oh. St. 102 (1883); *Rike et al. v. Floyd*

et al., 6 C. C. 80 (1891); *Miller et al. v. Elder et al.*, 7 C. C. 97 (1893); s. c., 3 C. D. 681.

As to rights of seceders.

Members who secede from a church organization thereby forfeit all right to any part of the church property.—*Wiswell v. Congregational Church*, 14 Oh. St. 31 (1863); *Rike et al. v. Floyd et al.*, 6 C. C. 80 (1891).

What constitutes secession?

Wiswell v. Congregational Church, 14 Oh. St. 31 (1863); *Rike et al. v. Floyd et al.*, 6 C. C. (1891).

See § 3794 and notes thereto.

§ 3775. **NOTICE BY PUBLICATION, AND JUDGMENT.**—Notice of the filing of such petition shall be given by publication in some newspaper printed and of general circulation in the county where it is filed, for four consecutive weeks, setting forth the object and prayer thereof, and that any person, church, or congregation, claiming an interest in the subject matter of such petition, may appear and file an answer therein; and the court, on final hearing of the case, shall make such order or decree therein as will best secure the rights of the churches or congregations, or persons having an interest therein, and as will best promote the interests of religion, having regard, as near as may be, to the nature and terms of the original trust or purpose with which such property or proceeds is charged, and shall tax the costs of the proceeding, as justice and equity require. (April 10, 1868, 65 v. 84, § 2; S. & S. 165.)

Church Sites, etc.—Consolidations, §§ 3776-3778.

§ 3776. WHEN TRUSTEES MAY CONVEY CHURCH SITES TO CONGREGATION; CHURCH SITE SUBJECT TO PAYMENT OF JUDGMENT. — When any real estate has been purchased by or conveyed to trustees for the use of churches or congregations, as sites for meeting-houses to be erected thereon, and such churches or congregations have erected houses of worship thereon, but no power is possessed by such trustees to convey such real estate to such congregations, or to the trustees thereof, such trustees may convey such improved sites to the trustees of such congregations; provided, however, that where an incorporated religious congregation, society, association, sect, or denomination use or occupy as and for a place of worship, real estate which is held in trust for such religious congregation, society, association, sect, or denomination, or the members thereof, as and for a place of worship, and a judgment has been, or may be, recovered against such incorporation, the said real estate, together with such edifice and improvements thereon, shall, by a civil action for that purpose, be subjected to the payment of such judgment and costs. (March 7, 1883, 80 v. 51; R. S. 1880; April 10, 1868, 65 v. 84, § 3; S. & S. 165.)

§ 3776-1. HOW EFFECTED. — Any ecclesiastical society incorporated under the laws of this state connected with a church of Christ in this state, may by a three-fourths vote of its adult members present and voting at a meeting warned and held for that purpose, assign, transfer and convey to the church with which it is concerned, and which is incorporated under the laws of this state, all the property and estate, real and personal, and trust funds of said society to be held by said corporation under the trusts and for the same uses upon which the same had heretofore been held by such society, and the society committee or trustees are fully authorized to make, pursuant to such vote, any and all conveyances necessary to complete such assignment and transfer; but, before the same shall be effectual a certificate of the fact of such assignment and transfer shall be filed in the office of the secretary of state, and in the office of the clerk of the county in which the property is located. (April 8, 1891, 88 v. 298; March 12, 1890, 87 v. 56.)

§ 3777. CONSOLIDATION OF RELIGIOUS CORPORATIONS. — When two or more religious societies, churches, or associations, recognizing the same ecclesiastical jurisdiction, form of faith, government, order, and discipline, and incorporated by or under any law of this state, desire to be consolidated or united as a single corporation, the elders, trustees, deacons, directors, or other known and legal representatives of such societies, churches, or associations, may enter into an agreement for such union or consolidation, and prescribe the terms and conditions thereof, the corporate name of such united society, church, or association, the time and place for the first meeting of the new corporation, the number of members of each separate branch or organization who shall be chosen as directors, trustees, elders, or other officers for the new corporation, to succeed to the rights, trusts, duties, and obligations of those officers who, in the separate organizations, held in trust the estate, real and personal, of such separate churches, societies, or associations, with such other estates as they may deem necessary to complete the new corporation; but an agreement so made shall not be valid until it has been submitted to a separate meeting of the members of each organization, of which due and full notice has been given, according to the form and usage for calling church, congregation, or society meetings, and ratified by a two-thirds vote of all present at such meeting, in person or by proxy, and entitled to vote according to the laws, regulations, or usages of such church, society, or corporation. (67 v. 30, § 1.)

§ 3778. RECORD OF PROCEEDINGS TO BE CERTIFIED, ETC. — When the agreement has been ratified by each church, society, or association which is a party to the proposed united organization, the clerk or secretary of each meeting shall certify the record of the proceedings thereof, and deliver the same to the clerk or secre-

Consolidations, etc., §§ 3779-3780.

tary of the first meeting of the united churches, societies, or organizations, as hereinbefore provided, and as specified in the terms of agreement. (April 2, 1870, 67 v. 30, § 2.)

§ 3779. **ARTICLES OF INCORPORATION, AND FILING OF SAME.**—If, at the first meeting of the united corporations, the proceedings and acts of the several churches, societies, and parties thereto are submitted to and approved by the meeting, and a board of trustees, directors, or other officers are chosen in accordance with the terms of agreement, the clerk or secretary of the meeting shall certify such approved agreement or terms of union, and file the same in the office of the secretary of state, whereupon the several churches, societies, or associations, parties thereto, shall be deemed and taken to be one corporation, possessing within this state all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties, of such new corporation. (April 2, 1870, 67 v. 30, § 3.)

§ 3779-1. **LANDS TO DESCEND IN TRUST.**—All lands and tenements not exceeding twenty acres that have been or hereafter may be conveyed by devise, purchase or otherwise to any person or persons as trustee or trustees in trust for the use of any religious society within this state, either for a meeting house, burying ground or residence for their preacher, shall descend, with the improvement and appurtenances, in perpetual succession, in trust to such trustee or trustees as shall from time to time be elected or appointed by any such religious society, according to the rules, customs, usages and regulations of such society respectively. (March 20, 1894, 91 v. 79; 23 v. 9; Chase, p. 1460; Curwen, p. 2347.)

See *Mannix, Assignee, v. Purcell*, 46 Oh. St. 102, 148 (1883).

§ 3779-2. **Sec. 2. TRUSTEES MAY SUE AND BE SUED.**—That the trustee or trustees, for the time being, of any religious society aforesaid, shall have the same power to defend and prosecute suits at law, or in equity, and do all other acts for the protection, improvement and preservation of said property, as individuals may do in relation to their individual property. (23 v. 9; Chase, p. 1460; Curwen, p. 2347.)

See *Mannix, Assignee, v. Purcell*, 46 Oh. St. 102, 148 (1883).

§ 3779-3. **LEGAL TITLE TO RELIGIOUS SOCIETIES' LANDS.**—Whenever any property has been, or may be, conveyed in trust for the use of any religious society, church or association, whether incorporated or not, the property so conveyed shall be held by the trustee or trustees, so appointed, and their successors, appointed as provided in the instrument creating such trust, or in case no provision is made in such instrument, then by such successor or successors, as may be appointed by any competent court; but no person shall be elected or appointed by such society, church or association, to act as trustees, to the exclusion of any trustee or trustees, appointed as aforesaid. (March 23, 1850, 48 v. 71; Curwen, p. 1554.)

See note to *Methodist Church v. Wood*, under § 3786.

§ 3780. **PROPERTY PASSES TO NEW CORPORATION.**—The new corporation, with its officers and chosen representatives, shall succeed to, and be invested with, all and singular, the right, title, and interest in and to every species of property, real, personal, or mixed, and all and singular the rights, privileges, and franchises of each of the churches, societies or associations parties to the agreement, without any other act, conveyance, or transfer; and such new corporation shall hold and enjoy the same, with all the rights pertaining to such property, franchises, and trusts, and shall be subject to all the debts, liabilities, and obligations, in the same manner and to the same extent as any or either of the churches or societies parties to the new corporation. (April 2, 1870, 67 v. 30, § 4.)

Consolidations — Endowment Fund Companies, §§ 3781-3784.

§ 3781. **TRANSFER OF PROPERTY AFTER UNION OF CORPORATIONS.** — When any two or more religious societies, denominations, or ecclesiastical corporations in this state hereafter unanimously form a union, or which have heretofore unanimously formed a union, and become united or consolidated under and by virtue of any rules and regulations of such societies, denominations, or corporations, or laws of this state, the trustees, deacons, directors, or other proper officers of such new society, denomination, or corporation may, at the request of a majority of the members of either of such societies, denominations, or corporations, petition the court of common pleas of the proper county, setting forth the fact of such union, and the court may, in its discretion, make an order requiring such officers, at the time of such union, to convey to such new organization the real estate owned and held by the parties to the union, as the court may direct; and if any of such officers refuse or neglect to obey such order, the decree of the court shall serve as such conveyance; but such order shall in no case be inconsistent with the original terms upon which such real estate became vested in or intrusted to the parties to the union; and in all cases the grantors of such real estate to such parties, or their heirs, shall be made parties to the petition, and such grantors or their heirs who make no defense shall not be subject to costs. (April 11, 1876, 73 v. 225, § 1.)

§ 3782. **NOTICE OF APPLICATION THEREFOR.** — Notice of the pendency of such petition shall be given by publication in a newspaper published in the county where the petition is filed, for four consecutive weeks, setting forth the object and prayer of the petition, and if no newspaper is printed in such county, publication shall be made in the newspaper published nearest to such county. (April 11, 1876, 73 v. 225, § 2.)

§ 3783. **ASSOCIATIONS FOR HOLDING DONATIONS AND BEQUESTS.** — An association incorporated for the purpose of receiving and holding donations and bequests, and funds arising from other sources, and disbursing the interest and income arising therefrom as in this section provided, shall hold all such principal sums as a permanent fund; and the interest arising from such fund, and the annual income arising from all personal and real property held by such association, shall be applied and distributed annually as follows:

First. To the payment of the necessary expenses of such association.

Second. The balance shall be paid to the board of stewards, or any officer that may be designated by any conference, synod, assembly, or association within the bounds of which the principal office is located at the time of such organization, to be distributed by the board of stewards or such officer annually, to such persons as may be designated by such conference, synod, presbytery, assembly, or association. (April 20, 1874, 71 v. 110, §§ 1, 2, 3, 4.)

Conflicting beneficiaries.

Where a trust is created for the benefit of an incorporated religious society, and there are two such bodies, each claiming to be such society, a court of equity may require the

claimants to interplead and proceed to ascertain the true beneficiary, without compelling either party to establish its corporate rights at law.—*Presbyterian Society v. Presbyterian Society*, 25 Oh. St. 128 (1874).

§ 3784. **ENDOWMENT FUND CORPORATIONS.** — When a presbytery, synod, conference, diocesan convention or other representative body of any religious denomination in this state, or when an assembly, synod, conference, convention or other general ecclesiastical body of any religious denomination held in the United States desires to create a board of trustees for any endowment fund or other property of the denomination represented by such body, and, at any regular meeting of such presbytery, synod, conference, diocesan convention or other representative body of such denomination in this state, or such assembly, synod, conference, convention or other general ecclesiastical body in the United States, elects not less than five mem-

 Endowment Fund Companies; Trustees, Powers of, §§ 3785, 3786.

bers of such denomination, one of whom shall be a resident freeholder in this state, to serve as trustees, and makes and files in the office of the secretary of state a statement, giving the names of such trustees, the character of the endowment fund or other property to be intrusted to their care, and the uses to which it is to be applied, signed by the proper presiding officer and the secretary or clerk of such body, acknowledged before a clerk of a court of record, notary public or a judicial officer having a seal, and the signing of the same is duly attested by such officer, and the statement thus authenticated is recorded in the office of the secretary of state, the persons named in such statement as trustees shall, thereupon, with their successors in office, become a body corporate and politic for the purpose in such statement specified; and a copy of such record, duly certified by the secretary of state, shall be evidence of the existence of such corporation. (March 21, 1894, 91 v. 83; April 21, 1890, 87 v. 243; April 20, 1874, 71 v. 118, § 1.)

§ 3785. **POWER OF TRUSTEES OF SUCH CORPORATIONS.** — Such trustees, if chosen to take charge of any endowment fund, may invest, manage, and dispose of the same in accordance with the purpose for which it was created, subject to such regulations as the body by which they were elected may from time to time prescribe. (April 20, 1874, 71 v. 118, § 3.)

§ 3786. **POWERS OF TRUSTEES OF RELIGIOUS SOCIETY; REAL ESTATE LIABLE FOR JUDGMENTS FOR LABOR PERFORMED, ETC.** — If the trustees are chosen to take charge of and manage any other property that may be owned or in any manner acquired by such religious denomination, they shall have full power to hold, invest, control, and manage the same for the benefit of the denomination within the presbytery, synod, conference, diocese, or other ecclesiastical territorial limits represented by the trustees, subject to the direction of the proper representative body of such denomination within such territorial limits as aforesaid; and if a parish or congregation connected with the denomination represented by the trustees become extinct, by reason of the death or dispersion of its members, the trustees may take possession of the church property of such parish, congregation, or society, whether real or personal, and rent, lease, sell, invest, or otherwise dispose of the same, for the benefit of the denomination represented by them, within the territorial limits represented by the body by which they were appointed, and subject to such regulations as such body may prescribe; but all property held by such trustees, and the proceeds thereof, shall be applied to the use and benefit of the proper denomination within this state; provided, however, that the real estate held by or in trust for any religious society or congregation as a place of worship, or otherwise, shall be liable for and may by civil action be subjected to the payment of any judgment which has been or shall be recovered against the trustees or any committee of such society or congregation, in their individual capacity, or otherwise, for labor performed, materials furnished, or damages sustained, under any contract with them for the erection of any church edifice or other building or improvement made thereon. (February 23, 1882, 79 v. 14; R. S. 1880; April 24, 1877, 74 v. 110, § 1.)

Trustees hold for corporation.

Where conveyances are made to individual trustees instead of the corporation, such individual grantees are trustees for the corporation, and on sale receive the proceeds to its use. — *Methodist Church v. Wood*, 5 Ohio, 283 (1856).

Officers illegally elected; de facto trustees.

See *Hullman v. Honcamp*, 5 Oh. St. 238, 242 (1856); *Presbyterian Society v. Smithers*, 12 Oh. St. 248 (1861); *Presbyterian Society v. Presbyterian Society*, 25 Oh. St. 128, 133

(1874); *Bartholomew v. Congregation*, 35 Oh. St. 567 (1880); *Messinger v. Wardens et al.*, 6 W. L. B. 397 (1881).

See §§ 3774 and 3794 and notes thereto.

See also *In re Shoup*, 16 W. L. B. 71 (1886).

May withdraw from synod.

Bartholomew v. Lutheran Church, 35 Oh. St. 567 (1880).

Judgment cannot be taken against an unincorporated church.

Males v. Murray et al., 7 N. P. 615 (1900); s. c., 10 Dec. 373.

 Extinct Parishes — Publishing Houses, §§ 3787-3789.

§ 3787. **WHEN AND HOW PROPERTY OF EXTINGUISHED CORPORATIONS MAY BE SOLD.** — When any parish, congregation, or society becomes extinct, as mentioned in the last section, the court of common pleas of the county in which any real property of such extinct parish, congregation, or society is situate, may, upon the petition of the trustees of the denomination to which such extinct parish, congregation, or society belonged, make an order for the sale of such property, whether the same has been built upon, or otherwise improved, or not, the proceeds of such sale to go to, and be for the benefit of, the denomination represented by such trustees, within the territorial limits represented by the body by which they were appointed, and the purchaser thereof shall be vested with as full and complete a title to the property as the character of the original grant to such parish, congregation, or society will allow; but this section shall not be so construed as to limit, or in any degree restrict, the powers conferred by the two preceding sections upon such trustees. (April 24, 1877, 74 v. 110, § 2.)

§ 3787a. **TRUSTEES OF EXTINGUISHED PARISH, CONGREGATIONS, ETC., DUTY AS TO MONEY RECEIVED FROM SALE OF PROPERTY.** — All money derived from the sale of any property under the provisions of original section and section three thousand seven hundred and eighty-seven, shall be placed in the custody of the trustees of the presbytery, synod, conference, diocese, or other ecclesiastical body having jurisdiction in the territorial limits in which said property may have been located, and they shall hold the same in trust for the period of ten years, or for such period as may be prescribed by the law of the denomination. If within that time another parish, congregation or society of the same denomination shall be organized in the same locality, then the court authorizing the sale of said property, may, upon proper application and evidence, authorize the return of said money to the trustees of the new organization. Otherwise such money shall become a part of the funds of the presbytery, synod, conference, diocese, or other ecclesiastical body having jurisdiction. (March 22, 1889, 86 v. 132, 133.)

§ 3787b. **FUNDS ARISING FROM SUCH SALE TO BE UNDER CONTROL OF PRESBYTERY, SYNOD, ETC.** — Be it further enacted, that all sums of money arising from the sale of property formerly belonging to any extinct parish, congregation or society, and which are now held by special trustees appointed by the courts authorizing sale of such property, shall be, from and after the passage of this act, under the control of the trustees of the presbytery, synod, conference, or other ecclesiastical body to which said extinct parish, congregation or society may have belonged, and shall be held by them subject to the conditions and provisions of this act; and said trustees are hereby authorized to take such steps, legal or otherwise, necessary to obtain possession of such money. (March 22, 1889, 86 v. 132, 133.)

§ 3788. **WHO TO BE PARTIES TO PROCEEDINGS FOR SALE.** — When a petition is filed, as provided for in the preceding section, all persons who may have a vested, contingent, or reversionary interest in such real estate, shall be made parties thereto, and be notified of the filing and pendency thereof, in the manner provided by law in cases of the partition of real estate; but the court may make such order as to costs as may be deemed just and proper. (April 24, 1877, 74 v. 110, § 3.)

§ 3789. **HOW PRINTING AND PUBLISHING HOUSES INCORPORATED.** — When a conference, presbytery, assembly, association, or other general ecclesiastical body held in the United States, elects, in conformity with the rules and regulations prescribed by such body, any number of persons, not less than three, as trustees or directors of a printing and publishing house, to hold their office until their successors are elected by such body, and a certificate of the election of such persons, and setting forth the name by which the corporation is to be known, signed by the clerk, secre-

Publishing Houses — Fiscal Trustees, §§ 3790-3792.

tary, or other like officer of such body, together with the written acceptance of such offices by the persons so elected thereto, is filed in the office of the secretary of state, such trustees shall be deemed and held to be duly incorporated, by the name set forth in such certificate. (March 18, 1871, 68 v. 43, § 1.)

§ 3790. EXPIRED CORPORATIONS MAY HAVE BENEFIT OF LAST SECTION. — Any corporation which has heretofore been established by special act of the legislature for the purpose named in the preceding section, and whose charter has expired, or hereafter expires, may be renewed by a compliance with the provisions of the preceding section on the part of the religious sect, association, or denomination to which such corporation belonged, or under the direction of which it was carried on; and the title to all property belonging to such former corporation at the date of the expiration of its charter, whether the same is real, personal, or mixed, shall pass to and be vested in the corporation so established. (March 18, 1871, 68 v. 43, § 2.)

§ 3791. FISCAL TRUSTEES OF WOMEN'S BENEVOLENT ASSOCIATIONS. — Any benevolent or charitable association incorporated by or under the laws of this state, and of which women are or may be trustees, managers, or directors, may vest the custody, control, and management of all its endowment or capital, funds, and property in three male trustees, to be styled fiscal trustees, who shall be appointed from time to time, as follows: One by the court of common pleas of the county where such association is located, one by the probate court of such county, and one by the vote of a majority of the members of such association present at a regular meeting duly convoked; such trustees shall hold their office for three years, except the first appointed, who shall hold their office respectively for one, two, and three years; they shall meet in the presence of the probate judge, and, by agreement, or by lot if they cannot agree, allot themselves accordingly, and the judge shall give to each a certificate of the term so allotted to him; and upon the death, resignation, incapacity, or removal from the county, of either of such trustees, the vacancy shall be filled for the unexpired term by the same appointing power; but trustees shall not be appointed except upon the written request of the association, filed in the probate court, in accordance with a resolution adopted by the association, at a regular meeting thereof, duly convoked; and until such appointment the association at a regular meeting, may elect any number of such trustees, not less than three with the power and subject to the duties aforesaid, who shall hold their office for such time not more than three years, as the association may by its by-laws determine. (May 13, 1878, 75 v. 524, § 1; S. & S. 51.)

§ 3792. POWERS AND DUTIES OF FISCAL TRUSTEES. — The trustees shall have the exclusive right, power, and authority, in the name and behalf of such association, to demand, take, and possess all the endowment or capital, funds, or property which such association may have or be entitled to have, and the same securely manage, invest, change, and dispose of at their will, for the use and benefit of the association, so as to yield a regular income; they shall, every three months, or oftener if necessary and convenient, give account of all such funds, property, and income, to the proper board of trustees, managers, or directors of the association, and shall collect at such times, and pay over to them or their order, all the net income of such investments, after deducting the actual and necessary expenses of the trust; but no charge or allowance for their services shall be made or permitted; and such trustees may, for the purposes (of) aforesaid, in the name of the association, contract and be contracted with, prosecute and defend suits, and receive, hold, and dispose of, all money and property which the association may have or acquire, or be entitled to have by gift, purchase, or otherwise, for its endowment, and when necessary for the purposes aforesaid may use the common seal of the corporation; but they shall not have or exercise any power, authority, or control over the institution or affairs of such cor-

Fiscal Trustees — Consolidation of Charitable, etc., Associations. §§ 3793-3793c.

poration, other than its fiscal affairs as hereinbefore limited, nor be liable for its debts, or for anything but their own acts or negligence. (March 30, 1864, 61 v. 87, § 2; S. & S. 52.)

§ 3793. OTHER ASSOCIATIONS MAY ACCEPT THESE PROVISIONS. — Any benevolent or charitable association hereafter formed, coming within the purview of section thirty-seven hundred and ninety-one, may make the provisions of the two preceding sections part of its articles of incorporation, and any such association now incorporated, by or under any general or special law, may accept such provisions, by a vote of the majority of the members present at a regular meeting, and when so accepted, and a certified copy of such acceptance filed in the office of the secretary of state, the provisions of the two preceding sections shall become and be a part of its charter. (March 30, 1864, 61 v. 87, § 3; S. & S. 52.)

§ 3793a. CONSOLIDATION OF CHARITABLE OR BENEVOLENT ASSOCIATIONS. — When two or more charitable or benevolent associations, societies or organizations now or hereafter formed or incorporated by or under any law of this state for charitable or benevolent purposes, desire to be consolidated or united as a single corporation, or when two or more charitable or benevolent associations, societies or organizations, one or more of which is, or may hereafter be, incorporated under the law of this state for charitable or benevolent purposes, desire to be consolidated or united as a single corporation, the trustees, directors or other known and legal representatives, or governing body or bodies, of such associations, societies or organizations may enter into an agreement for such union or consolidation and prescribe the terms and conditions thereof, the corporate name of such united association, society or organization, which may be the name of either one of them, or an entirely new name, the time and place for the first meeting of the new corporation, the number of members of one or more or of each separate branch or organization who shall be chosen as directors, trustees, or other officers of the new corporation to succeed to the rights, trusts, duties and obligations of those officers who in either or any of the separate organizations held in trust the estate, real and personal, of such separate association, society or organization, with such other estates as they may deem necessary to complete the new corporation;

AGREEMENT SUBMITTED TO MEMBERS OF SEPARATE ORGANIZATIONS. — But an agreement so made shall not be valid until it has been submitted to a separate meeting of the members of each of said associations, societies or organizations, of which due and full notice has been given according to the form and usage for calling meetings of each of said associations, societies or organizations, and ratified by a two-thirds vote of all the members present at such meeting, in person or by proxy, and entitled to vote according to the laws, regulations or usages of such associations, societies, organizations or corporations, respectively. (April 19, 1898, 93 v. 136.)

§ 3793b. RECORD OF RATIFICATION OF AGREEMENT. — When such agreement has been ratified by each association, society, organization or corporation which is a party to the proposed united organization, the clerk or secretary of each meeting shall certify the record of the proceedings thereof, and deliver the same to the clerk or secretary of the first meeting of the united association, society, organization or corporation, as herein provided and as specified in the terms of agreement. (April 19, 1898, 93 v. 137.)

§ 3793c. EACH MEMBER OF SEPARATE ASSOCIATION ENTITLED TO VOTE; APPROVAL OF PROCEEDINGS, ETC. — At the first meeting of the united association, society, organization or corporation, each member of each of said associations, societies, organizations or corporations shall be entitled to vote, and, if at such meet-

Consolidation of Charitable, etc., Associations, §§ 3793d-3793h.

ing the proceedings and acts of the several associations, societies, organizations or corporations, parties thereto, are submitted to and approved by the meeting, and a board of trustees, directors or other officers are chosen, in accordance with the terms of agreement,

AGREEMENT FILED WITH SECRETARY OF STATE.— the clerk or secretary of the meeting shall certify such approved agreement or terms of union and file the same in the office of the secretary of state, whereupon the several associations, societies, organizations or corporations, parties thereto, shall be deemed and taken to be one corporation under the name by it adopted, possessing within this state all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of such new corporation. (April 19, 1898, 93 v. 137.)

§ 3793d. UNPERFORMED ACTS AT FIRST MEETING MAY BE PERFECTED SUBSEQUENTLY.— Any of the acts provided for by section 3793c which shall not be performed or perfected at such first meeting may be performed and perfected at any subsequent or adjourned meeting of such united corporation. (April 19, 1898, 93 v. 137.)

§ 3793e. RECORDING OF CERTIFICATE OF AGREEMENT.— The certificate to the secretary of state provided for by section 3793c shall be by him recorded, and a copy duly certified by him shall be recorded in the office of the recorder of deeds of the county where such corporation exists and may be recorded in the office of the recorder of deeds of any county where any real estate lies belonging to any of said associations, societies, organizations or corporations entering into said union,

EVIDENCE OF CORPORATE EXISTENCE.— and a certified copy by the recorder of either county in whose office the same is recorded, or a copy certified by the secretary of state of the record in his office, shall be prima facie evidence of the existence of such corporation. (April 19, 1898, 93 v. 137.)

§ 3793f. CONSTITUTION, BY-LAWS AND RULES.— Such united corporation shall be authorized to adopt a constitution, by-laws and rules not inconsistent with the laws of the state of Ohio, and to amend the same from time to time under such provisions for such amendment as it may at any time adopt. (April 19, 1898, 93 v. 137.)

§ 3793g. RIGHTS, ETC., OF NEW CORPORATION.— All the various associations, societies, organizations or corporations entering into such union shall be merged in said united body and the new corporation with its officers and chosen directors, trustees or other representatives shall succeed to, and be vested with, all and singular, the right, title and interest in and to every species of property, real, personal and mixed, and all and singular the rights, privileges and franchises held by or vested in each of the said associations, societies, organizations or corporations, parties to the agreement, without any other act, conveyance or transfer, and such new corporation shall hold and enjoy the same with all the rights pertaining to such property, franchises and trusts, and shall be subject to all the debts, liabilities and obligations in the same manner and to the same extent as any or either of the associations, societies, organizations or corporations, parties to the new corporation. (April 19, 1898, 93 v. 137.)

§ 3793h. PROPERTY HELD IN TRUST TO BE GOVERNED BY ORIGINAL TERMS.— All and any real estate or other property vested or held by either of said associations, societies, or organizations or corporations under any trust or terms governing the grant, shall continue to be subject to such trust and controlled by the original terms under which such real estate or property became vested in or entrusted to the parties to the union. (April 19, 1898, 93 v. 138.)

Consolidation of Charitable, etc., Associations — Sale, etc., of Realty, §§ 3793i-3794.

§ 3793i. **PETITION FOR CONVEYANCE OF REAL ESTATE; ORDER OF COURT DECREE TO SERVE AS CONVEYANCE.**—The united corporation may, at the request of a majority of its members, or by act of its trustees, directors or other governing body, in its corporate name petition the court of common pleas of the proper county, setting forth the fact of such union, and the court may in its discretion make an order requiring such officers to convey to such new corporation the real estate owned and held by the parties to the union, as the court may direct, and, if any of such officers refuse or neglect to obey such order, the decree of the court shall serve as such conveyance, but such order shall in no case be inconsistent with the original terms under which such real estate became vested in, or entrusted to, the parties to the union;

DEFENDANTS.—And in all cases the grantors of such real estate, to such parties, or their heirs, or such other parties as the petitioners may deem advisable, may be made defendants to such petition, and such of the defendants who shall make no defense shall not be subject to costs. (April 19, 1898, 93 v. 138.)

§ 3793j. **NOTICE OF PETITION.**—Notice of the pendency of such petition shall be given by publication in a newspaper published in the county where the petition is filed for four consecutive weeks, setting forth the object and prayer of the petition, and, if no newspaper is printed in such county, publication shall be made in the newspaper published nearest to such county. (April 19, 1898, 93 v. 138.)

§ 3793k. **SUBSEQUENT UNION OF ASSOCIATIONS, ETC., WITH CORPORATION.**—Subsequent to the creation of the united corporation under the provisions of sections 3793a to 3793j, inclusive, any one or more associations, societies, organizations or corporations of like character, may at any time unite with and become a part of said corporation in accordance with the provisions of said sections. (April 19, 1898, 93 v. 138.)

§ 3794. **HOW CHARITABLE OR RELIGIOUS SOCIETIES MAY SELL, INCUMBER, ETC., REALTY.**—When any charitable or religious society or association desires to sell, exchange or incur by mortgage or otherwise any real estate now or hereafter owned by it, or held in trust by it for any specified religious or charitable purpose, or held for its use or benefit by trustees either chosen by it or otherwise constituted, for any such religious or charitable purpose, except grounds used or occupied as burial-places for the dead, the trustees, wardens and vestry, or other officers intrusted with the management of the affairs of such society or association or holding the title to such property, or such society or association itself, if it be incorporated under any law of this state, may file in the court of common pleas of the county in which such real estate is situated, a petition stating how and by whom the title thereto is held, that such society or association desires to make such sale, exchange or incumbrance, and setting forth the object of the same; and if upon the hearing of such case it appears that such sale, exchange or incumbrance is desired by the members of such society or association and that it is right and proper that authority be given to accomplish the same, the court may authorize the trustees or other officers of such society or association, or if incorporated as aforesaid the society or association itself, to sell, exchange or incur such real estate in accordance with the prayer of the petition and upon such terms as the court shall deem reasonable; and in case the title thereto is held for the use or benefit of such society or association by trustees, all or a majority of whom are not chosen thereby but otherwise constituted, and who refuse upon request of such society or association, or its duly elected trustees, wardens, and vestry or other officers, to file such petition, the court upon the petition of such society or association or its duly elected trustees, or other officers aforesaid, may require said trustees holding such title to convey or incur such real estate in accordance with the prayer of the petition and upon such terms as shall be deemed

Transfers of Realty, etc.—Homes for Children, §§ 3794a-3794-1.

reasonable; provided, that all trustees holding title as aforesaid and refusing to file or join in such petition shall be made defendants therein and be served with summons as in a civil action. (April 27, 1896, 92 v. 397; April 17, 1882, 79 v. 108; R. S. 1880; April 3, 1866, 63 v. 87, §§ 1, 2; S. & S. 163; S. & C. 371, 372.)

See 32 W. L. B. 377 (1894).

May give purchase-money mortgage without order of court.

Baptist Society v. Clapp, 18 Barb. 35 (1853).

Sale without authority of court invalid.

Trustees without consent and authority from the members of the society and without authority from court first obtained, have no

power to sell or give away the real property of the society.—South Kenton Sunday School v. Espy et al., 17 C. C. 524 (1899).

Special act of legislature empowering such conveyance, void.

South Kenton Sunday School v. Espy et al., 17 C. C. 524 (1899).

See §§ 3774 and 3786 and notes thereto.

§ 3794a. **INTERCONVEYANCE OF PROPERTY.**—The trustees of any church organization, religious or charitable society or association and all persons now or hereafter holding title to any property in trust therefor are hereby authorized and empowered to transfer and convey the same to other trustees of the same denomination or to the trustees of such organization, society or association for which the same is held in trust, or to such organization, society or association itself if incorporated under the law of this state; provided, however, such transfer or conveyance shall be made only when the property so transferred is still to be used for the specified religious, charitable or church purposes, and the same shall be thereafter held in trust by the grantees for such purposes. (April 27, 1896, 92 v. 397; April 27, 1893, 90 v. 321.)

§ 3794b. **TITLE TO CERTAIN TRANSFERS OF REAL ESTATE GUARANTEED.**—Provided, however, that where the trustees or other officers mentioned in section 3794 have heretofore sold and conveyed by deed in fee simple or mortgaged any real estate therein mentioned, without proceeding as required by such section, and the grantees thereof, and their successors in line of title, for five years since the date of such conveyance, held continued, exclusive, notorious and adverse possession of such real estate so conveyed, such sales, conveyances and mortgages shall be of, and have the same validity and effect as if the same had been made by proceedings instituted under said section and duly confirmed by the court of common pleas. (April 12, 1898, 93 v. 101.)

PREAMBLE.—Whereas, Some of the women's christian associations, incorporated under the laws of this state, in pursuance of the humane and benevolent purposes of their organization, have established and maintained branches or departments known as retreats for aiding (and assisting) betrayed women, and redeeming the fallen, and in which children are born and abandoned or deserted by their parents; and

WHEREAS, At present, no adequate means are provided whereby such children can be placed in and adopted by families where they will be provided with proper support, education and training, and proper supervision maintained over them after they have been so placed; therefore,

§ 3794-1. **WOMEN'S CHRISTIAN ASSOCIATIONS EMPOWERED TO PROCURE HOMES FOR CHILDREN.**—Every woman's christian association now or hereafter incorporated under the laws of the state of Ohio, having and maintaining a branch or department as a retreat for unfortunate or fallen women, shall have, and they are hereby vested with, all the powers and authority conferred upon children's homes, incorporated under the laws of this state, in placing, indenturing, and procuring the adoption in private families of children who are born in such retreats of the inmates thereof, and who are abandoned or deserted by their parents, and the supervision over them after they have been so placed or adopted. (April 18, 1892, 89 v. 405.)

Transfers, etc., of Realty — Secret Benevolent Societies, §§ 3795–3796c.

§ 3795. NOTICE OF THE PENDENCY OF THE PETITION. — The petitioners shall cause notice of the pendency and prayer of the petition to be published in some newspaper of general circulation in the county where the real estate proposed to be sold, exchanged or incumbered is situate, for four consecutive weeks, before the said application shall be heard. (April 17, 1882, 79 v. 108, 109; April 8, 1880, 77 v. 122; R. S. 1880; March 24, 1860, 57 v. 85, § 3; S. & C. 372a.)

§ 3796. SALES TO BE CONFIRMED BY COURT. — The trustees or other officers of such religious society, authorized to make such sale, exchange or incumbrance, shall make return thereof to the court ordering the same at such time as the court shall order, and thereupon, if the court is satisfied that the same has been made in all respects according to its order, it shall approve the same, and shall order that the proceeds be invested in other real estate for the use of such society, used in the payments of its debts, or otherwise invested or disposed of according to the prayer of said petition. (April 17, 1882, 79 v. 108, 109; April 8, 1880, 77 v. 122; R. S. 1880; April 3, 1866, 63 v. 87, § 2; S. & C. 372a.)

See § 3794 and notes thereto.

§ 3796a. SECRET BENEVOLENT SOCIETY EMPOWERED TO INVEST RESERVE FUNDS.—That any secret benevolent association, or society incorporated under or by the laws of the state, which shall have any reserve or accumulated funds, or moneys, held by them for the purpose of endowment of the widows, orphans, families, blood relatives or heirs of the members of such benevolent society or association, or for purely charitable purposes, shall have the right and power to invest such funds or moneys upon interest and shall take securities for such investment upon real or personal property, or otherwise, as such society or association may deem fit. (April 16, 1900, 94 v. 355; April 9, 1880, 77 v. 146.)

§ 3796b. MAY ELECT TRUSTEES TO TAKE CHARGE OF SUCH FUNDS.—Any such association or society may elect a board of trustees, consisting of not less than three members, to whom they may intrust the right to manage, control, take charge of, invest, collect, demand, receive and deposit all reserves, surplus or accumulated funds or moneys, which such association or society holds, or may hold, from time to time for the purpose of such endowments as are named in the first section of this act. (April 9, 1880, 77 v. 146.)

Funds must be applied to society's purposes.

The funds of a society, organized to assist its sick and needy members, cannot, without

a change in its constitution, be applied to religious purposes.—Podesta et al. v. Societa et al., 10 C. C. 19 (1895); s. c., 6 C. D. 210.

§ 3796c. SOCIETY TO FIX TERMS OF TRUSTEES AND DEFINE THEIR DUTIES, POWERS, ETC. — Any association or society as aforesaid, may, by law, define and limit the term of office of each and all of the said trustees; may define the duties and powers of said trustees and of said board of trustees; may remove either one for good cause; may fill all vacancies occurring in said board; shall demand from each of said trustees security for the faithful performance of their several duties, as it may deem fit; shall have power to cause investments to be made by said trustees, in the name or names of either or all of them, and in which name or names suit may be brought; may empower said trustees to discharge, acquit, and release all claims or demands of such association or society upon payment thereof. Such trustees may sue for any claim or demand, for any loan or investment heretofore made, or hereafter to be made by any such association or society; and upon foreclosure of any mortgage held by such association or society for any investment or loan, may purchase and hold any lands, tenement or interest in land, in fee or otherwise and may lease, rent, sell, and convey the same by deed. (April 9, 1880, 77 v. 146.)

Secret Benevolent Societies, §§ 3796d, 3796e.

§ 3796d. **MAY SUE AND BE SUED.** — Any such association or society may sue or be sued, answer or be answered unto, plead or be impleaded in any court in this state. (April 9, 1880, 77 v. 146.)

§ 3796e. **SOCIETY MAY ACCEPT DONATIONS; MAY PAY ENDOWMENTS NOT EXCEEDING \$5,000.** — Any such association or society shall have power to accept and receive any donation or voluntary contribution, may collect its assessments, which shall not exceed one-fifth of one per centum of the amount payable at the death of a member; may pay endowments in the mode and to the persons named and provided by its laws but in no case exceeding in the aggregate five thousand dollars on the death of any one member. (April 9, 1880, 77 v. 146.)

PART XX.

SAVINGS AND LOAN ASSOCIATIONS.

- § 3797. Savings and loan associations.
- § 3798. General regulations of such associations.
- § 3799. Deposits, and payment thereof.
- § 3800. Officers must give bond.
- § 3801. Deposit by persons under disability.
- § 3802. Officers shall not borrow of the association.
- § 3803. What real estate it may acquire.
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- § 3819. Form of report of stock companies.
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- § 3821. Reports to be compiled and published.
- § 3821a. Powers of safe deposit companies: courts may order moneys paid into court to be deposited with such companies; how moneys received in trust by such companies to be loaned; real estate acquired by such company by foreclosure of mortgage, etc., to be sold.
- § 3821b. Account of moneys, etc., received in trust shall be kept separate; said company shall maintain a reserve equal to fifteen per cent. of deposits; such company shall be appointed trustee under will; capital stock shall be held as security for faithful discharge of duties under this act; money held in trust to be invested in trust funds of company; money held in trust shall not be mingled with other funds, or be liable for debts of company; liability of stockholders: trustees to notify auditor of state of organization of company, and make statement: auditor of state may appoint expert to examine affairs of such companies: dividends, and how paid; increase of capital stock: assignment and transfer of stock.
- § 3821e. Trust capacities in which such companies may act.
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- § 3821e. Examination of company.
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Articles of Incorporation, § 3797.

- § 382lg. Loans on or investments in stock.
 § 382lgg. May exercise powers of safe deposit and trust companies, when. Stockholders' consent necessary. Certificate to be filed with secretary of state; what it shall contain.
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§ 3797. SAVINGS AND LOAN ASSOCIATIONS. — The secretary of state shall submit the articles of incorporation of any savings and loan association received by him to the attorney-general, who shall, if the same are in conformity to law, and sufficient, certify thereto on the same, and the secretary of the state shall then record the same; and no such association shall commence business with a subscribed capital of less than fifty thousand dollars, except in villages having a population at the federal census of 1880, or at any federal census to be taken hereafter, of less than twenty-five hundred, and in such villages no such associations shall commence business with a subscribed capital of less than twenty-five thousand dollars, which shall be divided into shares of one hundred dollars (each), nor until at least one-half of each subscription has been fully paid up. (April 12, 1889, 86 v. 269, 270; R. S. 1880; February 26, 1873, 70 v. 40, §§ 2, 4.)

As to lien on stock.

See § 3795.

Constitutional—merely authorize banks of deposit.

The associations authorized by this section are banks of deposit, and do not come in conflict with section 7, article 13, of the constitution of Ohio. The phrase "associations with banking powers," as used in the constitution,

refers only to banks of issue.—*Dearborn v. Northwestern Savings Bank*, 42 Oh. St. 617 (1885); *Bates v. Peoples Savings & Loan Ass'n*, 42 Oh. St. 655, 670 (1885). See notes to § 3804.

Deposits are trust fund.

Property of depositors and stockholders is a trust fund, and the directors are liable for waste and mismanagement.—*Meisse et al. v.*

Regulations as to Deposits — Officers, etc., §§ 3798-3802.

Loren et al., 4 N. P. 100 (1897); s. c., 6 Dec. 258.

Cannot issue notes for circulation.

In *Corwin v. Ins. Co.*, 14 Ohio, 7, 13 (1846), prior to the adoption of the new constitution, Wood, C. J., says: "All persons in Ohio, artificial as well as natural, may pursue the business of banking, with the single exception of the issuing of notes for circulation as money. This is the mischief the legislature have sought from time to time to remedy; it is the only exclusive, and the principal franchise, except its life, conferred upon a bank. It is against the issue and circulation of notes, as

currency, that our penal laws have, without exception, it is believed, been directed from 1816 to the present day. These deposits in savings institutions, however, have but little semblance to bank deposits. In general bank deposits, no interest is paid by the bank, and the money is repaid on demand. In savings banks the deposits, though called such, are strictly loans, on which interest is paid, and are repaid only on express and specific notice."

As to taxes on deposits.

Collett v. Savings Society, 13 C. C. 131, affirmed 37 W. L. B. 332 (1897).

§ 3798. **GENERAL REGULATIONS OF SUCH ASSOCIATIONS.** — The signers of the articles of incorporation shall give at least three days' notice, personally served upon each stockholder, or thirty days' notice by publication, of the time and place of the meeting for the election of directors; the offices of secretary and treasurer of the corporation may be held by the same person; and at every annual meeting the directors shall make full report of the business of the preceding year, and the present financial condition of the corporation. (70 v. 40, §§ 5, 6, 7.)

§ 3799. **DEPOSITS, AND THE PAYMENT THEREOF.** — The board of directors may prescribe the terms on which deposits shall be received and paid out, and the mode of transacting, managing, and conducting the affairs and business of the corporation; and the rules and regulations relating to the receipt and payment of deposits, and the interest thereon, shall be written or printed in the pass-books of depositors, shall not be altered so as to affect any deposit previously made, and shall be obligatory on such depositors. (February 26, 1873, 70 v. 40, § 9.)

See note to *Meisse et al. v. Loren et al.*, under § 3797.

Lien on stock.

Authorizes the making of by-laws by which the claims of the bank against a stockholder

should be a lien on the stock.—*Bank v. Higbee*, 4 C. C. 222, 230 (1890); s. c., 2 C. D. 512; affirmed 28 W. L. B. 336 (1892); *Staford v. Banking Co.*, 61 Oh. St. 160, 169 (1899); *Pomb v. Felch et al.*, 40 W. L. B. 186 (1898).

§ 3800. **OFFICERS MUST GIVE BOND.** — The officers of such corporation, other than directors, shall, before entering upon the discharge of their duties, give bond to the corporation, to the amount required by the directors, and with security to be approved by them, for their fidelity and good conduct, and for the safe-keeping and proper application of the funds of the association, and of such sums of money as may be placed in their charge by the depositors or others; and the directors may require an increase of the amount of such bonds whenever they deem it necessary. (February 26, 1873, 70 v. 40, § 10.)

§ 3801. **DEPOSIT BY PERSONS UNDER DISABILITY.** — When deposit is made in any such association by a minor, or a female who is or thereafter becomes a married woman, the same shall be held for the exclusive right and benefit of such depositor, free from the control or lien of any person, except creditors, and shall be repaid to the person making the deposit, and the receipt or acquittance of such minor or female shall be a sufficient release and discharge to the corporation for such deposit. (February 26, 1873, 70 v. 40, § 11.)

§ 3802. **OFFICERS SHALL NOT BORROW OF THE ASSOCIATION.** — No director or other officer of such corporation shall borrow or use the funds of the corporation, except to pay the necessary and current expenses, to an amount greater than one-half of the amount of stock by him owned or held; nor shall any officer or director be surety, or in any manner an obligor for any loan made by the corporation. (70 v. 40, § 12; S. & S. 188.)

Real Estate — Interest — Increase of Stock — Investments, etc., §§ 3803-3806.

§ 3803. **WHAT REAL ESTATE IT MAY ACQUIRE.** — Such corporation may acquire, hold, and convey only such real estate as is necessary and convenient for the transaction of its business, and such as it may find necessary to purchase, at judicial sale or otherwise, to secure debts due it; but it shall not hold any real estate purchased to secure debts due it for a longer period than five years; and in all cases of loans upon real estate the expense of searches, examination of certificates, and recording of papers, shall be paid by the borrower. (February 26, 1873, 70 v. 40, § 13.)

§ 3804. **INTEREST MAY BE PAID ON DEPOSITS.** — Such corporations may receive on deposit, for safe keeping or investment, all sums of money that may be offered for that purpose by tradesmen, clerks, mechanics, laborers, minors, or other persons, or by any religious or charitable society, or municipal corporation, or that may be ordered to be deposited by any court in this state having custody of money, and make investments thereof in the manner provided in this chapter, and may credit and pay such rates of interest thereon as may be agreed upon, not exceeding the rate allowed by law; and they may purchase and sell promissory notes, drafts, and bills of exchange, at such rates as may be agreed upon, and transact such other business as properly pertains to the business of such associations not forbidden by the constitution and laws of this state. (February 26, 1873, 70 v. 40, § 14.)

See notes to § 3797.

Liability for certificates fraudulently issued.

The power to receive deposits carries with it the power to issue certificates therefor. Issuing, dealing in, buying and selling certificates is one of the incidents of and properly pertains to the business of banking.

Where the proper officer to issue such certificates issued authorized certificates, though

without knowledge of the trustees, neither the abuse or disregard of his authority, nor his fraud or bad faith, can be shown in defense of the bank in an action against it by an innocent party holding such certificates.— Bank v. Blakesly, 42 Oh. St. 645 (1885).

As to usurious loans by building and loan associations.

See Bates v. Loan Ass'n, 42 Oh. St. 655 (1885).

§ 3805. **STOCKHOLDERS TO SHARE RATABLY IN INCREASED STOCK.** — Upon any increase of stock, the stockholders at the time of such increase shall each be entitled to a pro rata share thereof, upon the payment of its par value; but such right shall be forfeited if the amount be not paid within thirty days of the time fixed therefor by the directors, by public notice. (February 26, 1873, 70 v. 40, § 15.)

§ 3806. **SAVINGS BANKS, INVESTMENT OF FUNDS; DISCOUNTS; INTEREST; EXCHANGE; PROHIBITING ADVERTISEMENT OF CAPITAL NOT PAID IN.** — Such corporations may invest their funds in the purchase of stocks, bonds or other evidences of indebtedness of the United States, stocks and bonds of the state of Ohio, bonds of any municipal corporation of this state, or school bonds of any municipal corporation, special school district or body politic in this state, issued pursuant to law, or in bonds issued by county commissioners within this state in pursuance of law, to such an amount as may be deemed proper, or the stocks or bonds of any state of the United States that has, for five years immediately preceding such investment, paid the interest on its bonded debt in lawful money of the United States, to the extent of ten per cent. of their paid in capital and deposits, or in bonds or notes secured by mortgages on unincumbered real estate situated in the county where the association is located, or any adjoining county in this state, worth, exclusive of buildings, at least double the amount loaned thereon, unless accompanied with valid insurance upon the buildings thereon that will make the value of the real estate and insurance at least double the amount loaned thereon; but not more than seventy-five per centum of the amount of the paid in capital and deposits of any such association shall at any time be invested in such real estate securities. Such associations may

Loans — Chattel Mortgages, §§ 3806a, 3806b.

discount notes and bills of exchange, and may take, receive, reserve and charge upon any loan or discount made upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by law. Such interest may be reserved or taken in advance, at the time of making the loan or discount; and for interest taken directly or indirectly in excess thereof, the association shall be subject to the same penalties as natural persons; but in the purchase, discount or sale of a bill of exchange, payable at another place than the place of such purchase, discount or sale, the current rate of discount or premium may be charged and received in addition thereto. And no such corporation shall advertise by newspaper or letter-head or in any other way a larger capital stock than has been actually paid in. (April 18, 1892, 89 v. 366; April 16, 1888, 85 v. 288; R. S. 1880; March —, 1875, 72 v. 186, § 16.)

Usurious contract made in foreign state.

A corporation can make no contracts and do no acts, either within or without the state which creates it, except as are authorized by its charter. However, a savings bank incorporated under this charter cannot enforce in this state a usurious contract for the loan of money to the extent of the usury stipulated therein, although the contract was made in

another state, where the law allows such interest.—Ewing v. Savings Bank, 43 Oh. St. 31 (1885).

Void only as to usury.

The contract is not absolutely void, but only as to the extent of the usury.—Ewing v. Savings Bank, 43 Oh. St. 31, 36 (1885).

See note to Corwin v. Ins. Co., under § 3821-1.

§ 3806a. **LOANS BY SAVINGS BANKS IN COUNTIES CONTAINING A CITY OF THE SECOND GRADE, FIRST CLASS. HOW MADE.** — Provided, that any savings bank in county containing a city of the second grade of the first class, having in its articles of incorporation expressed the purpose to loan money upon pledges of personal property, it shall, as to all such loans, be subject to all laws and ordinances governing pawnbrokers; and such corporation having in its articles of incorporation such purpose so expressed, may invest its funds in loans upon personal property left with such corporation in pledge, not exceeding fifty per cent. of the cash value of such pledge, and upon such loans such corporation may charge and collect a rate of interest not exceeding one per cent. a month, and in addition to the cost of rent, insurance and storage, not exceeding one-half of one per cent. a month. In all cases where such corporation does a general pawnbroking business, the articles received in pledge shall be kept for ninety (90) days after the loan becomes due, when, if not redeemed, they shall be sold and the proceeds of such sale after payment of interest, costs of loan, storage, as hereinbefore provided, and the reasonable expenses of sale, shall be credited to the party (to whom) the loan was made and paid upon demand, together with any interest which may accrue thereon under the rules of such corporation governing deposits; provided, that any such corporation having expressed in its charter "to loan money upon pledges of personal property," shall have the same condition printed in all pass or deposit books and a notice conspicuously displayed in said bank stating that loans are so made by such corporation. And no corporation shall advertise by newspaper or letter-head, or in any other way, a larger capital stock than has actually been paid in. (April 15, 1889, 86 v. 369, 370.)

Failure to obtain license does not invalidate pledges.

A savings bank doing business as contemplated under this section did not comply with the laws regulating pawnbrokers in that it did not take out a license, make report of pledge, etc., as required by § 4386 et seq.

In an action brought by the creditors of the

pledgor to subject pledged property in the hands of the bank to the satisfaction of their claims, held, that the failure of the bank to comply with these regulations did not defeat its claims against the pledged property, and that it held the first lien on the same.—Griffith et al. v. Goldsoll, 42 W. L. B. 264 (1899).

§ 3806b. **CERTAIN POWERS OF ASSOCIATIONS LOANING MONEY ON CHATTEL MORTGAGE IN CERTAIN CITIES; CAPITAL.** — In cities of the first and third grades of the first class and the first and second grades of the second class, a company organized under the general incorporation laws of the state for the pur-

Loans — Dividends — Reports, etc., §§ 3807-3810.

poses and in accordance with the provisions of this chapter, and which also states in its articles of incorporation that it is organized for the purpose of making loans secured by mortgage of personal property, and which shall display in its place of business, a notice that it loans money upon chattel mortgage, shall have power to invest its funds in loans not greater than one thousand dollars each, upon mortgage of personal property not exceeding fifty per cent. of the value thereof. And upon such loans such company may charge and collect a rate of interest not exceeding one and one-half per cent. per month, and shall charge no commission, and not more than seventy-five cents for preparing a mortgage or contract, and the actual legal expenses of filing or recording the same, and such charge as may be agreed upon in written contract between the parties for inspection of property mortgaged, and indemnity against loss by fire when insurance is not made by mortgagor. And if any greater charge is made than is herein authorized such company shall forfeit the whole amount of interest. Such company shall have power to borrow money upon its certificates of indebtedness, but not exceeding the amount of its paid capital, and at interest not exceeding legal rates. The capital stock shall not be less than fifty thousand dollars, provided, that a company organized in pursuance hereof may commence business when fifteen thousand dollars of capital are actually paid in. (May 18, 1894, 91 v. 308.)

§ 3807. **LIMIT OF LOANS TO ONE PERSON.** — The total liabilities of any person, company, corporation, or firm, to any such association, either as principal debtor, or as security or indorser for others, for money borrowed, including the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-fifth part of the capital stock of such association actually paid in; but the discount of bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person, company, corporation, or firm negotiating the same, shall not be considered as money borrowed. (February 26, 1873, 70 v. 40, § 17.)

§ 3808. **DIVIDENDS.** — The directors may, as often as they deem proper, make and declare dividends of the profits of the corporation, after paying its expenses, and reserving and setting aside from the net profits of the institution not less than one-tenth part thereof, to be held and invested as a surplus fund to meet any contingency in its business, which reservation shall continue until such surplus is equal to at least twenty per cent. of the amount of the full capital stock; and such dividends shall be payable to the shareholders within ten days from the time the same are so declared. (February 26, 1873, 70 v. 40, § 18.)

§ 3809. **DISTRIBUTION WHEN ASSOCIATION CEASES TO DO BUSINESS.** — When any such association ceases to do business, or the directors thereof determine to close up its affairs, the assets of the association shall be distributed and disbursed by the directors, or other designated persons, as follows:

1st. In payment of depositors.

2d. In payment of the debts of the corporation.

3d. The remainder shall be distributed proportionately among the shareholders. (February 26, 1873, 70 v. 40, § 20.)

§ 3810. **NOTICES AND REPORTS TO AUDITOR OF STATE.** — The directors of every such association shall, within six months from and after its incorporation, notify the auditor of state of the date of its organization, and shall, each year, within ten days after its annual meeting, make, under oath, a complete statement of its condition, showing the amount of deposits and capital stock, the amount of the investments, and specifying the character of the same, which statement shall be filed with the auditor of state, and published in his annual report; and they shall also cause such statement to be published in at least one newspaper of general circulation in the county where the corporation is located. (February 26, 1873, 70 v. 40, § 21.)

Powers, etc., of Certain Companies — Surplus — Reports, §§ 3811-3817.

§ 3811. **CERTAIN CORPORATIONS NOT AFFECTED.** — Associations incorporated under the act entitled “an act to incorporate savings societies,” passed April 16, 1867, and the act passed March 19, 1868, entitled “an act to amend an act entitled, ‘an act to incorporate savings societies,’ passed April 16, 1867,” may continue their business under said acts, and without any prejudice to any rights acquired; such institution(s) and other savings and loan institutions organized under the laws of this state, may, if they so elect, continue their business under this chapter, by signifying such election, under their seal, to the secretary of state, and conforming their action thereto; and the secretary shall record the same, and his certificate be evidence thereof. (February 26, 1873, 70 v. 40, § 23.)

Referring to the act of April 16, 1867, see *Ridenour v. Mayo*, 40 Oh. St. 9 (1884).

§ 3812. **THEIR POWERS INCREASED.** — Savings societies organized and doing business under the acts named in the preceding section may, in addition to the investments authorized in said acts, invest their funds in the bonds of any county or municipal corporation issued in pursuance of any law of this state, and may charge interest on loans at a rate not to exceed eight per centum, payable semi-annually. (72 v. 150, §§ 1, 2.)

§ 3813. **FURTHER INCREASE OF THEIR POWERS.** — Societies for savings, duly incorporated by the general assembly of this state, and doing business under their respective acts of incorporation, may invest in land, and in the erection of buildings thereon, for the purpose of their own business, such sum as the trustees thereof deem necessary, not to exceed five per cent. of the amount of the deposits held by them, and they may rent any part of such buildings not needed for their own use. (May 31, 1866, 63 v. 62, § 1; S. & S. 187.)

§ 3814. **CERTAIN CHARTERS EXTENDED.** — All “societies for savings” and “savings societies,” now doing business, whose charters are subject to alteration or repeal, may continue their business under their respective charters, after the expiration thereof, subject, however, to the repeal of any such charter, and to such amendments, alterations, rules, and regulations as may be prescribed, from time to time, by any law of the state. (February 5, 1877, 74 v. 26, § 1.)

§ 3815. **MUST CREATE A SURPLUS FUND.** — Before any dividend, or interest on deposits, shall be paid by such societies, they must have a surplus fund equal to not less than five per centum of the whole amount of deposits, and they must gradually increase such surplus fund to an amount equal to ten per centum of the amount of deposits. (February 5, 1877, 74 v. 26, § 2.)

§ 3816. **ANNUAL REPORTS TO THE AUDITOR OF STATE.** — The president and treasurer of every such society shall make to the auditor of state, annually, in writing, during the month of June, an accurate statement of the financial affairs of the society, and the auditor of state shall cause the same to be investigated and examined by two suitable persons, appointed by him, who shall, within a reasonable time, report to him the result of the investigation and examination, with such suggestions as to them seem right and proper; the report of the president and treasurer, with the report of the examiners, or such portion thereof as the auditor of state deems advisable, shall be published in some newspaper printed and having general circulation within the county, to be designated by the auditor; and the auditor shall allow the examiners a reasonable compensation for their services, and such compensation, with the cost of publication, shall be paid by the society. (February 5, 1877, 74 v. 26, § 3.)

§ 3817. **SEMI-ANNUAL REPORTS OF CERTAIN CORPORATIONS TO SAME.** — Every banking institution, or incorporation engaged in the business of banking

Reports, etc., §§ 3818, 3819.

organized under the laws of this state, shall make a report to the auditor of state, as provided in the next section, showing the condition thereof before the commencement of business on the first Monday of the months of April and October of each year; but institutions known as building or loan associations, organized and conducted under the statutes for such institutions, and not doing a banking business, shall not be required to make such reports. (February 5, 1877, 74 v. 72, § 1.)

§ 3818. AUDITOR TO REQUIRE SAME, AND PENALTY. — The auditor of state shall issue his requisition upon each of such institutions, for the reports required to be made by the preceding section, a convenient number of days prior to the first day of April and October of each year, upon receipt of which it shall immediately forward to the auditor a balanced report of its condition, verified by the oath or affirmation of one or more of its officers, and shall also publish such report in full, at its own expense, in a newspaper published at the place where the institution is located, or, if there is no newspaper published at that place, then in the one nearest thereto; if any such institution neglect to comply with these provisions it shall be subject to a penalty of thirty dollars for each day's delay after the expiration of five days from the time any such report is required to be made, which penalty may be collected by a suit to be brought by the auditor of state, or by any creditor of the association, before any court of competent jurisdiction in the district wherein such institution is located; and all sums of money collected for penalties under this section shall be paid into the treasury of the state. (February 5, 1877, 74 v. 72, § 2.)

§ 3819. FORM OF REPORT OF STOCK COMPANIES. — All savings associations, banks, trust companies, savings banks, and other banking institutions having capital stock, shall make such report of their resources and liabilities in the following form:

Report of the condition of "The _____," at _____, in the State of _____, before the commencement of business on the first Monday of _____, 18—.

Dr.			Cr.		
Resources. Dollars. Cts.			Liabilities. Dollars. Cts.		
1. Loans on real estate.....			1. Capital stock paid in.....		
2. All other loans and discounts.....			2. Surplus fund.....		
3. Overdrafts.....			3. Undivided profits.....		
4. United States bonds on hand.....			4. State bank notes outstanding.....		
5. State bonds.....			5. Dividends unpaid.....		
6. Other stocks, bonds, and mortgages.....			6. Individual deposits.....		
7. Due from other banks and bankers.....			7. Due to banks and bankers,		
8. Real estate.....			8. Notes and bills re-dis-		
9. Furniture and fixtures....			counted.....		
10. Current expenses.....			9. Bills payable.....		
11. Premium on bonds.....					
12. Cash items.....					
13. Gold coin, \$—; Silver coin, \$—.....					
14. National bank notes.....					
15. United States notes.....					
Total.....			Total.....		
State of _____,			I, _____, of "The		
County of _____			_____," do solemnly swear that		
Sworn to and subscribed before me			the above statement is true, to the best of		
this _____ day of _____, 18—.			my knowledge and belief.		

			Cashier.		

Reports, etc.— Safe Deposit Companies, §§ 3820–3821a.

§ 3820. FORM OF REPORT OF OTHER CORPORATIONS. — All savings associations, savings banks, and other banking institutions having no capital stock, shall make such report of their resources and liabilities in the following form:

Report of the condition of "The _____," at _____, in the State of _____, before the commencement of business on the first Monday of _____, 18--.

Dr.	Cr.
Resources. Dollars. Cts.	Liabilities. Dollars. Cts.
1. Loans on real estate.....	1. Individual deposits
2. Loans on United States and State stocks.....	2. Due to banks and bankers,
3. Loans on other stocks and bonds.....	3. Undivided profits
4. All other loans.....	4. Other liabilities.....
5. United States bonds on hand.....	
6. State bonds on hand	
7. Other stocks and bonds...	
8. Real estate.....	
9. Furniture and fixtures....	
10. Expenses	
11. Due from banks and bankers.....	
12. Specie.....	
13. National bank and United States currency.....	
14. All other assets.....	
Total.. ..	Total
State of _____,	I, _____ of "The
County of _____.	_____," do solemnly swear that
Sworn to and subscribed before me	the above statement is true, to the best of
this _____ day of _____, 18--.	my knowledge and belief.
	Cashier.

And such associations and banks shall also furnish with their reports a statement showing the number of open accounts, and the rate per centum of dividends and of interest on deposits for the past year. (February 5, 1877, 74 v. 72, § 4.)

§ 3821. REPORTS TO BE COMPILED AND PUBLISHED. — The October reports shall be compiled by the auditor of state, and transmitted to the general assembly with his annual report. (February 5, 1877, 74 v. 72, § 5.)

§ 3821a. POWERS OF SAFE DEPOSIT COMPANIES; COURTS MAY ORDER MONEYS PAID INTO COURT TO BE DEPOSITED WITH SUCH COMPANIES; HOW MONEYS RECEIVED IN TRUST BY SUCH COMPANIES TO BE LOANED; REAL ESTATE ACQUIRED BY SUCH COMPANY BY FORECLOSURE OF MORTGAGE, ETC., TO BE SOLD. — Safe deposit and trust companies shall have power to provide by lease or purchase a proper and secure fire proof building or buildings and fire and burglar proof vaults, or safes, and to receive on deposit for safekeeping therein government securities, stocks, bonds, coins, jewelry, plate, valuable books, papers and documents, and other property of every kind, and to collect and disburse the interest or income upon such of said property received on deposit as produces interest or income, and to collect and disburse the principal of such of said property as produces interest or income when it becomes due, upon terms to be prescribed by such company so receiving such property. Said companies shall also have power to act as agent or trustee for the purpose of registering, countersigning or transferring the certificates of stock, bonds, or other evidences of indebtedness of any corporation, association, municipality, state, or public authority, upon such terms as may be agreed upon. Any court in this state, including probate courts, may by order, decree or otherwise

Safe Deposit Companies, § 3821b.

direct any moneys or properties under its control, or that may be paid into court by parties to any action or legal proceedings, or which may be brought into court by reason of any order, judgment or decree, in equity or otherwise, to be deposited with such safe-deposit and trust company, as may be by such court designated, upon such terms, and subject to such instructions as may be deemed expedient; provided, however, that such company shall not be required to assume or execute any trust without its own consent; such companies shall also have power to receive and hold moneys, or property in trust, or on deposit from executors, administrators, assignees, guardians, trustees, corporations or individuals upon such terms and conditions as may be obtained or agreed upon between the parties. All moneys or properties received in trust by such companies, unless by the terms of the trust some other mode of investment is prescribed, together with the capital of such company, shall be loaned on or invested only in the authorized loans of the United States, or of the state of Ohio, or cities, counties, or towns of this state, or the stocks or bonds of any state in the Union that has for five years previous to such investment being made regularly paid the interest on its legal bonded debt in lawful money of the United States, or cities, counties or towns of such states, which shall have so paid the interest on the legal bonded debt of such cities, counties or towns, or stocks of national banks organized within this state, or the first mortgage bonds of any railroad company within the states above named, which has earned and paid regular dividends on its stock for five years next preceding such loan, or investment, or first mortgages on real estate in this state or of individuals with a sufficient pledge of any of the aforesaid securities, or may be loaned to this state, or to any county, city, or town therein. No loan shall ever be made, directly or indirectly, to any officer, employee, or trustee of such company, and not more than ten per centum of its capital shall be invested in any one security or loan, except in the provisions of a building and vaults. All real estate not needed by such companies for the transaction of its (their) business, which may be acquired by foreclosure of mortgage or by levy of execution, shall be offered for sale, and if practicable be sold within two years after the same shall be so acquired. (April 17, 1892, 79 v. 101, 102.)

Powers of company.

A company has power to receive and hold property in trust, and can act as trustee un-

der a mortgage.—Cincinnati Hotel Co. v. Trust Co., 25 W. L. B. 375 (1891).

§ 3821b. ACCOUNT OF MONEYS, ETC., RECEIVED IN TRUST SHALL BE KEPT SEPARATE; SAID COMPANIES MUST MAINTAIN A RESERVE EQUAL TO FIFTEEN PER CENT. OF DEPOSITS; SUCH COMPANY MAY BE APPOINTED TRUSTEE UNDER WILL; CAPITAL STOCK SHALL BE HELD AS SECURITY FOR FAITHFUL DISCHARGE OF DUTIES UNDER THIS ACT; MONEY HELD IN TRUST TO BE INVESTED IN TRUST FUNDS OF COMPANY; MONEY HELD IN TRUST SHALL NOT BE MINGLED WITH OTHER FUNDS, OR BE LIABLE FOR DEBT OF COMPANY; LIABILITY OF STOCKHOLDERS; TRUSTEES TO NOTIFY AUDITOR OF STATE OF ORGANIZATION OF COMPANY, AND MAKE STATEMENT; AUDITOR OF STATE MAY APPOINT EXPERT TO EXAMINE AFFAIRS OF SUCH COMPANIES; DIVIDENDS, AND HOW PAID; INCREASE OF CAPITAL STOCK; ASSIGNMENT AND TRANSFER OF STOCK.—All money or property held in trust shall constitute a deposit in the trust department, and the accounts thereof shall be kept separate, and such funds and the investment or loans of them shall be especially appropriated to the security and payment of all such deposits, and not be subject to any other liabilities of the company, and for the purpose of securing the observance of this proviso, such companies shall have a trust department in which all business pertaining to such trust property shall be kept separate and distinct from its general business. Such company shall at all times have on hand in lawful money of the United States as a reserve, an amount equal to fifteen per centum of all deposits, payable on demand or within ten days; and when said

Safe Deposit Companies, § 3821b.

reserve shall be below such per centum of such deposits, said company shall not make new loans, nor make any dividends of its profits until the required proportion between the aggregate amount of its deposits and its reserve shall be restored; provided, that clearing house certificates representing specie or lawful money specially deposited in the vault of such safe deposit company, or the United States sub-treasury for the purpose of any clearing-house association of which said company may be a member, may be recorded as a part not exceeding one-third of said reserve; provided further, that one other third of said fifteen per centum shall consist of bonds of the United States or this state, the absolute property of said company, and the remaining third of said fifteen per centum in lawful money of the United States. Any such company may be appointed trustees under any will or instrument creating a trust for the care and management of property, under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as in the case of a legally qualified person. The capital stock of said company, with the liabilities of the stockholders existing thereunder, shall be held as security for the faithful discharge of the duties undertaken by virtue of this act, and surety shall be required upon the bonds filed by such company the same as in other cases. In all proceedings in the probate court, or elsewhere, connected with any authority exercised under this act, all accounts, returns and other papers may be signed and sworn to in behalf of such company by any officer thereof duly authorized by it; and the answers and examinations under oath, of such officer, shall be received as the answers and examination of the company, and the court may order and compel any and all officers of such company to answer and attend said examinations in the same manner as if they were parties to the proceedings or inquiry, instead of such company; provided, however, that such company shall not be required to receive or hold any property or moneys, or to execute any trust contrary to its own desire. In the management of money and property held by it as trustee, under the powers conferred in the foregoing section, said companies shall invest the same in the general trust fund of the company; provided, that it shall be competent for the authority making the appointment to direct, upon the conferring of the same, whether such money and property shall be held separately or invested in a general trust fund of the company; and provided, also, that said company shall always be bound to follow and be entirely governed by all directions contained in any will or instrument under which it may act. No money, property or securities received or held by such company under the provisions of this act establishing a trust department, shall be mingled with the investments of the capital stock or other moneys or property belonging to said company, or be liable for debts or obligations thereof. The stockholders of such company shall be held individually liable for all contracts, debts and engagements of such company, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. The trustees of all companies organized under this act shall, within six months after the incorporation of such company, notify the auditor of state of the date of the organization thereof, and shall, within ten days after the annual meeting thereof in each year, make, under oath, a complete statement of the condition of said company, in which they shall specify the different kinds of its liabilities, and the different kinds of its assets, stating the amount of each kind, which statement shall be filed with the auditor of state, and published in his annual report; and said auditor of state shall have the right and the power at any time, through an expert appointed by him, to make a full examination of the affairs and condition of every such company. The trustees shall also cause said statement to be published in a newspaper of general circulation in the county in which the principal office of such company shall be located. The trustees shall have power by their by-laws, as often as they may deem proper, to make and declare dividends of the profits of said company after paying its expenses and reserving and setting aside the reserve as hereinbefore required, and such other amount as they deem advisable wherewith to meet any contingency in its business. The dividends authorized herein shall be pay-

Safe Deposit Companies, §§ 3821c, 3821d.

able to the shareholders within twenty days from and after the time the same are so declared. No company organized under this act shall commence business until all of its authorized capital shall have been paid up in cash. Any safe deposit and trust company may increase its capital stock as provided in sections 3262 and 3263 of the Revised Statutes, and in case of such increase, either by preferred or common stock, the board of directors of such company may sell such increase, or additional stock, to such person or persons, at such price, not less than par, as they deem best, and to the interests of such company. The stockholders of such company shall have power to provide and determine, as they may see fit, the conditions upon which the shares of stock of said company shall be assignable and transferable, and said shares of stock of said company shall be assignable and transferable according to such rules and regulations and upon such conditions as the stockholders shall for that purpose make and establish, and not otherwise. (April 4, 1902, 95 v. 98; April 17, 1882, 79 v. 101, 104.)

§ 3821c. TRUST CAPACITIES IN WHICH SUCH COMPANIES MAY ACT. — Companies organized under the acts to which this is supplementary, and engaged in the business of safe deposit and trust companies, in addition to the powers already possessed, shall have the power to take, accept and execute all such trusts of every description as may be committed to such company by any person or persons, or any corporation, by grant, assignment, devise or bequest, or which may be committed or transferred to, or vested in said company, whether the same be to act as executor, administrator, assignee, guardian, receiver or trustee, or in any other trust capacity, by order of any court of record or probate court, in the county in which such company is located, and its principal business is transacted, or of any court of record or probate court of any other state, or of the United States, to receive and take any real estate which may be (the) subject of any such trust, and to act as agent under any power. Provided, any such appointment as guardian shall apply to the estate only, and not to the person. (May 16, 1894, 91 v. 255; April 26, 1891, 88 v. 407.)

§ 3821d. LIABILITY; ADDITIONAL SECURITY; PAID UP CAPITAL REQUIRED; DEPOSIT. — The capital of such companies shall, with all their property and effects, be absolutely liable in case of any default whatever in any of the trust positions aforesaid and shall, together with the statutory liability of the stockholders, be taken, and considered as the only security required by law, and such companies shall not be required to give in any trust capacity any other bond, security, oath or undertaking. The probate judge may, at any time he deems proper, require additional security in any amount he may think necessary. Provided, however, that no such company whose principal place of business is in a city of the first class or in a city of the first grade of the second class or in a city not of the second grade of the second class which by the last preceding federal census had a population of thirty-three thousand or more, shall accept any trusts which may be vested in, transferred or committed to it by any individual or by any court of record, as provided in section 3821c, until the capital stock of said company shall amount to two hundred thousand dollars, fully paid up, and until such company shall have deposited with the treasurer of state one hundred thousand dollars in cash, or in securities in which said company is by law allowed to invest its capital; and provided that no such company whose principal place of business is in a city of the second class, which city by the last preceding federal census had a population of less than thirty-three thousand shall accept any trusts which may be vested in, transferred or committed to it by any individual or by any court of record, as provided in section 3821c, until the capital stock of said company shall amount to fifty thousand dollars, fully paid up, and until such company shall have deposited with the treasurer of state twenty-five thousand dollars in cash, or in securities in which said company is by law allowed to invest its capital; provided, the full amount of such deposit so to be made by any such com-

Safe Deposit Companies, §§ 3821e-3821gg.

pany may be made in bonds of the United States or state of Ohio; the treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all the trusts assumed by said company, but so long as any such company shall continue solvent, said treasurer shall permit it to collect the interest of or dividends on its securities so deposited, and from time to time to withdraw such securities or cash, or any part thereof, on depositing with him cash, or other securities of the kind heretofore named, so as to maintain the value of said deposit as hereinbefore provided. (April 12, 1900, 94 v. 132; April 18, 1892, 89 v. 370; April 28, 1891, 88 v. 407.)

§ 3821e. **EXAMINATION OF COMPANY.**— Any judge of the court in which any such company is acting in such trust capacity, may, if he deem it necessary, or upon the written application of any party interested in the estate which such company holds in any trust capacity, at any time, appoint a suitable person or persons, who shall investigate the affairs and management of such company concerning said trust, and make sworn report to such court of such investigation; the expense of such investigation shall be defrayed by the party asking such examination; and any such court may, at any time, examine any officer or officers of such company, under oath or affirmation, as to the company's trust matters in such court, or as to its finances and management while considering its appointment in any such capacity; and such court may, for any cause applicable to natural persons in the same capacity, order that said company shall forthwith settle its trust in said court. (April 28, 1891, 88 v. 407.)

§ 3821f. **PROVISIONS APPLICABLE TO PROBATE COURTS OF CERTAIN COUNTIES.**— The provisions of sections 3821c, 3821d and 3821e relating to the power of the probate judge to appoint any such company to act as executor, administrator, assignee, guardian, receiver or trustee, shall apply to probate courts in all counties containing a city of the first class, and to all probate courts in counties containing a city of the second class, containing by the last preceding federal census a population of less than 33,000. (April 12, 1900, 94 v. 133; April 25, 1894, 93 v. 337; March 13, 1896, 92 v. 62; May 6, 1894, 91 v. 255; April 28, 1891, 88 v. 407.)

§ 3821g. **LOANS ON OR INVESTMENTS IN STOCKS.**— Any safe deposit and trust company organized under the acts to which this is supplementary, and engaged (exclusively) in the business of a safe deposit and trust company, may loan or invest any moneys or properties received in trust by such company, together with the capital of such company, in the following securities, in addition to those now authorized by law, i. e. in the stocks or (of) gas light and coke companies, gas companies, gas and electric light companies, or stocks of street railway companies which have paid regular dividends on their stock for five years next preceding such loan or investment, and are located in the county in which such safe deposit and trust company is located, or in which it has its principal office; provided, however, that no investment of any moneys or properties held in trust by any such company, or investment of any part of the capital of any such safe deposit and trust company shall be made in the stock of any such gas light and coke company, gas company, gas and electric light company, or street railway company, unless authorized by the board of directors of such safe deposit and trust company by resolution entered upon its minutes; and provided further, that not more than ten per centum of the capital of any such safe deposit and trust company shall be invested or loaned in any one security or loan. (May 4, 1894, 91 v. 201.)

§ 3821gg. **MAY EXERCISE POWER OF SAFE DEPOSIT AND TRUST COMPANIES, WHEN. STOCKHOLDERS' CONSENT NECESSARY.**— That any company now incorporated under the laws of the state of Ohio, as a savings and loan associa-

Title Guarantee and Trust Companies, § 3821ggg.

tion, and having at the time of the passage of this act, a paid up capital stock of not less than two hundred thousand dollars, and organized and doing business in this state, or any company heretofore organized under the laws of this state, as a safe deposit and trust company, may also engage in business as a safe deposit and trust company, under and in accordance with the provisions of section 3821a, 3821b, 3821c, 3821d, 3821e, 3821g, of the Revised Statutes of Ohio. Provided, however, that no such company shall be authorized to engage in business as such safe deposit and trust company, until after the holders of at least two-thirds in amount, of the capital stock of such company shall have voted in favor of so doing, at a meeting of the stockholders called for the purpose of considering such question. Upon the stockholders of any such company voting in favor of a resolution to engage in business as a safe deposit and trust company, as provided in this act, the president and secretary of such corporation shall make, and file with the secretary of state a certificate under the seal of such corporation, showing the action of the stockholders in this behalf, and the number of shares voted in favor of the proposition, and thereupon such corporation shall have all the powers, and be subject to all the regulations, obligations, liabilities and conditions which safe deposit and trust companies have and are subject to, under the several sections of the Revised Statutes to which this act is supplemental. (October 22, 1902, —; April 16, 1900, 94 v. 340.)

§ 3821ggg. TITLE GUARANTEE AND TRUST COMPANIES; POWERS, ETC.

— A title guarantee and trust company shall have power to prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and to guarantee such titles and the validity and due execution of such securities, and the performance of contracts incident to such powers; to make loans for itself or as agent or trustee for others, and to guarantee the collection of interest and principal of such loans; to take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and to perform all the duties of an agent relative to property deeded or otherwise entrusted to it.

AMOUNT OF CAPITAL STOCK REQUIRED. DEPOSIT WITH TREASURER OF STATE. — Provided, however, that no such company shall do business until the capital stock of said company shall amount to five hundred thousand dollars fully paid up, and until such company shall have deposited with the treasurer of state two hundred and fifty thousand dollars in the securities permitted by sections 3637 and 3638 of the Revised Statutes of Ohio, and with the exception of the deposit aforesaid said capital shall be invested as the board of directors of said company may prescribe. The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all guarantees entered into by said company, but so long as said company shall continue solvent said treasurer shall permit it to collect the interest of, or dividends on, its securities so deposited, and from time to time withdraw such securities, or any part thereof, on depositing with him cash or other securities of the kind heretofore named so as to maintain the value of said deposit at two hundred and fifty thousand dollars.

TRANSFER OF DEPOSIT WITH SUPERINTENDENT OF INSURANCE TO TREASURER OF STATE. — Any company heretofore organized for the purposes of guaranteeing the titles to real property, which may have made deposits with the superintendent of insurance, as required in section 3641d of the Revised Statutes of Ohio, may request said superintendent to transfer said deposit to the treasurer of state, whereupon he shall transfer all securities of such company so held by him to the treasurer of state, taking his receipt therefor.

REPORTS TO AUDITOR OF STATE. — Title guarantee and trust companies shall make such reports to the state auditor as are required of safe deposit and trust companies and shall be subject to the same examinations and penalties as such companies; and it is hereby expressly provided that all companies doing the business of guaran-

Consolidation of Certain Companies, §§ 1-6.

teeing titles to real property shall comply with and be governed by the provisions of this act, and section 3641 of the Revised Statutes of Ohio shall not apply to such companies. (April 22, 1902, 95 v. 222.)

*An Act to Authorize the Consolidation of Savings and Loan Associations
With Safe Deposit and Trust Companies in Certain Cases.*

Be it enacted by the General Assembly of the State of Ohio:

Section 1. **CONSOLIDATION OF SAVINGS AND LOAN ASSOCIATIONS WITH SAFE DEPOSIT AND TRUST COMPANIES AUTHORIZED.** — That any corporation organized to exercise the powers granted to savings and loan associations and any corporation organized to exercise the powers granted to safe deposit and trust companies may, when not less than one-fourth of the capital stock of each is held by the same persons, and their boards of directors, or trustees are composed in whole or in part of the same persons, consolidate themselves into a single corporation under such name and on such terms as shall be approved by not less than two-thirds of the stockholders of each company. (May 10, 1902, 95 v. 531.)

§ 2. **PROCEEDINGS IN SUCH ACTION.** — The proceedings to affect such consolidation shall be the same as those provided by section 3381 of the Revised Statutes of Ohio for the consolidation of railroad companies. (May 10, 1902, 95 v. 531.)

§ 3. **POWERS AND DUTIES, ETC., AFTER CONSOLIDATION.** — When the agreement of consolidation is so made and perfected and the same, or a copy thereof, is [filed] filed with the secretary of state, the several companies, parties thereto, shall be held and taken to be one company possessing all the rights, privileges, powers and franchises of said several companies, but subject to all and singular the provisions of law relating to the different branches of the business of such new company the same as though conducted by separate companies. (May 10, 1902, 95 v. 531.)

§ 4. **OFFICERS; TRANSFER OF PROPERTY; RIGHTS OF CREDITORS, ETC.** — The directors and other officers named in the agreement of consolidation shall serve until the first annual election, the time for which shall be named in said agreement; and on the filing of said agreement or a copy, as aforesaid, all and singular the property, real, personal and mixed, and all rights of every kind of said several companies shall be deemed to be transferred to and vested in such new company without further act or deed, and shall be as effectually the property of such new company as they were of the companies parties to said agreement; but all rights of creditors shall be preserved unimpaired and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall thenceforth attach to the new company and be enforced against it to the same extent as if the same had been contracted by it. (May 10, 1902, 95 v. 531.)

§ 5. **WHEN SECTION 148A REVISED STATUTES SHALL NOT APPLY.** — When the articles of the constituent companies were filed at the same time [and] by the same incorporators and the capital stock named in the agreement of consolidation does not exceed the sum of the capital stocks of the constituent companies the provisions of subdivision 3 of section 148a of the Revised Statutes shall not apply; provided the fees named in subdivision 1 of said section were duly paid by said constituent companies and the agreement of consolidation is filed within two years after the creation of said constituent companies. (May 10, 1902, 95 v. 531.)

§ 6. This act shall take effect and be in force from and after its passage. (May 10, 1902, 95 v. 531.)

Collateral Loan Companies, §§ 3821h-3821n.

COLLATERAL LOAN COMPANIES IN CUYAHOGA.

§ 3821h. **COLLATERAL LOAN COMPANIES; THEIR OBJECT.**—In all counties containing a city of the second grade of the first class, any number of persons not less than seven, may associate and form a collateral loan company in the manner prescribed by the Revised Statutes. The object of such association shall be to make loans upon pledges of goods and chattels of every kind; also, on mortgage on goods and chattels. It shall not do a deposit or exchange business, nor shall it make loans upon any other kind of securities than that above named. (April 16, 1885, 82 v. 132.)

§ 3821i. **CAPITAL STOCK; POWER TO BORROW.**—The capital of said company shall be raised by subscription. It shall not exceed five hundred thousand dollars, in shares of fifty dollars each; and no one person shall own more than one-seventh of the stock subscribed. It shall have the power to borrow on its own notes, not exceeding the amount of its capital paid in, and for periods not exceeding one year. (May 12, 1886, 83 v. 144; April 16, 1885, 82 v. 132.)

§ 3821j. **BOARD OF DIRECTORS; OFFICERS; BY-LAWS.**—The government of the company shall be in a board of seven directors, who shall be residents of the county where the association is located, five of whom shall be chosen annually by the stockholders, together with one to be appointed by the governor of the state, and one to be appointed by the mayor of the city where such company may be located, whose term of office shall also be for one year. The board thus created shall elect one of their number president, and such other officers as may be deemed necessary; said directors may also establish such by-laws, rules and regulations for conducting the business of said company as they may deem necessary, not inconsistent with the laws of this state. (April 16, 1885, 82 v. 132.)

§ 3821k. **ORGANIZATION.**—When twenty thousand dollars have been duly subscribed, and one-fourth of said subscribed capital has been actually paid in, the stockholders may organize, as hereinbefore provided, and proceed to transact business under the provisions of this act. (May 12, 1886, 83 v. 144; April 16, 1885, 82 v. 132.)

§ 3821l. **LOANS; RATE OF INTEREST, ETC.**—When the company has disposable funds, it shall loan on all goods and chattels offered, embraced within its rules and regulations, in the order in which they are offered; with the exception that the company shall always discriminate in favor of small loans to the indigent. It shall loan to four-fifths of the appraised value on gold and silver plate and ware, and to two-thirds of such value on all other goods and chattels as aforesaid. In no case shall the rate of interest charged exceed eight per cent. per annum, and any other charges, including insurance, investigation of titles, and the expense of the custody and care of all property offered as security shall not exceed ten per cent. per annum on the amount loaned. (May 12, 1886, 83 v. 144; April 16, 1885, 82 v. 132.)

§ 3821m. **MATURITY OF LOANS; RIGHT TO REDEEM.**—All loans shall be on a time fixed, and for a period of not over one year; and the pledger shall have the right to redeem his property pledged, at any time, within the specified period, at the rate of compensation to the time of offer to redeem. (April 16, 1885, 82 v. 132.)

§ 3821n. **SALE OF UNREDEEMED PROPERTY; PROCEEDS; PAWN TICKETS.**—If the property pledged is not redeemed within the time limited, the same shall be sold at auction, and the net surplus, after paying loan charges and expenses, shall be held one year for the owner; when, if not demanded within said year, it shall be forfeited to the company. The company shall give to each pledger, a card inscribed with the name of the company, the article or articles pledged, name of the pledger, the amount of the loan, the rate of compensation, the date when made, the date when payable, and the page of the book where recorded. (April 16, 1885, 82 v. 132.)

Collateral Loan Companies — Bond and Investment Companies, §§ 3821o-3821r.

§ 3821o. **REPORTS OF COMPANY'S BUSINESS.** — The president and directors of said company shall report in writing, to the stockholders and to the governor of the state, full and accurate statistics of its business, and of its financial condition, in the month of November, in each year, and at such other times as they may be requested to do so by the governor of the state. (April 16, 1885, 82 v. 132.)

§ 3821p. **TRANSFER OF STOCK.** — The stock of said company shall be transferable only at the office of said company, and on its books. (April 16, 1885, 82 v. 132.)

§ 3821q. **APPLICABILITY OF STATUTES TO STOCKHOLDERS.** — The stockholders of said corporations shall be subject to the provisions of section three thousand two hundred and fifty-eight of the Revised Statutes of Ohio, and to all other provisions of the Revised Statutes where applicable. (April 16, 1885, 82 v. 132.)

BOND AND INVESTMENT COMPANIES.

§ 3821r. **Sec. 1. MUST MAKE DEPOSIT WITH STATE TREASURER, UPON COMMENCING BUSINESS.** — That every corporation, partnership and association, other than a building and loan company, which shall hereafter commence, in this state, the business of placing or selling certificates, bonds, debentures, or other investment securities of any kind or description, on the partial payment or installment plan, and every investment guaranty company doing business on the service dividend plan, shall, before doing business in Ohio, deposit with the state treasurer one hundred thousand dollars in cash or bonds of the United States, or of the state of Ohio, or of any county or municipal corporation in the state of Ohio, for the protection of the investors in such certificates, debentures or other investment securities. Such deposit of one hundred thousand dollars shall be made out of the paid-up capital stock of such corporation, partnership or association.

DEPOSIT BY COMPANIES ALREADY IN OPERATION IN OHIO. — And every corporation, partnership or association now doing such business in the state of Ohio shall, in addition to the amount now on deposit with the state treasurer by such corporation, partnership or association, on or before the 10th day of January of each year, deposit with the state treasurer, either in cash, or bonds of the United States, or of the state of Ohio, or of any county or municipal corporation in the state of Ohio, an amount equal to ten per cent. of the gross receipts on the amount of business done by it in the state of Ohio for the twelve months next preceding the 31st day of December; and the said deposit shall be made each year as aforesaid until the total amount of such cash or bonds so deposited shall amount to one hundred thousand dollars.

MINIMUM AMOUNT OF DEPOSIT. — Provided, every such corporation, partnership or association now doing such business in the state of Ohio shall have on deposit with the state treasurer not less than twenty-five thousand dollars out of its paid-up capital stock.

PURPOSE. — The deposit made with the treasurer shall be held as a security for all claims of residents of this state against such corporation, partnership or association, and shall be liable for all judgments or decrees thereon, and subjected to the payment of the same in the same manner as the property of other non-residents. Should any such corporation, partnership or association cease to do business in this state, the treasurer may release securities in his discretion, retaining sufficient to satisfy all outstanding liabilities. (April 25, 1898, 93 v. 402; April 14, 1900, 94 v. 147.)

When business is fraudulent.

See State ex rel. v. Interstate Investment Co., 45 W. L. B. 225 (1901); Woods v. Equitable Debenture Co., 8 N. P. 125 (1901).

See, generally, State ex rel. v. Ins. Co., 43 W. L. B. 407 (1900); Shaw v. Interstate Co., 5 N. P. 411 (1898).

State treasurer necessary party to action to wind up.

See Everhardt v. United States Investment Co., 8 N. P. 525 (1901).

Deposit — source of.

See Ohio v. Matthews, 43 W. L. B. 221 (1900).

Bond and Investment Companies, §§ 3821s-3821w.

§ 3821s. Sec. 2. **CONDITIONS PRECEDENT TO DOING BUSINESS.** — Every such corporation, partnership and association shall, as a condition precedent to transacting business in this state, comply with the following conditions, to wit:

First. COPY OF CHARTER. — It shall file with the supervisor of bond investment companies, a certified copy of its charter or articles of incorporation, constitution and by-laws, and other rules and regulations showing its manner of conducting business.

Second. STATEMENT OF BUSINESS OF PRECEDING YEAR. — It shall also file with the supervisor a statement under oath of the president and secretary or other managing officer in the form by the supervisor required, of its business for the preceding year.

Third. PROCESS. — It shall also file with the supervisor a written instrument, duly executed, agreeing that a summons may issue against it from any county in this state directed to the sheriff of the county in which the office of supervisor is situate, commanding him to serve the same by certified copy personally upon the supervisor or by leaving a copy thereof at his office. The supervisor shall, however, mail a copy of any papers served on him, postage prepaid, to the home office of such corporation, partnership or association. (April 14, 1900, 94 v. 148; April 25, 1898, 93 v. 401.)

§ 3821t. Sec. 3. **CERTIFICATE OF AUTHORITY TO DO BUSINESS.** — Whenever such company, partnership or association has complied with the provisions of this act, and the supervisor is satisfied that it is doing business in accordance with law, he shall issue to such company, partnership or association a certificate of authority to do business in Ohio. Annually thereafter, upon the filing of the annual statement herein provided for, if the supervisor shall be satisfied as aforesaid, he shall issue a renewal of such certificate of authority.

REVOCATION. — And said authority shall be revoked whenever the supervisor on investigation or examination finds that such company, partnership or association is not transacting business in accordance with law, or that the statement of its condition and affairs required under the provisions of this act are false and fraudulent, or for failure to file the annual statement. (April 14, 1900, 94 v. 148; April 25, 1898, 93 v. 402.)

§ 3821u. Sec. 4. **INTEREST ON SECURITIES DEPOSITED.** — Every such company, partnership or association may collect and use the interest of any securities so deposited, so long as it fulfills its obligations and complies with the provisions of this act. It may also exchange them for other securities of equal value and satisfactory to the treasurer. (April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

§ 3821v. Sec. 5. **AGENTS TO BE LICENSED.** — It shall be unlawful for any agent of every such company, partnership or association to transact business in this state without being first regularly appointed thereby and being licensed by a certificate of authority issued by the supervisor. (April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

§ 3821w. Sec. 6. **ANNUAL STATEMENT OF BUSINESS; EXAMINATIONS.** — Every such corporation, partnership and association doing business in this state shall, annually hereafter, and on or before the tenth day of January, file with the supervisor under oath of the president and secretary, or other managing officer in the form by said supervisor required, a statement of its business for the twelve months next preceding the thirty-first day of December. Such abstract thereof as the supervisor may require shall be posted for sixty days in the principal office of such company, partnership or association, and also published in some newspaper having a general circulation in the county in which the principal office or place of business of such com-

 Bond and Investment Companies, §§ 3821x-3821z.

pany, partnership or association is situate. And the said supervisor shall verify said report by an examination of the affairs of said company, partnership or association, and he may make quarterly examinations of the affairs of said company, partnership or association, if he deem the same necessary. The expenses of all examinations provided for herein shall be paid by the state of Ohio, provided that when, by the law of any other state, district, territory or nation, examinations of such corporations, partnerships or associations of this state are required or permitted to be made by any officer or other authority of such state, district, territory or nation, at the expense of such corporation, partnership or association, then the expense of all such examinations made by said supervisor of this state, of such corporations, partnerships or associations of such state, district, territory or nation shall be respectively charged to and collected from such corporations, partnerships or associations so examined.

WHEN PROCEEDINGS TO BE INSTITUTED AGAINST COMPANY. — If, upon such examination, it shall appear that such company, partnership or association is not carrying on its business in accordance with law, or that its affairs are being improperly managed, the supervisor, after notice to such company, partnership or association of at least ten days, shall institute proceedings in quo warranto against said company, partnership or association in the manner provided by law. (May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 402.)

§ 3821x. **Sec. 7. SUPERVISOR OF BOND INVESTMENT COMPANIES; DUTY AND COMPENSATION.** — The acting and deputy inspector of building and loan associations is hereby made ex-officio supervisor of bond investment companies. It shall be his duty to see that all the laws of this state relating to such companies, partnerships or associations are faithfully executed, and as compensation for his services as such supervisor he shall receive the sum of six hundred dollars per year. (May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 149; April 25, 1898, 93 v. 403.)

§ 3821y. **Sec. 8. FEES.** — Every such company, partnership or association shall pay to the supervisor the following fees to wit: For filing each application for admission to do business in this state, one hundred dollars; for each certificate of authority, and annual renewal of same, fifty dollars; for filing each annual statement, twenty-five dollars; for issuing license to each agent, two dollars; for each copy of paper filed in his office, fifty cents per folio; for affixing seal and certifying any paper, one dollar. All fees provided for herein shall be deposited, by said supervisor, with the state treasurer, upon the warrant of the state auditor. (May 12, 1902, 95 v. 642; April 14, 1900, 94 v. 150; April 25, 1898, 93 v. 403.)

§ 3821z. **Sec. 9. PENALTY FOR DOING BUSINESS WITHOUT COMPLYING WITH THIS ACT.** — Any officer, agent or representative of any such company, partnership or association who shall attempt to place or sell any certificates, debentures or other investment securities or transact any business whatsoever in the name of or on behalf of such company, partnership or association when such company, partnership or association has failed or refused to comply with the provisions of this act, or shall fail to file with the supervisor of bond investment companies the statement or report herein provided to be filed, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense, or be imprisoned in the county jail for not less than thirty days nor more than six months, or both. (April 14, 1900, 94 v. 150; April 25, 1898, 93 v. 403.)

PART XXI.

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UNAUTHORIZED BANKING, ETC.

§ 3821-1. Sec. 2. **WHAT IS AN UNAUTHORIZED BANK.** — Every company or association that shall lend money, and shall issue by their officer or officers, or by any other person or persons, bonds, notes, or bills, payable to bearer or payable to order, and indorsed in blank, or use other shift or device, whereby the bonds, notes, or bills, given by such company or association, or on their behalf, pass or circulate by delivery, shall be taken and deemed a bank within this act. (14 v. 10; S. & C. 150.)

See notes to *Cowin v. Ins. Co.*, 14 Ohio, 7, under § 3797.

Rate of interest where no charter limitation.

A corporation authorized by its charter to lend money, without restriction as to the rate of interest, does not forfeit its charter by receiving more than six per cent. per annum, and where its charter allows it to lend upon "such terms as the directors may deem expedient," extra interest beyond six per cent. can be collected by law. — *Corwin v. Ins. Co.*, 14 Ohio, 7 (1846).

Comity between states.

By the act of January 27, 1816 (*Swan's Stat.* 136), every company issuing notes or bills, intended to pass or circulate by delivery, "not incorporated by a law of this

state," was declared to be an authorized bank. Held, that a bank authorized to issue such bills in Michigan did not by comity have such power in this state. — *Myers et al. v. Manhattan Bank*, 20 Oh. 283, 302 (1851).

All securities given to an unauthorized bank are void.

Myers et al. v. Manhattan Bank, 20 Oh. 283, 302 (1851).

Substantial compliance with charter sufficient.

Mere irregularities in organizing a corporation will not deprive the officers and stockholders of the protection of the charter or subject them to private liability; but such organization must be substantially in accordance with its charter. — *Bartholomew v. Bentley et al.*, 1 Oh. St. 37 (1853).

§ 3821-2. Sec. 11. **STOCKHOLDERS PERSONALLY LIABLE.** — Every stockholder, shareholder or partner, hereafter interested in any such bank, shall be jointly and severally answerable, in their individual capacity, for the whole amount of the bonds, bills, notes, and contracts of such bank, hereafter executed, any agreement, shift or device, in such bond, bill, note, or contract, or otherwise, to the contrary notwithstanding. (14 v. 10; S. & C. 150.)

No liability without participation in unauthorized acts.

The original stockholders in a literary corporation acting within the scope of their granted powers, are not made liable for the acts of those who go beyond them: but the act of incorporation can furnish no protection from private responsibility, to those who en-

gage in or assent to such unauthorized acts. — *Kearney v. Buttles*, 1 Oh. St. 362 (1853).

The liability imposed is one in tort, not in contract.

Lawler v. Burt, 7 Oh. St. 341 (1867).

Right of action barred in four years.

The liability imposed upon the stockholders is in the nature of a penalty for issuing notes

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in the form and with a design to be circulated as money, and a right of action thereon is barred in four years.—*Lawler v. Burt*, 7 Oh. St. 341 (1867).

This case overrules *Lawler v. Walker*, 18 Oh. 151 (1849), in which it was held that such right of action was not barred for fifteen years.

§ 3821-3. Sec. 12. **SUITS AGAINST STOCKHOLDERS.**—The holder of any bond, bill, note, or contract of such bank, may institute suit and recover judgment thereon, against any part or the whole of the persons who were interested in such bank at the date of such bond, bill, note, or contract, or who became interested in such bank at any time between that and the commencement of such suit. (14 v. 10; S. & C. 150.)

See notes to preceding section.

§ 3821-4. Sec. 13. **PLEADINGS AND TRIAL IN SUCH SUIT.**—In such suit, it shall be sufficient for the plaintiff to set forth, in substance, that he is the holder of such bond, note, bill, or contract; that the defendants were interested in said bank at the date of such bond, bill, note, or contract, or subsequently thereto, and that it remains unpaid; it shall be unnecessary to show in the declaration of pleadings, and unnecessary to prove on the trial, that a demand was made of the contents of such bond, bill, note, or contract, at the time or place when and where it purports to be payable, but the persons aforesaid shall be liable without such demand. (14 v. 10; S. & C. 150.)

Sufficiency of declaration.

A declaration filed under this act is sufficient if it contains the requisites prescribed by this section. It is sufficient to aver that the defendant was a stockholder at the date of the notes, or subsequently, without showing him to be such at the commencement of

the suit.—*Kearney v. Buttles*, 1 Oh. St. 362 (1853).

Demand and notice not necessary.

It is not necessary to show demand and notice in order to charge an unauthorized banker as the drawer of a bill of exchange.—*Watson v. Brown*, 14 Oh. 474 (1846).

§ 3821-5. Sec. 14. **SAME.**—If, during the progress, or on the trial of such suit, it shall appear that any one or more of the defendants are not liable to such action, under this act, it shall not prevent the suit from proceeding as to any other defendant, but judgment shall be given for the full amount of such bond, bill, note, or contract, against any one or more of the defendants who may appear to be liable. (14 v. 10; S. & C. 150.)

Common-law rule as to joint defendants changed.

If the jury find a verdict against a part of the defendants and in favor of others, judg-

ment may be rendered against those who are found liable by the jury. The rule of the common law is changed by this section.—*Porter v. Kepler*, 14 Oh. 128 (1846).

§ 3821-6. Sec. 1. **BANKING, ETC., BY CORPORATIONS, PROHIBITED.**—No body politic or corporate shall establish a bank, or engage in the business of banking, to receive on deposit, keep and circulate the money or bank paper of others, without express authority of a law of this state. (March 12, 1845, 43 v. 121; S. & C. 152.)

Receiving deposits not banking.

It is no violation of a charter, which contains a clause prohibiting the exercise of banking powers, to receive money on deposit.—*State v. Ins. Co.*, 14 Oh. 7 (1846).

Religious corporations cannot engage in banking.

Where a religious corporation engages in

the business of banking by receiving on deposit and keeping and circulating the money of others, such business is contrary to this section, and a note discounted by such corporation is illegal and void.—*Huber v. United Protestant Evang. Congregation*, 16 Oh. St. 377, 381 (1865).

§ 3821-7. Sec. 2. **PENALTY AGAINST STOCKHOLDERS, ETC.**—Every person who shall subscribe to become a member of, or become in any way interested in, any such body corporate or politic, with a view to establishing such bank, or

Unauthorized Banking; Regulations, etc., §§ 3821-8 3821-14.

engaging in the business of banking, or shall in any way aid or assist such body corporate or politic to establish a bank, or carry on the business of banking, contrary to the provisions of the first section (§ 3821-6) of this act, shall forfeit and pay the sum of one thousand dollars for every offense. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-8. Sec. 3. **MAKING AND CIRCULATING UNAUTHORIZED PAPER PROHIBITED.** — No person, association of persons, body politic, or corporate, shall make and put in circulation, or make and attempt to put in circulation, as money or currency, any note, bill, or other evidence of debt, without express authority of a law of this state. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-9. Sec. 4. **PENALTY THEREFOR.** — Every person who shall violate the provisions of the third section (§ 3821-8) of this act, or in any way aid or assist any association of persons, body politic or corporate, to make or put in circulation any note, bill, or other evidence of debt, contrary to the provisions of the third section (§ 3821-8) of this act, shall forfeit and pay one thousand dollars for every such offense; and any corporation, not a municipal corporation, which shall offend against the third section (§ 3821-8) of this act, shall forfeit its charter. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-10. Sec. 5. **UNAUTHORIZED OFFICES OR AGENCIES PROHIBITED; PENALTIES THEREFOR.** — No person shall open or keep an office or agency for the purpose of redeeming the notes, bills, or other evidence of debt, which have been issued for circulation as money or currency, without express authority of a law of this state, under the penalty of five hundred dollars for every such offense, and every day such office or agency is kept for such purpose, shall be considered a distinct and separate offense. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-11. Sec. 6. **PASSING UNAUTHORIZED NOTES, ETC.; PENALTY THEREFOR.** — No person shall put in circulation, pass or attempt to circulate or pass, as money or currency, any note, bill, or other evidence of debt, made or issued without authority of law, knowing the same to have been made or issued without authority of law; and no person shall make, or put in circulation, pass or attempt to circulate or pass, as money or currency, any note, bill, or other evidence of debt, which is not made payable in the lawful money of the United States, or which is for a less sum than one dollar, under a penalty of fifty dollars for every such offense. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-12. Sec. 7. **PENALTIES, HOW RECOVERED AND DISPOSED OF.** — All penalties imposed by this act shall be recovered by action of debt, in the name of the state of Ohio, before any court of competent jurisdiction, or by indictment; and all penalties incurred under this act, when collected, shall be paid to the treasurer of the county in which the judgment is recovered for the same, for the use of the state of Ohio. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-13. Sec. 8. **ALTERED BILLS SHALL BE REDEEMED.** — Every bank in this state shall be liable to pay to any bona fide holder the original amount of any bill of such bank, which shall have been altered to a larger amount in the course of its circulation, notwithstanding such alteration. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-14. Sec. 9. **SUITS COMMENCED UNDER CERTAIN LAWS; HOW PROCEEDED WITH; ACTS REPEALED, EXCEPT, ETC., BANKS TO BE EXAMINED ONCE A YEAR, ETC.** — All suits heretofore commenced, and now pending, under the provisions of the act entitled “an act to prohibit the issuing and circulat-

 Unauthorized Banking; Regulations, etc., §§ 3821-15-3821-17.

ing of unauthorized bank paper," passed January twenty-seven, A. D. one thousand eight hundred and sixteen, and the several acts amendatory thereto, and the act entitled "an act to prohibit the establishment, within this state, of any branch, office or agency, of the Bank of the United States of Pennsylvania, or any other corporation, incorporated by the laws of any other state, or by the laws of the United States, and for other purposes," passed January nine, A. D. one thousand eight hundred and thirty-nine, and the act entitled "an act providing for the appointment of a board of bank commissioners, and for the regulation of banks within the State of Ohio," passed February twenty-five, one thousand eight hundred and thirty-nine, and the several acts amendatory and supplementary thereto, and the act entitled "an act to punish crimes therein named, and the prevention of a fraudulent currency," passed March seven, A. D. one thousand eight hundred and forty-two, whether judgment has been obtained or not, or decrees rendered, shall, in all respects, be proceeded with in the same manner as though such suits had been originally commenced under the provisions of this act; and the acts above recited and referred to in this section, except the eleventh, twelfth, thirteenth, and fourteenth sections of the act entitled "an act to prohibit the issuing and circulation of unauthorized bank paper," aforesaid, are hereby repealed; provided, that each banking company in this state, existing at the time of the passage of the act entitled "an act to incorporate the state bank of Ohio, and other banking companies," passed February twenty-four, one thousand eight hundred and forty-five, shall be examined as often as once in each year by a person to be appointed by the auditor, treasurer, and secretary of state, or any two of them, in the same manner as is provided for by the forty-fourth section of the last recited act; and when such person is appointed, he shall perform the same duties, and receive the same compensation as is provided by said act; and each of said companies shall make out a statement in the same manner, and forward the same to the auditor, at the times required by the fifty-ninth section of the last named act; and the laws hereby repealed shall remain in force, as to all banks now in process of liquidation under them, until the concerns of such banks shall be finally closed up: provided, further, that this act shall not affect any special act for the relief of any institution or company which has exercised or assumed any banking powers, or for the relief or for (of) the creditors thereof. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-15. Sec. 10. **SMALL NOTES.**— Nothing in this act shall be so construed as to restore to any existing bank a right to issue and circulate the notes of such bank, of a less denomination than five dollars. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-16. Sec. 11. **WHEN TO TAKE EFFECT; DISCRIMINATION.**— This act shall take effect from and after the first day of June next: provided, that the first section (§ 3821-6) of this act shall not take effect before the first day of March, 1846, upon any existing corporation now engaged in the business prohibited by that section, and which has duly reported, and shall continue to report, its dividends and profits to the auditor of state for taxation. (March 12, 1845, 43 v. 121; S. & C. 152.)

§ 3821-17. Sec. 1. **FOREIGN PAPER MONEY NOT TO BE BROUGHT TO OHIO BY BROKERS, ETC., FOR CIRCULATION; PENALTY.**— No exchange broker, money broker or incorporated company shall bring or cause to be brought into this state any notes issued by any bank or banking company out of this state, for the purpose of paying them out on loans, discounts, in exchange for other money, or of otherwise giving circulation to such notes within this state; nor shall any such broker or incorporated company receive, for any such purpose, such notes, knowing the same to have been so brought into this state; and every exchange broker, money broker, or incorporated company that shall offend against the provisions of this section, shall forfeit and pay, for every such offense, a sum equal to one-fourth part of the amount of the notes which such broker or company shall have so brought, or

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caused to be brought into the state, or so received for the purpose hereinbefore specified: provided, however, that the prohibitions contained in this section shall not be so construed as to prevent any broker or incorporated company from receiving at par in payment of debts or on deposit, and again paying out notes issued by banks or banking companies out of this state, which, at the time of such paying out, are redeeming their notes, on demand, in gold and silver coin, and which notes have been brought into the state in the ordinary course of trade or business, otherwise than for the purpose of being paid out on loans, discounts, or in exchange for other money, with a view to giving circulation to such notes within this state. (January 22, 1846, 44 v. 13; S. & C. 154.)

See *Reznor v. Hatch*, 7 Oh. St. 249 (1857).

§ 3821-18. Sec. 2. SAME. — No broker or incorporated company in this state shall either directly or indirectly pay out or otherwise circulate, or cause to be circulated, any note or notes issued by any bank or banking company out of this state, of any denomination less than five dollars, nor any note issued by any bank or banking company out of this state, which the broker or company so paying out, or giving circulation to, is not at the same time receiving on deposit, or in the payment of debts, as of equal value with gold and silver coin, under the penalty of one hundred dollars for every such offense: Provided, that nothing in this section contained shall be so construed as to prevent any broker or incorporated company from selling any depreciated bank notes in its possession, and which such broker or company shall have received at par, to any person or persons, for the purpose of obtaining payment thereof from the bank or banking company which issued the same, or from any person or company that may be liable for such payment. (January 22, 1846, 44 v. 13; S. & C. 154.)

§ 3821-19. Sec. 3. PENALTIES; HOW RECOVERED, ETC. — All penalties imposed by this act shall be recovered and paid over for the use of the state in the manner prescribed by the act to prohibit unauthorized banking and the circulation of unauthorized bank paper, passed March twelve, one thousand eight hundred and forty-five. (44 v. 13; S. & C. 154.)

§ 3821-20. Sec. 4. WHO DEEMED BROKERS. — All persons dealing in exchange, or who keep an office for the lending of money, shall be deemed and taken as brokers within the meaning of this act. (January 22, 1846, 44 v. 13; S. & C. 154.)

§ 3821-21. Sec. 5. OUTSTANDING NOTES OF EXPIRED CORPORATIONS, ETC. — It shall not be lawful for any person appointed by the court to redeem the outstanding notes of any bank, whose assets have been or shall be placed in the hands of receivers, pursuant to the provisions of any law of this state, or who shall have in any way undertaken or become bound to redeem such outstanding notes, or the outstanding notes of any bank whose charter shall have expired, or whose right to issue notes for circulation shall have ceased, either by himself or by his agent, or any person or persons, company or companies, to pay out, loan, give in exchange for other money, or in any way whatever put in circulation any such notes, or to take any measures or procure to be taken any measures to prevent such notes from being presented for redemption; and any person who shall violate any of the provisions of this section shall forfeit and pay to the state of Ohio, for every such offense, not less than fifty nor more than two hundred dollars, at the discretion of the court, with costs of suit, to be recovered in an action of debt to be prosecuted and collected by the prosecuting attorney of the proper county, and by him paid into the treasury of the proper county, for the use of the state. (January 22, 1846, 44 v. 13; S. & C. 154.)

§ 3821-22. Sec. 7. DUTY OF PROSECUTING ATTORNEY. — It is hereby made the especial duty of the prosecuting attorney of each county in this state to inquire

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into all cases where he may have reason to believe that offenses shall have been committed against the provisions of this act; and if, upon such inquiries, he shall have good cause for believing that any such offense shall have been committed, immediately to prosecute the offenders thereof. (January 22, 1846, 44 v. 13; S. & C. 154.)

§ 3821-23. Sec. 1. (§ 3821-17) MODIFIED, SUSPENDED, ETC.—So much of the act entitled an act supplementary to the act to prevent unauthorized banking, and the circulation of unauthorized bank paper, passed January twenty-second, one thousand eight hundred and forty-six, as prohibits the state treasurer of this state from putting in circulation or passing out any note or notes of any bank described in the fifth section of this act, to which this is an amendment, be and the same is hereby suspended until the fifteenth day of August next; and that from and after said fifteenth day of August it shall be unlawful for the treasurer of state, the county treasurer of any county, or any collector of tolls on any of the public works of this state either to receive, pay out, or otherwise give circulation to any note or notes of any of the banks described in the fifth section of the act aforesaid. (January 22, 1846, 44 v. 116; S. & C. 156.)

§ 3821-24. PUTTING IN CIRCULATION NOTES OF ISSUE NOT RECEIVABLE AT PAR.—It shall be unlawful for any bank, banker, broker, exchange broker, or other money dealer or incorporated company in any manner, to put in circulation, either directly or indirectly, the notes of issue of any bank or banking company, whether in or out of this state; which notes shall not, at the time they are so put in circulation, be receivable at par by the bank, banker, broker, exchange broker, or other money dealer or incorporated company so putting the same in circulation, and redeemable at par, in gold or silver coin, by the bank or banker or banking company issuing the same. (May 3, 1861, 58 v. 114.)

§ 3821-25. Sec. 2. PENALTY; WHERE PROSECUTED; PROCEEDS.—Any bank, banker, broker, exchange broker, or other money dealer or incorporated company, that shall violate the provisions of the first section (§ 3821-24) of this act, shall forfeit and pay for each offense, a sum of money equal to one-fifth of the nominal value of the notes so put in circulation contrary to the provisions of this act, together with the costs of prosecution, to be recovered in an action in the name of the state of Ohio, before any justice of the peace, or court of common pleas having jurisdiction; and all forfeitures recovered and collected under this act shall be paid into the treasury of the county in which the action is brought, for the use of the county. (May 3, 1861, 58 v. 114.)

§ 3821-27. CANCELLATION OF COUNTERFEIT BILLS.—It shall be lawful for any cashier, president, or other officer of any bank, authorized by the laws of this state, to issue notes for circulation, whenever any counterfeit note or notes, purporting to have been issued by such bank, shall be presented to such person at the banking house of such bank for inspection, payment or redemption, to write in a bold hand across the face of such note or notes, the word "counterfeit," and sign his name under the same. (April 14, 1857, 54 v. 93; S. & C. 157.)

§ 3821-28. Sec. 1. BANKERS MUST STAMP COUNTERFEIT NOTES.—Whenever any officer or clerk of any incorporated bank, or any banker, exchange broker, or a regular dealer in money, or any clerk employed by either of them, shall have offered to him, for sale, exchange, deposit, or in payment of debt, at his office or place of business, any bank note or notes, knowing the same to be counterfeit, worthless, broken or altered, he shall forthwith write or stamp upon said note or notes upon the face thereof with ink, the name of the bank, banker, exchange broker, or regular dealer in money, and the date of said writing or stamping, and the word counterfeit,

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worthless, broken, or altered, as the case may be, and return such note or notes to the person claiming to be the owner of the same. (April 5, 1866, 63 v. 136, § 1.)

§ 3821-29. Sec. 2. **PENALTY FOR STAMPING GENUINE NOTES.** — If any officer or clerk of a bank, or any banker, exchange broker, dealer in money, or any clerk employed by either of them shall write upon or stamp any genuine bank note or notes, as prescribed for in section one, (§ 3821-28) such bank, banker, exchange broker, or dealer in money, shall be liable to the person holding the same, and upon satisfactory evidence being produced of the genuineness of said note or notes, said bank, banker, exchange broker, or dealer in money, as the case may be, shall redeem the same without delay, at the current value of such note or notes, at the time the same were stamped. (April 5, 1866, 63 v. 136.)

§ 3821-30. Sec. 3. **PENALTY FOR REFUSAL TO STAMP COUNTERFEIT NOTE.** — If any bank, banker, exchange broker, or a regular dealer in money, shall knowingly refuse, neglect or fail to write upon or stamp, or cause to be written upon or stamped, such counterfeit, worthless, broken or altered bank note or notes, which have come into his or their possession, as provided in section one (§ 3821-28) of this act he shall forfeit and pay not exceeding one hundred dollars nor less than fifty dollars for every such offense. (April 5, 1866, 63 v. 136.)

§ 3821-31. Sec. 4. **PENALTIES; HOW RECOVERED.** — All penalties imposed by this act shall be recovered by civil action, in the name of the state of Ohio, before any court of competent jurisdiction, or by indictment; and all penalties incurred under this act, when collected, shall be paid, one-half to the informant, and the other half to the treasurer of the county in which the judgment is recovered for the same, for the use of the state of Ohio. (April 5, 1866, 63 v. 136.)

§ 3821-32. Sec. 1. **BANKING COMPANIES MAY HOLD REAL ESTATE.** — All banking companies of this state, which have been heretofore incorporated, or which may hereafter be incorporated, are hereby authorized to acquire, hold and convey such real estate as may be necessary as a place for the convenient transaction of the business of said companies. (April 9, 1856, 53 v. 157; S. & C. 157.)

§ 3821-33. Sec. 1. **USURY MAY BE SET UP BEFORE OR AFTER JUDGMENT WITHOUT TENDER OF AMOUNT LEGALLY DUE.** — Whenever usurious interest shall have been charged or taken in this state by any bank, whether incorporated by the laws of this state or elsewhere, it shall be lawful for any party or parties to an action brought upon any bond, bill, note, or other instrument of writing in which such usurious interest shall have been charged or included, at any time before or after judgment to set up and prove the taking or demand of such usurious interest, without tendering to such bank the legal amount of debt and interest due on such obligation. (56 v. 171; Curwen's R. S. 1524; Curwen's Laws, 891; S. & C. 157, 158.)

§ 3821-34. Sec. 2. **SETTING ASIDE JUDGMENTS HERETOFORE RENDERED AND PERMITTING USURY TO BE SET UP ON DEFENSE.** — In all cases in which judgment shall have been heretofore rendered in favor of such bank or banks upon default, or upon warrant of attorney to confess judgment, it shall be the duty of the court in which such judgment was rendered, at any time before such judgment shall have been satisfied, upon affidavit of any defendant against whom such judgment was rendered, setting forth the facts constituting such usurious demand, to set aside such judgment, and permit such defendant or defendants to file his or their answer in said action, setting up such usurious demand, without tendering to such bank the legal amount of debt and interest due on the bond, bill, note, or other obligation upon which said action was founded. (April 5, 1859, 56 v. 171; Curwen's R. S. 1524; Curwen's Laws, 891; S. & C. 157, 158.)

Suits By and Against Banks, §§ 3821-35-3821-39.

SUITS BY AND AGAINST BANKS.

Whereas, Doubts have arisen whether the act passed March eighteenth, one thousand eight hundred and thirty-nine, entitled "an act further to amend the act entitled an act to prohibit the issuing and circulating of unauthorized bank paper," passed January twenty-seventh, one thousand eight hundred and sixteen, does not prohibit banking institutions incorporated by any government other than this state, to sue in the courts of this state — to remove such doubts —

§ 3821-35. Sec. 1. SUITS BY FOREIGN BANKS. — The act first in the preamble of this act mentioned, shall not be so construed in any court of this state, or elsewhere, as to prohibit any person, or company of persons, incorporated by any government other than the government of this state, and doing business lawfully as a bank, at the place of the location of such bank, without any intention to infringe the laws of this state, from having power and right to institute, maintain, and prosecute, any action at law or suit in equity in any court in this state, in his or their corporate name, nor from enjoying and enforcing all judgments and decrees heretofore rendered, or which hereafter may be rendered in the courts of this state in like manner, and under like regulations, as non-residents are, or may be permitted to sue in courts of this state, and enjoy and enforce the judgments and decrees thereof. (March 12, 1845, 43 v. 88; S. & C. 158.)

Applies to foreign banks.

A joint action against a drawee and indorser may be brought under the statute by a foreign bank as well as banks incorporated in this state.— Lewis v. Bank of Kentucky, 12 Oh. 132 (1843).

§ 3821-36. Sec. 2. REMEDY AGAINST FOREIGN BANKS. — The rights, credits, moneys, and effects of such incorporations which may be in this state, shall be subject to attachment and equity proceedings, as the rights, credits, moneys, and effects of non-residents are or may be so subject. (March 12, 1845, 43 v. 88; S. & C. 158.)

§ 3821-37. Sec. 1. DECLARATION IN SUITS AGAINST BANKS. — In all actions against any bank or banker for the non-payment of any note, bill, check, draft, certificate of deposit, or other written evidence of debt, the plaintiff may declare for money had and received, and file with his declaration a pertinent description of the written evidence of the debt for which suit was brought, and, on the trial, give the same in evidence, and recover judgment for the amount due thereon, with lawful interest from the time the same became due and payable. (March 12, 1845, 43 v. 67; S. & C. 159.)

§ 3821-38. Sec. 3. OFFICERS OF BANK COMPETENT WITNESSES AGAINST BANK. — In all cases where proceedings have been commenced against any bank or banker, either at law or in chancery, to subject the rights, credits, moneys, and effects of such bank or banker to the payment of his debts, the president, directors, cashier, clerks, tellers, and other officers and agents of such bank or banker shall be competent witnesses for the party bringing the suit, notwithstanding any interest they may have in the event of the suit, and may be required, at any time after the commencement of such proceedings, to testify by deposition, as in cases of non-resident or going witnesses: provided, that nothing in this act contained shall be construed to require any witness to give evidence tending to criminate himself. (March 12, 1845, 43 v. 67; S. & C. 159.)

§ 3821-39. Sec. 5. SUITS BEGUN UNDER CERTAIN LAWS SUBJECT HERETO AND REPEALED, ETC. — All suits heretofore commenced under the provisions of the act entitled "an act to regulate judicial proceedings where banks and bankers are parties, and to prohibit the issuing of bank bills of certain descriptions,"

 Suits By and Against Banks, §§ 3821-40-3821-41.

passed January twenty-eight, one thousand eight hundred and twenty-four, and the act entitled "an act to amend the act entitled 'an act to regulate judicial proceedings where banks and bankers are parties, and to prohibit the issuing of bank bills of certain descriptions, passed January twenty eight, one thousand eight hundred and twenty-four, and to declare the meaning and intention of the ninth section thereof,'" passed March fifth, one thousand eight hundred and forty-two, whether judgment has been obtained or not, or decree rendered, shall, in all respects, be proceeded with in the same manner as though such suits had been originally commenced under the provisions of this act; and the above recited acts, passed January twenty-eight, one thousand eight hundred and twenty-four, and March fifth, one thousand eight hundred and forty-two, be and the same are hereby repealed: provided, that this act shall not affect any special act for the relief of any institution or company which has exercised or assumed any banking powers, or for the relief of the creditors thereof. (March 12, 1845, 43 v. 67; S. & C. 159.)

§ 3821-40. Sec. 1. SUITS ON BANK NOTES: DESCRIBED IN PLEADINGS.— In any suit now pending, or which may hereafter be instituted against any bank, or against any stockholder, shareholder, officer or agent of any bank, whether authorized or unauthorized by law, and whether the charter of such bank, in case such bank were ever incorporated, has expired or not, upon the bank bills or notes of such bank, authorized or unauthorized, it shall not be required, for the sufficiency of the pleadings in such action, that the plaintiff's declaration shall contain a separate count on each bank bill or note; but such bank bills or notes may be given in evidence under any count of the declaration containing the allegation that the plaintiff is the holder of sundry bank bills or notes, issued by such bank, amounting, in the whole, to a certain sum named in the declaration, without setting forth the date, denomination, or names of the payees, and other particulars of the contents of such bills or notes, or of any of them; and such bank bills or notes may also be given in evidence under the common counts, in the action of debt and assumpsit. (January 25, 1851, 49 v. 22; S. & C. 160.)

§ 3821-41. Sec. 2. AND IN COPY AND BILL OF PARTICULARS; BUT MUST BE EXHIBITED ON DEMAND. — And, in case the defendant or defendants, in any such action, shall require of the plaintiff a bill of the particulars of his demand, or a copy of the bills, notes, or papers which the plaintiff designs to offer in evidence, it shall be sufficient for the plaintiff, in order to entitle him to give such bills or notes in evidence, to furnish the defendant or defendants, or to file in the cause in court a writing, setting forth the amount of such bills or notes of each denomination held by him, without giving a copy of each of such bills or notes, or any further particulars thereof: provided, that any defendant or defendants in any such action, may at any time before or after the filing of the declaration, apply to the court in which the action is pending, or to the president judge thereof, for an order requiring the plaintiff or plaintiffs to produce before the clerk of the court, at his office, at such time as the court or judge may direct, for the inspection by the defendant or defendants, or any of them, of all the bills or notes upon which the plaintiff or plaintiffs seek to recover; and in case such plaintiff or plaintiffs shall refuse to comply with such order, upon being duly notified thereof, he or they shall be precluded from recovering in such action upon all bills or notes not produced in pursuance of such order: provided, however, that the court or judge may, upon good cause shown, extend the time, or appoint another suitable time for such inspection of said bills or notes before the clerk, where the plaintiff or plaintiffs have been prevented from a compliance with such order as first made. (January 25, 1851, 49 v. 22; S. & C. 160.)

Assets, etc., of Expired, etc., Banks, §§ 3821-42-3821-46.

ASSETS, ETC., OF EXPIRED AND INSOLVENT BANKING COMPANIES.

§ 3821-42. Sec. 1. **PROCEEDINGS TO OBTAIN AN ACCOUNT OF ASSETS.** — In all cases where the charter of any banking company has, or may hereafter have expired, or become forfeited, any stockholder or stockholders, or other person or persons, in interest, may, at any time, by petition in chancery, in a suit to be commenced in the county where such bank was located, be entitled to have any person or persons holding, or having received any funds, credits, or assets of such banking company, render a full and fair account of the same. (January 25, 1851, 49 v. 86; S. & C. 161.)

§ 3821-43. Sec. 2. **INTEREST ON ASSETS, ETC.** — That in taking such accounts, the person or persons so holding or having received said funds, credits, or assets of such banking company, shall stand chargeable with interest upon all sums of money and credits by him or them held, and with all rents and profits received or enjoyed of the same, from the time of having first received said funds and credits, or having enjoyed and received said rents and profits, except in cases where by proof made to the satisfaction of the court, said person or persons have kept and held said funds in trust upon deposit, without using or receiving any benefit, use, or profit of the same; and in stating said account, interest shall be computed, and rents made annually. (January 25, 1851, 49 v. 86; S. & C. 161.)

§ 3821-44. Sec. 3. **APPOINTMENT OF RECEIVER.** — That in case any person or persons holding any funds or assets of such banking company, shall claim to hold, or to have received the same in a fiduciary capacity, to meet any contingent or future liability of such company, it shall be lawful for the court to appoint a receiver or receivers of all such funds or assets, as, upon hearing of said cause, shall be found necessary to meet and discharge all such contingent or future liabilities of such banking company; and to order such funds to be loaned, with good and sufficient security, upon annual interest, until the time when such contingent and future liabilities may be finally discharged or barred by laws of limitation: provided, that said funds so loaned upon annual interest shall be made payable, either in whole or part, as may be necessary to pay any such accruing contingent liabilities, within thirty days after the notice and demand of the same. (January 25, 1851, 49 v. 86; S. & C. 161.)

Trustees may sue after expiration of charter.

A warrant of attorney given to a bank for the entry of a judgment may be sued on by trustees after the expiration of the bank's charter.—*Martin v. Bank*, 13 Oh. 250 (1844).

Corporation in hands of receiver cannot sue.

A corporation which has been placed in the hands of receivers cannot prosecute a suit. Such suit can only be brought by the receivers on behalf of the corporation.—*Miami Exporting Co. v. Gano*, 13 Oh. 270 (1844).

§ 3821-45. Sec. 4. **DISTRIBUTION OF ASSETS.** — That all accruing interest and rents upon such funds and assets, after discharging such contingent liabilities arising during the year, shall be annually divided and paid over to the several parties in interest, according to their respective distributive shares in said fund, to be determined and settled by said court, in and by their final decree in said cause; and the principal of said fund, and all assets so belonging to said company, shall, according to the decree and order of the court, upon final discharge or termination of said contingent liabilities of said company, be in like manner distributed and paid over to the several parties in interest, according to their respective distributive shares, as determined by the decree of said court. (January 25, 1851, 49 v. 86; S. & C. 161.)

§ 3821-46. Sec. 1. **WHEN SUPREME COURT MAY APPOINT EXAMINER; DUTIES; POWERS.** — Any banking corporation in the state of Ohio, organized under the laws thereof, which shall have suspended payment upon its notes of circulation or other liabilities, or shall have made an assignment in trust of its effects, or any

Assets, etc., of Expired, etc., Banks, §§ 3821-47-3821-50.

part thereof, for the purpose of preferring any of its creditors, whereby the provisions of the charter of any such corporation, or the law under which the same is organized, the supreme court of Ohio has power to appoint a master commissioner, examiner or other person, for the purpose of investigating the condition and management of said corporation. The master commissioner, examiner, or other person, who may be appointed by the supreme court of Ohio to make such examinations, shall examine fully in regard to all such matters touching the condition and management of such corporation as may be directed by the court, and for that purpose power is given him to issue process for the attendance of witnesses, the production of papers, books, and accounts necessary for such examination; also, to summon the officers, agents, assignees, or employees of said corporation, or other persons, to appear before him and testify in relation to the condition and management of said corporation, and also to take all necessary testimony to show the condition and management of the affairs of said corporation. (April 2, 1859, 56 v. 117; S. & C. 162.)

§ 3821-47. Sec. 2. SAME. — Said master commissioner, examiner, or other person, who may be appointed by said court, shall have power to compel the service of his process, the attendance of witnesses and other persons, the production of books, papers, and accounts, to compel answers to questions which may be propounded to all persons by him sworn, and to enforce all orders by him made touching such examination, by proceeding for contempt, as fully, and to the same extent as any court of the state of Ohio can. (April 2, 1859, 56 v. 117; S. & C. 162.)

§ 3821-48. Sec. 3. HIS OATH. — The master commissioner, examiner, or other person, before entering upon the duties of such appointment, shall take an oath, that he will faithfully, honestly, and impartially discharge the same, and shall report his proceedings to the supreme court as it may require. (April 2, 1859, 56 v. 117; S. & C. 162.)

§ 3821-49. Sec. 4. HIS POWER. — If, upon the examination of the officers, agents, employes or assignees of said corporation, or from the evidence of other witnesses sworn, it shall appear that there are books, papers, or accounts material and necessary to the examination, provided for in this act, in the possession, or under the control of, or within the knowledge of such officers, agents, employes or assignees, within the state of Ohio, or elsewhere, which now belong to, or once did belong to said corporation, the originals of which can not be produced at such examination, such master commissioner, examiners or other person shall have power to the same extent, and in the same manner as is prescribed by section two (§ 3821-47) of this act, to compel the officers, agents, employes or assignees of said corporation to produce upon such examination, attested copies of said books, papers, or accounts. (April 2, 1859, 56 v. 117; S. & C. 162.)

§ 3821-50. Sec. 1. CIRCULATION OF BILLS OF EXPIRED BANKS PROHIBITED; PENALTY THEREFOR; RE-ISSUE OF SUCH PAPER. — It shall be unlawful for any officer or agent of any banking company, or of any other incorporated company, any private banker, broker, dealer in money, the treasurer of this state, or the treasurer of any county of this state, or any clerk or agent of any private banker, broker, or dealer in money; or any clerk or assistant of the treasurer of state, or of the treasurer of any county of this state, either directly or indirectly, to put in circulation, pay out, loan, or exchange, otherwise than to send or deliver for the purpose of redemption, to the company, person or persons, trustee or trustees, bound to redeem the same, any bank note or notes of any bank of this state, whose charter, or whose right to issue notes of circulation, shall have expired, or which shall have given notice officially of its intention to close its banking business; and any person or persons who shall violate any of the foregoing provisions of this act, shall be deemed

Assets, etc., of Expired, etc.— Deposit and Circulation of Banks, §§ 3821-51-3821-55.

guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars for each and every offense, or be imprisoned in the jail of the county, for any period of time not exceeding thirty days, or both, at the discretion of the court: provided, that no such company, after the passage of this act, shall re-issue any of its circulating notes redeemed by it, or received in the ordinary course of business, but shall keep a regular account thereof, and monthly, in the presence of the auditor and treasurer of state, burn the same. (May 1, 1854, 52 v. 133; S. & C. 164.)

§ 3821-51. Sec. 2. **PENALTY FOR RE-ISSUING.**— It shall be unlawful for any person or persons, whose duty it is, or who is or are bound by any law of this state to redeem the notes of any banking company, whose charter or right to issue notes of circulation shall have expired, or which has given notice, officially, of its intention to close its banking business; or for any trustee or trustees of such banking company, or any agent of such person or persons, trustee or trustees as aforesaid, to put in circulation, pay out, loan or exchange, either directly or indirectly, any note or notes of any such banking company, described in this section of this act; and any person or persons offending against the provisions of this section mentioned, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail for any period of time not exceeding thirty days, or both, at the discretion of the court. (May 1, 1854, 52 v. 133; S. & C. 164.)

§ 3821-52. Sec. 3. **HOW PROSECUTED.**— Prosecutions for violations of this act, shall be by information of the prosecuting attorney, or by indictment of the grand jury of the county in which the offense was committed, in the court of common pleas, or any other court having competent jurisdiction of like offenses. (May 1, 1854, 52 v. 133; S. & C. 164.)

§ 3821-53. Sec. 4. **REPEALING CLAUSE.**— That section six of the act entitled “an act supplement(ary) to the act entitled an act to prevent unauthorized banking, and the circulation of unauthorized bank paper,” passed January 22, 1846, be and the same is hereby repealed. (May 1, 1854, 52 v. 133; S. & C. 164.)

§ 3821-54. Sec. 5. **PENALTY FOR NOT REDEEMING.**— It shall be the duty of the trustee or trustees, or agent of any banking company, whose charter or right to issue notes of circulation shall have expired, or which has given notice, officially, of its intention to close its banking business, to redeem its notes in the order of their presentation; and on the refusal of the trustee or trustees, or agent to redeem any notes presented for redemption, the holder thereof shall have the same protested; and all protested notes shall draw interest at the rate of fifteen per cent. per annum, from the date of protest until redeemed. (May 1, 1854, 52 v. 133; S. & C. 164.)

STOCKS, ETC., DEPOSITED BY BANKS.

§ 3821-55. Sec. 1. **CERTIFICATES OF FUNDED DEBT DEPOSITED WITH STATE TREASURER, TRANSFER, ETC.**— The certificates of the funded debt of this state and of the United States, required to be deposited with and transferred to the treasurer of state as security for the redemption of circulating notes of independent banking companies, agreeably to the provisions of the act to incorporate the state bank of Ohio, and other banking companies, passed February 24, 1845; and the certificates of the funded debt of this state, of the United States, and of other states, required to be transferred to the auditor of state as security for the redemption of the circulating notes of banking companies, agreeably to the provisions of the act to authorize free banking, passed March 21, 1851, and of the act supplementary to the

Deposit and Circulation of Banks, §§ 3821-56, 3821-57.

last mentioned act, passed April 11, 1856, shall hereafter be deposited with the treasurer of state, and be carefully preserved by him in the state treasury; and all such certificates as shall have heretofore been transferred to the auditor of state shall be by him deposited with the treasurer of state, and be carefully preserved by him in the state treasury. All such certificates, so deposited, as shall be transferable at any agency or office of this state, of the United States, or of any other state, shall be transferred and made payable to "the treasurer of the state of Ohio, and the comptroller of the treasury of the state of Ohio, for the use of" (naming the particular banking company owning or depositing the same); and such certificates so deposited, and that have heretofore been deposited, shall be subject to sale and transfer upon the written authority of the treasurer of state, the comptroller of the treasury, and of the president or cashier of the particular banking company owning or depositing the same, and not otherwise, except as hereinafter provided; and all such certificates so deposited, as shall be payable to any person or persons, corporation or banking company, or order, or assigns, or bearer, or as shall be transferable by delivery, shall, by special endorsement thereon, be assigned to the treasurer and comptroller for the use of the banking company owning or depositing the same, in the manner aforesaid; and such certificates as shall be so assigned and deposited, and such as have heretofore been deposited, shall be transferable by indorsement of the treasurer and comptroller, by special indorsement, to the banking company owning or depositing the same, or to such person or persons, company or corporation, as the president or cashier of the proper banking company shall authorize in writing, and not otherwise, except as hereinafter provided; but no such transfer or assignment shall be made, unless the banking company owning or depositing such certificates, shall be entitled thereto, agreeably to the provisions of the act under which the banking company shall have been organized. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-56. Sec. 2. ACCOUNTS TO BE KEPT BY THE TREASURER AND COMPTROLLER, AND BY REGISTER OF BANK DEPARTMENT; ACCOUNTS OPEN TO INSPECTION. — It shall be the duty of the treasurer of state, and of the comptroller of the treasury, forthwith to make, and thereafter to keep in their respective departments, accurate accounts of all certificates of debt so deposited as aforesaid, and of all certificates hereafter deposited as security for the redemption of circulating notes of banking companies; and the treasurer shall forthwith inform the register of the bank department of the certificates that have heretofore been, and that may hereafter be deposited; and it shall be the duty of the register to keep accurate accounts thereof; and such accounts, as also all other accounts pertaining to banking companies, shall, at all reasonable times, be open to the inspection and examination of any officer or agent of any of said banking companies; of the governor, auditor of state, treasurer, comptroller, and attorney-general, or either of them, or any commissioner appointed by the governor for that purpose, and of any committee of the general assembly, or either branch thereof, thereunto authorized by resolution. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-57. Sec. 3. ENGRAVING PLATES AND PRINTING NOTES; DUTIES OF COMPTROLLER AND TREASURER. — Whenever any banking company shall desire to have any plate or plates for circulating notes engraved, or any blank circulating notes printed, and shall notify the comptroller thereof in writing, the comptroller shall issue an order to the treasurer of state to cause the same to be engraved or printed, specifying particularly in the order the denomination or denominations of the plate or plates to be engraved; or the several denominations of the blank notes to be printed, with the amount of each denomination; and the treasurer of state shall strictly observe such order in causing such engraving and printing to be done; and upon the delivery to the treasurer of any blank printed circulating notes, the treasurer shall notify the comptroller and register thereof, and they, in the presence of

Deposit and Circulation of Banks, §§ 3821-58-3821-61.

the treasurer, shall carefully examine the same, and make an account thereof in their respective departments. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-58. Sec. 4. REGISTERED NOTES; DELIVERY THEREOF TO BANKS, ETC. — When a banking company shall be entitled to receive any registered notes, the comptroller of the treasury shall, on the written application of the proper officers of the bank, issue an order on the treasurer of state therefor, and deliver the same to the register, specifying in such order the amount of each denomination of unregistered notes, to be delivered to the register; and on the presentation of such order, and ascertaining from the accounts in his office that the banking company is entitled to the same, the treasurer of state shall deliver the notes specified in such order to the register, who shall forthwith register and deliver the same to the agent of the banking company, and make an account thereof; but such notes shall not be registered or delivered unless it shall appear from the accounts in the register's office that the bank is entitled thereto. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-59. Sec. 5. BURNING RETURNED CIRCULATING NOTES. — Whenever a banking company shall return any of its circulating notes to be burnt the same shall be burned to ashes by the treasurer of state, in the presence of the comptroller of the treasury and the agent of the bank, and four certificates thereof be made and signed by the treasurer, comptroller, and agent of the bank, specifying the amount of each denomination of notes so burned to ashes; one copy of which certificate shall be delivered to the agent of the bank, and one each to the treasurer, comptroller, and register. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-60. Sec. 6. THE REGISTER; HIS ACCOUNTS OF STOCK AND CIRCULATING NOTES DELIVERED TO BANKS AND RETURNED TO BE BURNT. — The auditor of state shall appoint some suitable person as a clerk in his office, who shall be styled the register, and be under the supervision and control of the auditor. The register shall, without delay, make and keep in his office accurate accounts of all certificates of debt now deposited, and that may hereafter be deposited with the treasurer as security for the redemption of circulating notes of banking companies; he shall also make and keep an account of the amount of each denomination of the notes of each banking company, delivered to such bank, and of the amount returned and burned, so as to show the balance of notes chargeable to such bank; and he shall also keep accurate accounts of all notes hereafter registered and delivered to each bank, and notes returned to be burnt, so as at all times to exhibit the true amount of each denomination of registered notes delivered to each banking company, and the amount thereof returned. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-61. Sec. 7. THE SALE OF STOCK TO REDEEM NOTES OF FAILING BANK; REPORT OF SALE AND PROCEEDS; ACCOUNTS THEREOF; PAYMENTS FOR REDEMPTION OF NOTES, HOW MADE; BURNING REDEEMED NOTES. — Whenever it shall be necessary to sell any of the certificates of funded debt so deposited as aforesaid, for the redemption of the notes of a failing bank, the auditor, treasurer, and comptroller shall make an order on the treasurer to sell such certificate and certificates, and at such time and times, place and places, as may be necessary to redeem the outstanding circulating notes of such bank, as the same may be presented for redemption, and produce the largest sum that may be obtained for such certificates; and when it shall have been determined to make such sale, the comptroller shall issue an order to the treasurer specifying what certificates shall be sold, and the time and times, place and places of selling the same; and in making such sale the treasurer shall be governed by the provisions of the act under which such bank shall have been organized, except as provided by this act. When any such sale shall be made, the treasurer shall forthwith report the same and the amount of money thence arising, to the comptroller and the auditor, who shall cause an account thereof

 Deposit and Circulation — Free Banking, §§ 3821-62-3821-65.

to be made in their respective departments, and the treasurer shall be charged with the money as a redemption fund, and all payments made by the treasurer for the redemption of the notes of a bank, shall be upon the warrant of the auditor, as in other cases; all notes, presented for redemption at the treasury, shall be burned to ashes by the treasurer in the presence of the comptroller and register, and certificates of such burning, signed by the treasurer, comptroller, and register, shall be made, and account thereof kept, as in other cases. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-62. Sec. 8. **PROCEEDINGS ON QUO WARRANTO AGAINST BANKS.** — If any banking company shall fail to transfer, and keep deposited with the treasurer of state, the amount of securities for the redemption of circulating notes required to be deposited by the act under which such banking company shall have been organized; or shall fail to make the quarterly returns of the condition of the bank, or to keep on hand the amount of coin and its equivalent required by the act aforesaid; or if any other violation of any of the provisions of the act under which such banking company may be organized shall come to his knowledge, the auditor of state shall forthwith notify the attorney-general thereof; and the attorney-general shall thereupon, and also for any such violations that may otherwise come to his knowledge, proceed by quo warranto, in the proper court, against such banking company as for a forfeiture of the corporate franchises thereof. (April 5, 1859, 56 v. 162; S. & C. 165.)

§ 3821-63. Sec. 9. **FRAUDULENT USE OR DISPOSITION OF SECURITIES PUNISHED AS EMBEZZLEMENT; PROSECUTIONS, ETC.** — If the auditor of state, treasurer of state, or comptroller of the treasury, or any clerk in either of their offices, shall knowingly and purposely, and with intent thereby to cheat or defraud any person or persons, or body corporate, use or otherwise dispose of any of the securities deposited by any banking company as aforesaid, or any of the circulating notes of any banking company, whether the same be registered or unregistered, and which may have come into his possession or under his control, for any of the purposes named in this act, or in the several acts mentioned in the first section (§ 3821-55) of this act, he shall be deemed and held guilty of embezzlement, and prosecuted by indictment in any court having jurisdiction of the offense, and upon conviction thereof shall suffer the same punishment or penalty as is or may be provided by law for the punishment of persons guilty of the embezzlement of the proper securities and moneys of the state; and in all prosecutions for embezzlement under the provisions of this act, the securities and the notes aforesaid, whether registered or unregistered, shall be deemed and held to be of the value denominated on the face thereof. (April 5, 1859, 56 v. 162; S. & C. 165.)

Sec. 10. Sections seven, eight, and nine of the act entitled "an act to further provide for the better regulation, and receipt, disbursement, and safe-keeping of the public revenue, passed April 12, 1858," are hereby repealed; provided, that the repeal thereof shall not affect the existing rights or liabilities, civil or criminal, of any person or persons, arising under the sections so repealed. (April 5, 1859, 56 v. 162; S. & C. 165.)

FREE BANKING.

§ 3821-64. Sec. 1. **WHO MAY ENGAGE IN BANKING.** — Any number of natural persons, not less than three, may engage in the business of banking, with all the rights, privileges, and powers conferred by and subject to the restrictions of this act. (March 21, 1851, 49 v. 41.)

Not inconsistent with the constitution of 1851, and is not repealed thereby.

Cass v. Dillon, 2 Oh. St. 607 (1853); Citizens' Bank v. Wright, 6 Oh. St. 319 (1856).

§ 3821-65. Sec. 2. **CERTIFICATE TO BE MADE; COPY TO BE DEPOSITED WITH SECRETARY OF STATE.** — Persons associating to form a banking company shall, under their hands and seals, make a certificate, which shall specify:

Free Banking, §§ 3821-66-3821-69.

First — The name assumed by such company, and by which it shall be known in its dealings; also, the name of the place where its banking operations shall be carried on, at which place such banking company shall keep an office for the transaction of business, and for the redemption of its circulating notes.

Second — The amount of the capital stock of such company, and the number of shares into which the same is divided.

Third — The name and place of residence, and the number of shares held by each member of the company.

Fourth — The time when such company shall have been formed. Such certificate shall be acknowledged before a justice of the peace or notary public, and shall be recorded by the recorder of the county where such company is to be established, in a book to be kept by him for that purpose, which shall, at all times during office hours, be kept open for inspection of any person wishing to examine the same; and a copy of said record, duly certified, shall be by the recorder transmitted to the secretary of state, who shall record and carefully preserve the same in his office; copies thereof, duly certified by either of those officers, may be used as evidence in all courts and places, for and against any such company, and shall be conclusive evidence of the legal existence of such banking company. (March 21, 1851, 49 v. 41.)

§ 3821-66. Sec. 3. CAPITAL STOCK. — The capital stock of each company hereby authorized, exclusive of the securities of such company, deposited with the auditor of state for the redemption of the notes of circulation of such company, shall be at least twenty-five thousand dollars, and shall not exceed five hundred thousand dollars; and any such company may, from time to time, increase its capital stock to any amount not exceeding five hundred thousand dollars. (March 21, 1851, 49 v. 41.)

§ 3821-67. Sec. 4. SIXTY PER CENT OF STOCK TO BE PAID IN. — Every such banking company, before commencing business, shall have paid in and remaining in its possession, bona fide, the property of such company, for the sole purposes of such company, sixty per centum of its entire capital stock, and the residue shall be paid in in such installments as may be required by the directors of any such company. (March 21, 1851, 49 v. 41.)

§ 3821-68. Sec. 5. GOVERNOR, AUDITOR, SECRETARY OF STATE TO FURNISH COMPANY A CERTIFICATE. — Whenever any company herein authorized shall furnish to the auditor, governor, and secretary of state satisfactory evidence that such company has complied with the preceding sections of this act, said auditor, governor, and secretary shall furnish to such company a certificate of such fact, under their hands and under the great seal of the state, which shall be recorded in the office of the secretary of state, in the same book in which is required to be recorded the certificate provided for in the second section (§ 3821-65) of this act. (March 21, 1851, 49 v. 41.)

§ 3821-69. Sec. 10. POWERS OF THE COMPANY. — Every company formed under this act, after having procured the certificate required in the fifth section (§ 3821-68) of this act, shall be, and hereby is created a body politic and corporate, with succession, until the year eighteen hundred and seventy-two, and thereafter, until the repeal of this act; and by its name shall have power to contract, and to prosecute and defend suits and actions of every description, as fully as natural persons; to loan money, buy, sell, and discount bills of exchange, notes and all other written evidences of debt, except such as may be herein prohibited; to receive deposits, buy and sell gold and silver coin and bullion, collect and pay over money, and transact all other business properly appertaining to banking, subject to the provisions and restrictions of this act; may acquire, hold and convey such real estate as may be necessary to the convenient transaction of its business, and no more; but may, however,

Free Banking, §§ 3821-70-3821-73.

acquire title to any real estate pledged to secure any debt previously contracted or purchased on an execution or order of sale, to satisfy any judgment or decree in its favor, or which shall have been conveyed to it in payment of any previous debt; but shall not hold any real estate so acquired, longer than is necessary to avoid a loss of any part of the debt, interest, and costs for the collection or security of which it was acquired; but at any time before selling the same, upon being tendered by the last preceding owner, or his legal representative, such sum as shall be necessary to save such company from loss of any part of the debt, interest, taxes, costs, and other necessary charges for the collection or security of which said real estate was acquired, such company shall release to such owner, his legal representative or assigns, all its right, title, and interest therein. (March 21, 1851, 49 v. 41.)

§ 3821-70. Sec. 11. STOCK TO BE PERSONAL PROPERTY, ETC. — The capital stock of every company shall be divided into shares of fifty dollars each, which shall be deemed personal property, and shall only be assignable on the books of the company, in such a manner as its by-laws shall prescribe; each bank shall have a lien upon all stock owned by its debtors, and no stock shall be transferred without the consent of a majority of the directors, while the holder thereof is indebted to the company. (March 21, 1851, 49 v. 41.)

§ 3821-71. Sec. 12. NO LIEN TO BE TAKEN ON CAPITAL STOCK. — No company shall take, as security for any loan or discount, a lien upon any part of its capital stock; but the same security, both in kind and amount, shall be required of shareholders as of persons not shareholders; and no banking company shall be the holder or purchaser of any portion of its capital stock, or of the capital stock of any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, on security which, at the time, was deemed adequate to insure the payment of such debt, independent of any lien upon such stock; and stock so purchased shall in no case be held by the company so purchasing, for a longer period of time than six months, if the same can be sold for what the stock cost, at par. (March 21, 1851, 49 v. 41.)

Not entitled to transfer of stock of other bank.

A bank organized under this act, receiving as security for a loan, certificates of stock of another bank similarly organized, is not en-

titled to a transfer of such stock on the books of the latter bank, nor is the latter liable in damages for refusal to make such transfer.— *Franklin Bank v. Commercial Bank*, 36 Oh. St. 350 (1881).

§ 3821-72. Sec. 13. WHO MAY VOTE AT ELECTIONS. — In all elections of directors, and in deciding all questions at meetings of the stockholders, each share shall entitle the owner thereof to one vote; stockholders may vote by proxies, duly authorized in writing, but no officer, clerk, teller, or book-keeper of the company, shall act as proxy. (March 21, 1851, 49 v. 41.)

§ 3821-73. Sec. 14. OFFICER, AND WHO ELIGIBLE. — The affairs of every company formed and organized to carry on the business of banking under the provisions of this act, shall be managed by not less than three (3) nor more than nine (9) directors, as may be determined by a majority in interest of the stockholders; every director shall, during the whole term of his service, be a resident of the state; at least three-fourths of the directors shall have resided in this state two (2) years next previous to their election as directors; the directors of each banking company, collectively, shall own at least one-tenth of the capital stock; each director shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the company, and not knowingly violate, or willingly permit to be violated, any of the provisions of this act; that he is a bona fide owner, in his own right, of the stock, specifying the amount standing in his name on the books of

Free Banking, §§ 3821-74-3821-77.

the company, and that the same is not hypothecated or in any way pledged as security for any loan obtained or debt owing, which oath, subscribed by himself and certified by the officer before whom it was taken, shall be filed and carefully preserved in the office of the recorder of the county in which the banking company is located. (April 15, 1890, 87 v. 208; March 21, 1851, 49 v. 41.)

§ 3821-74. Sec. 15. **TERM OF OFFICE OF DIRECTORS.** — The directors of any banking company first elected, shall hold their places until the first Monday in January next thereafter, and until their successors shall be elected and qualified; all subsequent elections shall be held annually, on the first Monday of January, at the office of the bank, and the directors so elected, shall hold their place for one year, and until their successors are elected and qualified; but any director removing from the state, shall thereby vacate his place; any vacancy in the board shall be filled by appointment, by the remaining directors; the director so appointed shall hold his place until the next annual election, and if, from any cause, an election of directors shall not be made at the time appointed, the company shall not, for that cause, be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof having been given in a newspaper printed and in general circulation in the county where the company is located. (March 21, 1851, 49 v. 41.)

§ 3821-75. Sec. 17. **BANKING COMPANIES SHALL NOT CIRCULATE EVIDENCES OF DEBT AS MONEY.** — No banking company, either heretofore or hereafter organized under this law, shall at any time issue, or have in circulation, any note, draft, bill of exchange, acceptance, certificate of deposit, or any other evidence of debt, which, from its character, form, or appearance, shall be calculated or intended to circulate as money; and every violation of this section, by any officer or member of a banking company, shall be deemed and judged a misdemeanor, punished by fine or imprisonment, or both, in the discretion of the court having cognizance thereof, as now provided by law. (As amended and took effect April 24, 1879, 76 v. 72; March 21, 1851, 49 v. 41.)

§ 3821-76. Sec. 19. **WHEN PROHIBITED FROM MAKING LOANS; WHEN BONDS EQUIVALENT TO LAWFUL MONEY.** — Each banking company shall at all times have on hand of lawful money of the United States, an amount equal to at least twenty per centum of its deposits; and whenever the lawful money of any company shall fall below twenty per cent. of its deposits, such company shall not make any new loan or discount, otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividends of its profits, until the required proportion of its deposits, and its lawful money of the United States, shall be restored; and for such purpose money actually invested in bonds of the United States shall be deemed equivalent to lawful money of the United States. (As amended and took effect April 24, 1879, 76 v. 73; March 21, 1851, 49 v. 41.)

§ 3821-77. Sec. 20. **NOT LIABLE FOR MORE THAN AMOUNT OF CAPITAL STOCK; EXCEPTIONS.** — No banking company herein authorized shall at any time be indebted, or in any way liable, to an amount exceeding the amount of the capital stock at such time actually paid in and remaining as capital stock, undiminished by losses or otherwise, except on the following accounts:

First — On account of moneys deposited with or collected by such company.

Second — On account of bills of exchange or drafts drawn against money actually paid on deposit to the credit of or due to such company.

Third — Liabilities of the stockholders on account of moneys paid in as capital stock, and dividends thereon, and such stockholders shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock. (As amended and took effect April 24, 1879, 76 v. 73; 49 v. 41.)

Free Banking, §§ 3821-78-3821-82.

§ 3821-78. Sec. 22. CAPITAL STOCK NOT TO BE WITHDRAWN. — No banking company shall, during the time it shall continue its operations as a bank, withdraw or permit to be withdrawn, either in form of dividends, loans to stockholders, for a longer period of time than six months, or in any other manner, any portion of its capital stock, and if losses shall at any time have been sustained by any banking company, equal to, or exceeding its undivided profits then on hand, no dividends shall be made, and no dividend shall ever be made by any banking company, while it shall continue its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses, bad and suspended debts, and all debts due to a banking company, on which interest is past due and unpaid for a period of six months, unless the same shall be well secured, and shall be in process of collection, shall be considered bad or suspended debts within the meaning of this act. (March 21, 1851, 49 v. 41.)

§ 3821-79. Sec. 23. HOW DECLARE DIVIDEND; SHALL REPORT SEMI-ANNUALLY TO AUDITOR OF STATE. — The directors of each banking company shall, semi-annually, declare a dividend of so much of the net profits of the company as they shall judge expedient; but such company shall, before the declaration of a dividend, carry one-tenth part of its net profit of the preceding half year to its surplus fund, until the same shall amount to twenty per centum of its capital stock; every banking company shall make to the auditor of state a report, according to the form which may be prescribed by him, verified by the oath of the president or cashier of such company, which report shall exhibit in detail, and under appropriate heads such as he shall require, the resources and liabilities of the company before the commencement of business in the morning of the first Monday of the months of January and July of each year, and shall transmit the same to the auditor of state within ten days thereafter. (As amended and took effect April 24, 1879, 76 v. 73; March 21, 1851, 49 v. 41.)

§ 3821-80. Sec. 25. LIABILITIES SPECIFIED; PROVISIO. — The total liabilities of any person, company, corporation, or firm, for money borrowed, including in the liabilities of the several members thereof to any banking company herein authorized, shall at no time exceed one-tenth part of the amount of the capital stock of such company actually paid in; provided, that the discount of bona fide bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation, or firm negotiating the same, shall not be considered money borrowed. (As amended and took effect April 24, 1879, 76 v. 74; March 21, 1851, 49 v. 41.)

§ 3821-81. Sec. 26. UNCURRENT NOTES NOT TO BE PAID OUT. — No banking company shall, at any time, pay out on loans or discounts, or in purchasing of drafts or bills of exchange, or in payment of depositors; nor shall it in any other mode, put in circulation the notes of any bank or banking company, either in or out of this state, which notes shall not at that time be receivable at par, in payment of debts, and by the company so paying out or circulating such notes; nor shall it knowingly pay out or put in circulation any notes, issued by any bank or banking company, which, at the time of such paying out or putting in circulation, is not redeeming its notes in gold and silver, nor any notes issued by any bank out of this state, of a denomination less than five dollars. (March 21, 1851, 49 v. 41.)

§ 3821-82. Sec. 27. NOTES, ETC., TO WHOM PAYABLE. — All notes, bills, and other evidences of debt, excepting bills of exchange, discounted by any banking company, shall be made, by the terms thereof, or by special indorsement, payable solely to such company; and no such evidence of debt shall be assignable, except for collection, or for the following purposes: First — To pay and redeem the circulating

Free Banking, §§ 3821-83-3821-86.

notes of such company; Second — To pay other liabilities of the said company; and after such liabilities shall have been discharged, Third — To divide among the shareholders on their stock. (March 21, 1851, 49 v. 41.)

§ 3821-83. Sec. 28. **WHAT TRANSACTIONS ARE VOID.** — All transfers of notes, bonds, bills of exchange, and other evidences of debt, owing to any banking company, or of deposits to its credit; all assignments or mortgages, or other securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its stockholders or creditors; all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be held utterly null and void. (March 21, 1851, 49 v. 41.)

§ 3821-84. Sec. 29. **PENALTY FOR VIOLATION OF THE PROVISIONS OF THIS ACT.** — If the directors of any banking company which shall have availed itself of any of the privileges granted by this act, shall knowingly violate, or knowingly permit any of the officers, agents, or servants of such company, to violate any of the provisions of this act, all the rights, privileges, and franchises of said company, derived from this act, shall thereby be forfeited; such violation shall, however, be determined and adjudged by a court of competent jurisdiction, agreeably to the laws of this state, and the practice of such court, before the corporation shall be declared dissolved; and in case of such violation, every director who participated in or assented to the same, shall be held liable, in his personal and individual capacity, for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation. (March 21, 1851, 49 v. 41.)

§ 3821-85. Sec. 30. **RELATING TO EMBEZZLEMENT, ETC., BY BANK OFFICERS, EMPLOYEES, AND AGENTS; PENALTY.** — Every president, director, cashier, teller, clerk, or agent of any banking company, who shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of such company, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any notes, bonds, drafts, or bills of exchange, mortgage, judgment or decree, or shall make any false entry in any book, report, or statement of the company, with intent in either case to injure or defraud the company, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the company, or any agent appointed to inspect the affairs of any banking company in this state, shall be guilty of an offense, and, upon conviction thereof, shall be confined in the penitentiary, at hard labor, not less than one year, nor more than ten years. (As amended and took effect April 24, 1879, 76 v. 74; March 21, 1851, 49 v. 41.)

§ 3821-86. Sec. 38. **NO DIVIDENDS TO BE MADE WHEN CAPITAL STOCK IS DIMINISHED.** — If the original capital stock of any such banking companies shall in any manner be diminished, or any portion thereof be withdrawn for any purpose whatever, while any debts or demands against such company remain unsatisfied, no dividends shall thereafter be made on the shares of the capital stock of such company, until the original amount of the capital stock shall be restored, either by contribution of the shareholders, or out of the profits of the business of such company; and in case any dividend shall be made while the capital stock shall remain so diminished or withdrawn, it shall be the duty of any court, having competent jurisdiction, to make the necessary orders and decrees for closing the affairs of such company, and dividing its effects among its creditors and shareholders, as in this act provided. (March 21, 1851, 49 v. 41.)

Free Banking — Unknown Depositors, §§ 3821-87-3821-90.

§ 3821-87. Sec. 40. **STOCKHOLDERS SHALL NOT BE LIABLE TO BANK BEYOND TWO-FIFTHS OF CAPITAL STOCK.** — The stockholders collectively, of any banking company, shall at no time be liable to such company, either as principal debtors or sureties, or both, to an amount greater than two-fifths of the amount of capital stock actually paid in and remaining undiminished by losses or otherwise, nor shall the directors be so liable by the by-laws of such company, adopted by its stockholders to regulate such liabilities; and it shall be the duty of the auditor, treasurer, and secretary of state, or a majority of them, as often as once in each year, to appoint some suitable person in the vicinity of each banking company, who shall not be a stockholder in any bank of this state, who shall have power to make a thorough examination into all the affairs of the bank which he may be appointed to examine; and, in so doing, to examine any of the officers and agents of such bank, on oath; and such agent shall make a detailed report of the condition of such bank to the auditor of state; and the banking companies herein authorized shall be subject to any other visitorial powers authorized by law; and every agent appointed, as in this section provided, shall receive for his services at the rate of two dollars for each day by him employed in such examination, and two dollars for every twenty-five miles he shall necessarily travel, in the performance of his duty, which shall be paid by the banking company by him examined. (March 21, 1851, 49 v. 41.)

§ 3821-88. Sec. 1. **BANKING COMPANIES AUTHORIZED TO DEMAND RELINQUISHMENT OF SECURITIES; REDEMPTION OF CIRCULATION NOT EXCUSED BEFORE 1880.** — All independent and free banking companies, and the State Bank of Ohio and its branches, and their assignees and successors, respectively, organized under the provisions of an act entitled "an act to incorporate the State Bank of Ohio and other banking companies," and an act entitled "an act to authorize free banking," and having complied with the provisions for relinquishing business required by the above recited acts, and having redeemed at least ninety-five per cent. of their authorized circulation, may, on or after the first day of January, eighteen hundred and eighty (1880), demand of the auditor of state, and said auditor is hereby authorized and required to relinquish to such companies on such demand any bonds or securities he may hold as security for the redemption of any outstanding circulating notes of such companies, and thereafter the affairs of such companies shall be considered closed: provided, that nothing herein shall be so construed as to excuse the redemption of all of said circulation that may be presented for redemption prior to the first day of January, 1880. (March 15, 1875, 72 v. 54.)

UNKNOWN DEPOSITORS.

§ 3821-89. Sec. 1. **ANNUAL REPORT TO PROBATE JUDGE OF UNKNOWN BANKING DEPOSITORS, ETC.** — Every incorporated bank or banking association located in this state, whether now or hereafter incorporated or organized under the laws of this state, or of the United States, and every company, association, or person, who shall in this state keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, or bills of exchange, notes, bonds, stocks, or other evidence of indebtedness, with a view to profit, shall, annually, between the first and second Mondays of January, make out and return to the probate judge of the county in which said bank, office, or other place of business is located, under oath of the owner, or principal officer or manager thereof, a true and complete statement, setting forth, in alphabetical order, the names of all unknown depositors with said bank, company, association or person, together with the amount due to every such unknown depositor, including accrued interest and dividends. (March 6, 1888, 85 v. 65.)

§ 3821-90. Sec. 2. **WHO ARE TO BE DEEMED "UNKNOWN DEPOSITORS."** — Every corporation, company, association, or person, in whose name a deposit of any

Unknown Depositors, §§ 3821-91-3821-94.

money, bullion, bill of exchange, note, stock, bond or other evidence of indebtedness has been made with any bank, company, association, or person, designated in the first section (§ 3821-89) hereof, shall be deemed an unknown depositor within the meaning of this act, when the date of the last bona fide item of debt or credit to the account of such depositor on the books of said bank shall be more than seven years prior to the time fixed by the first section (§ 3821-89) hereof for the filing of said statement with the probate court of the proper county; provided, that in fixing the date of the last item of credit to the account of any depositor, reference shall not be had to any item of credit for interest or dividends accrued on such deposit, unless the same shall be entered upon a pass book presented by and returned to the depositor, or unless the depositor be a minor. (March 6, 1888, 85 v. 65.)

§ 3821-91. Sec. 3. RECORD OF UNCLAIMED DEPOSITS TO BE KEPT BY PROBATE JUDGE.— The probate judge of each county shall, on or before the third Monday of January, annually, cause to be recorded in a book kept for that purpose, entitled "record of unclaimed deposits in banks, ——— county, Ohio," and which shall at all times be open to public inspection, all statements returned to him for the preceding year under the provisions of this act, and said probate judge shall designate in said book at the head of each statement recorded therein, the name of the bank, company, association or person by whom said statement is returned. The original statement returned to said probate judge shall be kept on file and preserved in his office. (March 6, 1888, 85 v. 65.)

§ 3821-92. Sec. 4. HIS FEES FOR MAKING SUCH RECORD; HOW PAID. — There shall be allowed and paid to the probate judge of each county, the sum of eight cents per hundred words, for all statements recorded by said probate judge under the provisions of this act; provided, that the cost of recording the names and amounts due to any depositors, by whom deposits shall be made as aforesaid after the passage of this act, and who shall thereafter become unknown within the meaning of this act, shall be paid to said probate judge by the bank, company, association, or person, designated in section one (§ 3821-89) hereof, at the time such annual statement is returned, and shall be by such bank, company, association, or person, deducted from the amount due such unknown depositor. (March 6, 1888, 85 v. 65.)

§ 3821-93. Sec. 5. UNKNOWN DEPOSITS TO BE PAID INTO COUNTY TREASURY, WHEN; SUCH PAYMENT RELEASES THE BANK'S LIABILITY.— That whenever any corporation, company, association, or person, in whose name any deposit is hereafter made with any bank, company, association, or person designated in section one (§ 3821-89) hereof shall become unknown within the definition and meaning of this act, the amount due to such depositor shall be by such bank, company, association or person, paid to the treasurer of the county in which such bank, company association is located, and shall be by said treasurer credited to the general fund of said county; provided, that such deposit shall not be paid to said treasurer until after the expiration of eight years from the date of the first statement, in which the name and amount due such unknown depositor shall be returned to the probate judge as hereinbefore provided; and the bank, corporation, association or person so making such payment shall thereby be released from any claim, demand or liability to pay the same or any part thereof to the depositor, his administrators, executors or assign(s). (March 6, 1888, 85 v. 65.)

§ 3821-94. Sec. 6. HOW AND BY WHOM SUCH DEPOSITS MAY BE RECLAIMED. — If at any time thereafter proof is made to the satisfaction of the probate court, or the county commissioners, of the right of any person or persons, by inheritance or otherwise, to said funds or any part of the same, or paid to the treasurer under the provisions of the preceding section, said court or commissioners shall

Unknown Depositors, §§ 3821-95-3821-97.

certify the same to the county auditor, who shall thereupon draw a warrant on the treasurer of the county in favor of such claimant or claimants, or the legal representative or duly authorized agent of such claimant or claimants for the sum so paid into the treasury; provided, if any such person or persons become aggrieved by the decision, finding or action of the probate court or the county commissioners, such person or persons may appeal to the court of common pleas, by virtue of the provisions of the Revised Statutes of 1883, sections eight hundred and ninety-six, six thousand four hundred and seven, six thousand four hundred and eight, six thousand four hundred and nine, and six thousand four hundred and ten, respectively, and all acts amendatory and supplementary thereto, and said sections shall, so far as applicable, govern proceedings had under the provisions of this act. (March 6, 1888, 85 v. 65.)

§ 3821-95. Sec. 7. PENALTY FOR BANK'S REFUSAL OR NEGLECT TO COMPLY WITH THIS ACT. — That every bank, company, association, or person designated in section one (§ 3821-89) of this act, who shall neglect or refuse to comply with the provisions of this act, shall forfeit and pay five hundred dollars for every such offense. (March 6, 1888, 85 v. 65.)

§ 3821-96. Sec. 8. RECOVERY AND DISPOSITION OF PENALTIES. — The penalty imposed by this act shall be recovered by action in the name of the state of Ohio, before any court of competent jurisdiction; and all penalties incurred under this act, when collected, shall be paid to the treasurer of the county in which the judgment is recovered for the same, and one-half thereof shall be by said treasurer credited to the general fund of said county, and one-half thereof shall be by him held for the use of the state of Ohio. (March 6, 1888, 85 v. 65.)

§ 3821-97. Sec. 9. WHO MAY SUE; DUTY OF PROSECUTING ATTORNEY. — The action provided by the eighth section (§ 3821-96) hereof, for the recovery of penalties incurred under the provisions of this act, may be instituted and prosecuted to judgment by any citizen of the state of Ohio; and it is hereby made the duty of the prosecuting attorney of such county to institute and prosecute such action against every bank, company, association or person designated in the first section (§ 3821-89) hereof, and located in said county, who shall fail to comply with the provisions of this act. (March 6, 1888, 85 v. 65.)

PART XXII.

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§ 3822. AVENUE COMPANIES IN CERTAIN COUNTIES. — Companies may be incorporated in any county having not less than one hundred thousand inhabitants, for the purpose of constructing avenues in the counties where they are organized; such avenues shall be opened not more than one hundred feet in width, at least sixty feet of which shall be cleared of all obstructions, and not less than thirty feet shall be made an artificial road composed of stone, gravel, or other suitable material, well compacted together in such manner as to secure a firm and substantial road, and shall not be less than five miles in length; and they may enter upon and appropriate any lands for the use of such avenue after having obtained the written consent of a majority of the persons owning the lands sought to be appropriated, which consent shall be entered upon their records. (April 3, 1856, 53 v. 47, § 12.)

§ 3823. OTHER TURNPIKE COMPANIES. — A corporation created for the purpose of constructing and maintaining a free public avenue shall construct and maintain its avenue not less than fifty nor more than one hundred feet wide, of such materials as it may deem proper, and shall not charge toll of any kind for the use of its avenue by the public, but may make and enforce all necessary and reasonable regulations for the use and preservation of the same; and if in laying out such avenue, it be necessary to enter upon and appropriate any lands or premises, the proceedings therefor shall be instituted and carried on in all respects as is provided by law for the appropriation of private property by municipal corporations. (April 16, 1879, 76 v. 62, §§ 1, 2.)

Montgomery county.

See § 3536-1 et seq.

§ 3824. WHEN COMPANY MAY TAKE TOLLS. — When any such company puts under contract five consecutive miles of any such avenue, and completes not less than two consecutive miles thereof to the acceptance of the county commissioners, or when the whole of any such avenue is completed to such acceptance by any such company, the company may erect a toll-gate thereon for the collection of such tolls as turnpike and plankroad companies are allowed by law to collect; and when a company completes to such acceptance five consecutive miles of an avenue, it may erect thereon

Avenue and Turnpike Companies, §§ 3825-3826b.

two toll-gates, at such places as in the opinion of the directors will best subserve the interest of the company, for the collection of tolls as above provided. (April 3, 1856, 53 v. 46, § 3.)

§ 3825. WHEN CONSENT OF AUTHORITIES NECESSARY. — When in laying out any such avenue it becomes necessary to run through or along the line of any village, the board of directors of the avenue company shall obtain the consent of the council of such village to the laying out of such avenue through or along the territory over which they have supervision or control. (April 3, 1856, 53 v. 46, § 4.)

§ 3826. AUTHORITIES MAY SURRENDER ROADS TO COMPANY. — If, on application being made to the council of a village, they are of opinion that the public good demands the laying out of such avenue, they may give their written consent to the laying out and construction of the same, which shall have the force and effect of a full and complete release of all authority over the avenue within their corporate jurisdiction, and the directors may lay out and construct the avenue through the territory of such village, and control the same in all respects as though the village did not exist. (April 3, 1856, 53 v. 46, § 5.)

§ 3826a. POWER TO CONDEMN AVENUES BELONGING TO AVENUE COMPANIES WITHIN CORPORATE LIMITS. — Where avenue companies have been or may hereafter be organized, and have constructed and operated, or may hereafter construct and operate an avenue or avenues in a county containing a city of the first grade of the first class, the board of public improvements of such city of the first grade of the first class, may, by resolution, declare it essential or necessary to the interest of said city that so much of any such avenue as may be within the corporate limits of the city should belong to the city for the purpose of a public street; and thereupon if the company owning such avenue and the board of public improvements of the city are unable to agree upon the amount of compensation to be paid for so much of said avenue as lies within the city, the board of public improvements of such city and the company owning such avenue may submit the question of the amount to be paid for so much of such avenue as lies within the limits of such city to arbitration in the following manner, to wit: The board of public improvements of such city to select one disinterested person, the company owning such avenue to select another disinterested person, and these two (2) select the third disinterested person to act as arbitrators and all such arbitrators shall be resident freeholders of such city; and the amount agreed upon by all these three arbitrators shall be binding on both such city and such company; and in case the arbitrator appointed by the board of public improvements of such city and the arbitrator appointed by such company cannot agree upon a third arbitrator, or all three of such arbitrators fail to agree on the amount to be paid for so much of such avenue as lies within the city limits, or in case the board of public improvements of such city, or the company owning such avenue refuse to submit to arbitration the question of the amount to be paid for such part of such avenue as lies within the limits of such city, then the board of public improvements of such city may proceed to condemn and appropriate so much of such avenue as lies within the city limits, for public purposes, in the same manner in which other property is condemned and appropriated by municipal corporations, except that the resolution of such board of public improvements deeming it necessary to condemn shall take the place and stand in lieu of the resolution of council required by sections 2234, 2235 and 2236, Revised Statutes of Ohio. (April 4, 1888, 85 v. 152; April 20, 1890, 87 v. 241.)

§ 3826b. ISSUE AND SALE OF BONDS. — When the amount of compensation to be paid for such avenue appropriated under the preceding section shall have been ascertained either by agreement of the parties, by decision of the arbitrators or by

Chamber of Commerce, etc., §§ 3827, 3829.

the verdict of a jury in the proceedings instituted for the purpose, a fund shall be provided for the payment of such compensation together with the costs and expenses of such proceedings as may have been had, by issuing the bonds of such city for the amount thus ascertained; and it shall be the duty of the board of public improvements of such city to issue said bonds. Said bonds shall be made payable at such time and shall bear interest at such rate not to exceed four (4) per centum per annum as said board of public improvements shall determine; said bonds shall be signed by the president of the board of public improvements and the mayor of such city, and be attested by the comptroller of such city, and shall be secured by a pledge of the faith of such city and a tax, which it shall be the duty of the council of such city annually to levy upon the taxable property of such city, and certify the same to the county auditor, upon a certificate to that effect from the trustees of the sinking fund of such city, as to the amount necessary to pay the interest thereon and to provide a sinking fund for the final redemption of said bonds. Said tax shall be in addition to the amount now authorized to be levied for municipal purposes. Said bonds shall be sold to the highest bidder by said board of public improvements at not less than their par value, after advertising the same for not less than four consecutive weeks, on the same day of the week, in some newspaper of general circulation in such city. (April 4, 1888, 85 v. 152; April 20, 1890, 87 v. 241.)

§ 3827. OFFICERS OF BOARD OF TRADE, CHAMBER OF COMMERCE, ETC. — The officers of an incorporated board of trade, chamber of commerce or merchants' exchange or other kindred association, shall consist of a president, two vice-presidents, treasurer, secretary, and not less than ten directors, all of whom shall be members of the association, and be engaged in business at, or residents of the city or town where it is established; they shall be elected by ballot at the annual meeting of the association, and shall hold their office for one year, unless said association shall, by its by-laws, provide a longer term for all or any of said officers, and until their successors are elected and qualified; the officers thus elected, together with said directors, shall constitute the board of directors of such association; provided, however, that any such association may provide for the election of not less than ten directors, as aforesaid, and by its by-laws authorize said directors to elect a president, two vice-presidents, a treasurer and a secretary, and such additional directors as may be necessary to complete the maximum membership of the board, all of whom shall be members of said association; the officers thus elected, together with said directors, shall constitute the board of directors of such association; and all other officers, agents or committees deemed necessary for the interest of the association, shall be elected or appointed in such manner and with such powers as may be provided by the by-laws of the association. And in like manner said association may have the power to provide for the trial, suspension, fine or expulsion of any of its members by the board of directors constituted as hereinbefore provided. And said association may make provision for the relief and support of the families and dependents of deceased members. (January 24, 1876, 73 v. 3 § 4; R. S. 1880; March 5, 1883, 80 v. 40; April 4, 1894, 91 v. 108.)

Appointment of inspectors.

Under this section the Association of the Tobacco Trade of Cincinnati is authorized to appoint an inspector of leaf tobacco, whose duties are to be prescribed by the by-laws and rules of the association, and the performance

of his duties, at the instance of members of the association, is not a usurpation of the duties required of the inspectors appointed under § 4340.— State ex rel. v. Casey, 38 Oh. St. 555 (1883).

§ 3828. MAY APPOINT COMMITTEES OF ARBITRATION. — Such corporations may constitute and appoint committees of reference and arbitration, and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in rules or by-laws for the settlement of such matters of reference as may be volun-

Chambers of Commerce, etc.—Building and Loan Associations, §§ 3829-3836-1.

tarily submitted for arbitration by members of the association, or by other persons not members thereof. (April 3, 1866, 63 v. 89, § 5.)

§ 3829. **MAY REQUIRE BONDS FROM OFFICERS.**—Such corporations may receive and require of and from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts, which bonds shall be conditioned and made payable as prescribed by the by-laws of the corporations, and may be sued (on), and the money collected and held for the use of the party injured, or such other use as may be determined upon by the corporation; and the president, a vice-president, or the secretary of any such corporation, may administer such oaths of office as may be prescribed in its by-laws. (April 3, 1866, 63 v. 89, § 6.)

§ 3830. **MAY APPOINT INSPECTORS, ETC.**—Every inspector, gauger, weigher, or measurer appointed by any such association shall be recognized as a legally appointed officer, for the duties pertaining to his position, in the city and county wherein the association is located, and shall be subject to all the provisions and penalties of the laws relating to such officers; and the certificate of such appointee as to his official acts shall be evidence, and binding upon the persons interested. (April 3, 1866, 63 v. 89, § 9.)

§ 3830a. **INSPECTORS, GAUGERS, ETC., MAY APPOINT DEPUTIES.**—Every inspector, gauger, weigher or measurer appointed by any board of trade or chamber of commerce heretofore or hereafter organized in this state may appoint one or more deputies to be approved by the board of directors or board of officers of such board of trade or chamber of commerce, and the said inspector, gauger, weigher or measurer may take from his deputy a bond, with sureties, conditioned for the faithful performance of the duties of the appointment, but in all cases said inspector, gauger, weigher or measurer shall be responsible for his deputy's neglect of duty or misconduct in office. (April 6, 1883, 80 v. 98.)

§ 3831. **OTHER LIKE ASSOCIATIONS MAY HAVE BENEFIT OF THESE PROVISIONS.**—Any board of trade or chamber of commerce heretofore organized in this state may avail itself of the privileges and powers, in whole or in part, conferred by the three preceding sections, by making a certificate of its adoption thereof, under its seal, and attested by the signature of its president and secretary, which shall be filed in the office of the secretary of state, and when so filed shall confer all the privileges and powers so defined. (April 3, 1866, 63 v. 89, § 11.)

§ 3832. **MAY PURCHASE OR LEASE GROUNDS AND ERECT BUILDINGS; ISSUING OF BONDS.**—Any such incorporated association may purchase or lease suitable grounds and erect thereon such buildings as the board of directors deem proper, for the interest of the association, and such association may lease any portion of such building, that is not occupied by or needed for its immediate use. And such incorporated association shall have power, for the purposes mentioned in this section to borrow money and execute and sell or otherwise dispose of its bonds or other obligations secured by a mortgage of its property or otherwise. (April 3, 1877, 74 v. 145, § 1; R. S. 1880; February 21, 1887, 84 v. 33.)

§ 3836-1. **BUILDING AND LOAN ASSOCIATIONS; DOMESTIC; FOREIGN.**—A corporation for the purpose of raising money to be loaned among its members shall be known in this act as a building and loan association. Associations organized under the laws of this state shall be known in this act as "domestic" associations, and those organized under the laws of other states or territories, as "foreign" associations. Associations may be organized and conducted under the general laws

Building and Loan Associations, §§ 3836-2-3836-3.

of Ohio relating to corporations, except as otherwise provided in this act. (May 1, 1891, 88 v. 469.)

General laws.

Building associations are corporations formed for profit, having a capital stock and the respective powers and duties of the cor-

poration, and its members are to be decided according to the statutes of Ohio relating to such corporations.—*Hilman v. Ryan*, 3 O. C. C. 529 (1888); s. e., 2 C. D. 305.

§ 3836-2. CAPITAL; WHEN MAY BEGIN BUSINESS.—The capital stock named in the articles of incorporation shall be deemed to refer to the authorized capital, and the organization may be completed and business commenced when five per cent. thereof is subscribed.

DIRECTORS' TERMS.—Directors may be elected for any term, not less than one year nor longer than three years, but if such term be longer than one year, it shall be so arranged that the term of office of an equal number of directors, as nearly as may be, will expire each year. (May 1, 1891, 88 v. 469.)

§ 3836-3. Such corporation shall have power:

DEPOSITS.—To receive money on deposit from time to time to the extent necessary to meet the demands made on it by its members and depositors, but shall not pay interest thereon, exceeding the legal rate.

Rights of depositors.

The rules governing the rights of depositors in building and loan associations differ from those governing the rights of depositors

in banks or other companies where the depositor is a stranger to the company.—*Sachs v. Duckworth, etc.*, Ass'n, 4 N. P. 214 (1897); s. e., 6 Dec. 484.

STOCK.—To issue stock to members on such terms and conditions as the constitution and by-laws may provide; but no person shall vote more than twenty shares in any such corporation in his own right.

Holding stock in excess of limit.

An association cannot, by its action, authorize or permit a member to hold more than twenty shares of its stock in his own right.—*State ex rel. v. Greenville, etc.*, Ass'n, 29 Oh. St. 92 (1876).

Same subject.

An executory contract between a building association and one of its members, in respect to shares claimed by him in his own right and in excess of twenty shares, is *ultra vires*, and cannot be enforced by action.—*Simpson v. Building, etc.*, Ass'n, 38 Oh. St. 349 (1882).

Holding more shares than rules allow — effect.

The fact that a member is permitted to hold in his own right a number of shares greater than the maximum prescribed by the by-laws of the company, but not in excess of the number limited by statute, is not a matter

of defense by such member against the claims of the company against such shares. The association may waive its rule.—*Hagerman v. Ohio, etc.*, Ass'n. 25 Oh. St. 186.

Taking shares in another's name to obtain more than limit — estoppel.

Where one signs a mortgage given to secure a loan taken in his name by another for the purpose of evading this section, he is estopped to plead this as a defense.—See *Ohio, etc.*, Ass'n v. *Leyden*, 1 W. L. B. 126 (1876); *Victoria, etc.*, Ass'n v. *Arbeiter Bund*, 6 W. L. B. 823 (1882).

Transfer fees — not chargeable to equitable owner.

See *Northwestern, etc.*, Ass'n v. *Henderson*, 3 W. L. B. 386 (1878).

Injunction to prevent transfer.

See *Fox v. Baldwin*, O. D. (Dayton) 132.

DUES, FINES, INTEREST AND PREMIUM.—To assess and collect from members and depositors such dues, fines, interest and premium on loans made, or other assessments, as may be provided for in the constitution and by-laws. Such dues, fines, premiums or other assessments shall not be deemed usury, although in excess of the legal rate of interest.

Constitutionality.

This section, in exempting associations from the operation of the usury laws, is in violation of §§ 1 and 2 of the Bill of Rights, and is

void.—*Mykrantz v. Globe, etc.*, Ass'n, 19 O. C. C. 51 (1899); s. e., 10 C. D. 250. See opinion of A. T. Brewer, *contra*, 42 W. L. B. 330.

Building and Loan Associations, § 3836-3.

Interest payable to receiver.

Although the association is in the hands of a receiver, and dues have stopped by common consent, a loan continues to draw interest, without any order of court, it being no defense to show that this interest is unnecessary to equalize the members, and the receiver is entitled to a decree for accrued and unpaid interest without prejudice to future action.—*Hinman v. Ryan*, 3 O. C. C. 529 (1888); s. c., 2 C. D. 305.

Premiums—how fixed under old law.

Premiums could only be fixed by competitive bidding, and the association had no power to fix the premium as a condition of making the loan.—*State ex rel. v. Oberlin, etc., Ass'n*, 55 Oh. St. 258 (1879); *State ex rel. v. Greenville, etc., Ass'n*, 29 Oh. St. 92 (1876); *Bates v. Peoples, etc., Ass'n*, 42 Oh. St. 655 (1885).

When premium cannot be collected.

Where the premium is fixed by a rate per cent., the association cannot recover the premium for a longer period than that fixed in the contract of loan. If the time of payment of the loan is extended either by a renewal of the note or mere forbearance to collect, no premium can be collected after the maturity of the note and mortgage.—*Peoples, etc., Ass'n v. Stevens*, 3 W. L. B. 112 (1878).

Extortionate premiums.

See *Home, etc., Ass'n v. Boning*, 7 W. L. B. 174 (1882).

Interest on premiums.

Associations are not authorized to charge interest on the premiums allowed for pre-advance in taking loans. The money actually advanced is the basis for the computation of interest.—*Forest City, etc., Ass'n v. Gallagher*, 25 Oh. St. 208 (1874). See *Ohio, etc., Ass'n v. Leyden*, 1 W. L. B. 126 (1876).

Dues in insolvent associations.

When an association is insolvent, and is in the hands of a court for liquidation, dues will only be payable as ordered by the court for the purpose of paying debts and equalizing stockholders among themselves.—*Hinman v. Ryan*, 3 O. C. C. 529 (1888); s. c., 2 C. D. 305.

Dues are payments, on stock.

Where the dues are to be paid until the amount of capital is paid in full, such payments are analogous to called payments of installments on stock subscriptions in other corporations.—*Hinman v. Ryan*, 3 O. C. C. 529 (1888); s. c., 2 C. D. 305.

Power to assess fines.

An association may, by its by-laws, assess and collect a reasonable fine for default in the payment of a stated due, but cannot assess or collect more than one fine for the nonpayment of the same stated due. There is no power in

the association to levy, assess or collect a fine for any default in the payment of interest on loans advanced.—*Hagerman v. Ohio, etc., Ass'n*, 25 Oh. St. 186 (1874); *Forest City, etc., Ass'n v. Gallagher*, 25 Oh. St. 208 (1874).

Security for payment of fines.

Where a loan is advanced to a member on his stock, it is within the capacity of the association to take security from such member by mortgage or otherwise for the payment of fines, as well as dues, which may be lawfully assessed on account of such stock.—*Hagerman v. Ohio, etc., Ass'n*, 25 Oh. St. 186 (1874).

Fines collectible to time of decree for sale, but not afterward.

See *Hutchinson v. Straub*, 16 O. C. C. 452 (1879); s. c., 9 C. D. 171; *Windisch v. Korman*, 5 W. L. B. 364 (1880).

Usury.

The various charges in excess of the legal rate of interest are not usurious.—*Lucas v. Greenville, etc., Ass'n*, 22 Oh. St. 339 (1872).

Usury—premium not.

Since the amendments to the original act, the association has the right to fix the premium, though such sum, when added to the interest, exceeds the legal rate of interest allowed by the statutes in other cases, and such excess is not usurious.—*Peoples, etc., Ass'n v. Roberts*, 5 N. P. 86 (1898); s. c., 5 Dec. 489. See *Bates v. Peoples, etc., Ass'n*, 42 Oh. St. 655 (1885); *Mykrantz v. Globe, etc., Ass'n*, 19 O. C. C. 51 (1899); s. c., 10 C. D. 250; opinion of A. T. Brewer, 42 W. L. B. 330.

Attorney fee.

Where a mortgagor has not defaulted on any of the conditions of his mortgage, he cannot be fined or assessed any sum as an attorney fee.—*Kesting v. Donahoe*, 13 O. C. C. 653 (1895); s. c., 6 C. D. 262.

Time and place of payment.

No shareholder is entitled to credit for payments made except those made in cash at the usual place of business of the association at the hour fixed by the by-laws for the receipt of dues, and made according to rules. Payments otherwise made are good, if the money actually comes into the hands of the association.—*Sachs v. Duckworth, etc., Ass'n*, 4 N. P. 214 (1897); s. c., 6 Dec. 254.

In what payments to be made.

Where the constitution of an association provided that payments should be made in money, payments of dues must be made in cash, and the giving of checks is not payment, and if a check is taken the officers are acting as the agents of the member in the matter of the collection of the check, unless it can be shown that the stockholders, by acqui-

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escence in custom or otherwise, authorized a departure from the rules requiring cash payments.—*Mueller v. Cohen*, 27 W. L. B. 353 (1892); *Sachs v. Duckworth, etc.*, Ass'n, 4 N. P. 214 (1897); s. c., 6 Dec. 254.

Default — stoppage of payment — consent.

Where, the company being mistaken as to its basis of business, by common consent all stopped paying dues, although the stock was not paid in full, there is no default because

of such common consent.—*Hinman v. Ryan*, 3 O. C. C. 529 (1888); s. c., 2 C. D. 305.

Controversy as to payment — burden of proof.

The burden of proof is upon the claimants to show payment made according to law, and this burden is not sustained by the mere introduction of the pass-book, showing credits to the amount claimed.—*Sachs v. Duckworth, etc.*, Ass'n, 4 N. P. 214 (1897); s. c., 6 Dec. 254.

WITHDRAWALS.—To permit members to withdraw all or part of their stock deposits at such times and upon such terms as the constitution and by-laws may provide. Any member, however, who withdraws his entire stock or whose stock has matured, shall be entitled to receive all dues paid in and dividends declared, less all fines or other assessments, and less a pro rata share of all losses, if any have occurred.

Power to compromise.

An association has power to compromise with a member and release him from further obligation to the corporation, whether the indebtedness arose from a loan or on a subscription for stock. And where the parties to the compromise have acted in good faith, the transaction will not be rescinded because the released member was paid a greater sum of money than he would have received upon a pro rata distribution of the assets of the concern.—*Wangerien v. Aspell*, 47 Oh. St. 250 (1890). See *State ex rel. v. Oberlin, etc.*, Ass'n, 35 Oh. St. 258 (1879); *Eversmann v. Schmitt*, 53 Oh. St. 174, 189 (1895); *Main Street, etc., Co. v. Richter*, 16 O. C. C. 191 (1898); s. c., 9 C. D. 74.

Inequitable compromise.

A compromise which is unfair and inequitable is not binding and conclusive in an action to adjust liabilities and pay debts.—*Main Street, etc., Co. v. Richter*, 16 O. C. C. 191 (1898); s. c., 9 C. D. 74. See *McKeon v. Irish, etc.*, Ass'n, 5 W. L. B. 52 (1880).

Payment of debts to association, withdrawal claims.

Where the constitution of an association provided that withdrawal claims could only be paid in the order of filing, a mortgagor, having purchased the withdrawal claim of a nonborrowing member which was not yet payable, cannot compel the association to cancel his mortgage by tendering in payment the withdrawal claim.—*Ward v. North Fairmount, etc., Co.*, 5 N. P. 133 (1897); s. c., 8 Dec. 489.

Deductions for possible losses.

As the settlement of the liability of stockholders is a matter between creditors and stockholders, the association cannot make deductions in allowing withdrawals to provide for possible losses.—*Jungkuntz v. West Liberty, etc.*, Ass'n, 6 W. L. B. 428 (1881).

Notice of withdrawal does not change stockholder or member into creditor.

See *Rehn v. North Fairmount, etc., Co.*, 5 N. P. 314; s. c., 7 Dec. 398; s. c., 6 N. P. 185 (1899); s. c., 8 Dec. 594.

CANCELLATIONS.—To cancel shares of stock upon which all payments have been withdrawn, or upon which loans have been canceled, and re-issue them as new stock.

STOCK OF MINORS.—To issue stock to minors and permit the same to be withdrawn as other stock, and the receipt of such minor shall be a valid acquittance, if his rights have been fully secured to him.

REAL ESTATE AND PERSONAL PROPERTY.—To acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of its business or necessary to enforce or protect its securities.

Cannot buy real estate for allotment.

A building association has no power to purchase land on credit to be allotted among its members, and its notes given in part payment

are void in the hands of holders with notice.—*Vos v. Cedar Grove, etc.*, Ass'n, 9 W. L. B. 194 (1883).

BORROWING MONEY.—To borrow money, not exceeding twenty per cent. of the assets, and issue its evidences of indebtedness therefor.

Purposes for which money may be borrowed.

See *State ex rel. v. Oberlin, etc.*, Ass'n, 35 Oh. St. 258 (1879).

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LOANS.—To make loans to members and depositors on such terms, conditions, and securities as may be provided in the constitution and by-laws.

Not a grant of banking powers.

This act is not an act granting "banking powers" within the meaning of § 7, art. 13, of the constitution.—*Bates v. Peoples, etc., Ass'n*, 42 Oh. St. 655 (1885).

General banking business.

An association has no power to make loans and discounts except as provided, and hence no power to do general banking.—*See State ex rel. v. Greenville, etc., Ass'n*, 29 Oh. St. 92 (1876).

Corporation may become borrowing member.

Notwithstanding the general law, that one company cannot become a shareholder in another, a corporation for the purpose of borrowing money may become a member of a loan association.—*Norwalk Savings Bank Co. v. Norwalk Metal, etc., Co.*, 14 O. C. C. 1 (1897); s. c., 7 C. D. 275.

Loans to nonmembers.

An association cannot loan money to persons who are not members.—*State ex rel. v. Oberlin, etc., Ass'n*, 35 Oh. St. 258, 262 (1879); *State ex rel. v. Greenville, etc., Ass'n*, 29 Oh. St. 92 (1876).

Who is depositor.

A person who applies to a building and loan association for a loan of money, and deposits therewith a sum of money, however small, for the purpose of making himself eligible as a borrower, and thereby receives a loan, is estopped, when sued for the money by the association, from denying that he was in fact a depositor.—*Bates v. Peoples, etc., Ass'n*, 42 Oh. St. 655 (1885).

Same subject.

A loan to a depositor is not invalid, though he made a deposit the day the loan was made, and drew it out the day after.—*Lockwood v. Robbins*, 1 C. L. Rep. 101 (1878).

Refusal to loan to members—ouster.

See State ex rel. v. Oberlin, etc., Ass'n, 35 Oh. St. 258 (1879).

Purpose of loan—inquiry.

Associations are not required to ascertain the use to which a member, who obtains a loan on his stock, intends to apply the money. The borrower may use the money for the payment of debts generally, or in his general busi-

ness, or for any other purpose.—*Hagerman v. Ohio, etc., Ass'n*, 25 Oh. St. 186 (1874).

Foreclosure—distribution—computation.

Where the mortgage is given to secure dues, fines and interest, the computation in an order of distribution is made by adding (1) amount found due by order of sale, (2) interest on that amount to confirmation, (3) dues and interest from order of sale to confirmation, (4) average interest on that amount, (5) present value of future dues and interest from date of confirmation.—*Windisch v. Korman*, 5 W. L. B. 364 (1880); *Monitor, etc., Ass'n v. Eggen*, 5 W. L. B. 752 (1880). *See Cincinnati, etc., Ass'n v. Flach*, 1 C. S. C. 468 (1871); *Central, etc., Ass'n v. O'Connor*, 5 W. L. B. 853 (1880).

Same subject—permanent association.

Where the association is a permanent one, the time is to be estimated according to what would be required for paying the particular shares. Future profits must also be estimated and credited, and where the by-laws so provide a balance struck at the end of each year, and computations made on that basis.—*Allemania, etc., Ass'n v. Mueller*, 8 W. L. B. 97 (1882).

Breach of condition of mortgage—deceit.

After breach of the condition of a mortgage given to secure the payment of stated dues, interest on loans advanced, and fines, the decree in an action to foreclose should be confined to the amount of such dues, interest and fines then due and unpaid.—*Hagerman v. Ohio, etc., Ass'n*, 25 Oh. St. 186 (1874). *See Ohio, etc., Ass'n v. Leyden*, 1 W. L. B. 126 (1876); *Risk v. Delphos, etc., Ass'n*, 31 Oh. St. 517 (1877).

Suit brought prematurely.

Where the constitution and by-laws of an association provide that suit may be brought on a loan where the borrowing member is three months in arrears in the payment of his dues, an action brought before such three months have elapsed is prematurely brought.—*Home, etc., Co. v. Tenney*, 7 N. P. 130 (1898); s. c., 8 Dec. 391.

Taxes on property given as security—rights of association.

See Bates v. Peoples, etc., Ass'n, 42 Oh. St. 655 (1885).

CANCELLATION OF LOANS.—To cancel such loans and release the securities on such terms as the board of directors may provide. But any member may have his loan canceled upon the following terms, to wit: After the premium for one year has been paid, and also the interest and premium up to the date of cancellation, the borrower shall pay the sum actually borrowed, less the dues paid and dividends credited.

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He shall pay also any fines or other assessments required by the constitution or by-laws.

Power to traffic in stock.

An association cannot purchase its own shares of stock for the purpose of disposing of them to persons not intending to become members of the association, with a view of making such share the basis of loans to such persons.—*State ex rel. v. Oberlin, etc., Ass'n*, 35 Oh. St. 258 (1879).

When cancellation should be made.

A borrowing member is one who receives in advance the par value of his shares, and agrees, in consideration of such advance, to pay dues on the shares and interest on the loan until the dues paid and the dividend declared are equal to the par value of his shares. He then ceases to be a member, and is entitled to a cancellation of the mortgage given to secure the obligations arising from the loan.—*Eversmann v. Schmitt*, 53 Oh. St. 174

(1895); *Home, etc., Co. v. Tenney*, 7 N. P. 130 (1898); s. c., 8 Dec. 391.

Cancellation by heirs or legal representatives.

Where an association provides by its by-laws that in case a shareholder who has received a loan shall die, "his or her heirs or legal representatives may return the same to the association" and receive the value of the stock as fixed by the by-laws, or they may continue the loan, *held*, that if they elect to return the loan, the amount to be returned is the money actually received plus the premium bid for precedence.—*Licking, etc., Ass'n v. Bebout*, 29 Oh. St. 252 (1876)

Payment of premium.

See *Windhorst v. Germania, etc., Ass'n*, 7 W. L. B. 29 (1882).

RESERVE FUND.—To accumulate from the earnings and invest as the board of directors may determine, a reserve fund, for the payment of contingent losses.

DIVIDENDS.—To make such annual or semi-annual distribution of the earnings (after paying expenses and setting aside a sum for the reserve fund as herein-after provided), as the constitution and by-laws may prescribe.

INCREASE OR DECREASE OF CAPITAL OR FACE VALUE OF SHARES.—To increase or decrease its authorized capital or the face value of its shares at any time, by a majority vote of its board of directors; and a certificate of such action shall be made by the president and secretary, and duly filed with the secretary of state.

DISSOLUTION.—To dissolve the corporation when its continuance shall be deemed, by a majority vote of its members, to be no longer desirable, subject, however, to the vested rights of members.

See § 3836-27. Dissolution of corporations, § 5687. See *North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899); s. c., 8 Dec. 594;

In re Home, etc., Ass'n, 3 N. P. 145 (1896); s. c., 4 Dec. 272.

CONSTITUTION AND BY-LAWS.—To provide, by constitution adopted by its members, and by-laws adopted by its board of directors, for the proper exercise of the powers herein granted, and the conduct and management of its affairs.

Amendments.

By-laws may be amended notwithstanding the fact that they contain no provision for amendments, and though they may be signed by all the members.—*Wangerien v. Aspell*, 47 Oh. St. 250, 260 (1890).

Amendments must except existing contracts.

The mortgage contracts between borrowing members and building associations create vested rights as to rebate of interest, etc., which the association cannot change without their consent. A threatened change may be enjoined.—*Betz v. Fulton, etc., Ass'n*, 1 N. P. 42 (1894); s. c., 1 Dec. 58. See *Burke v. Home, etc., Ass'n*, 7 W. L. B. 114 (1882);

Home, etc., Ass'n v. Boning, 7 W. L. B. 174 (1882).

Changes in constitution cannot affect existing contracts.

See *Wyatt v. Workmen's, etc., Co.*, 12 Dec. 526 (1902).

Proof of by-laws.

It is not necessary to prove the adoption of by-laws by a formal vote of the members or directors. The adoption of by-laws is sufficiently proved by showing that they appear upon the records of the corporation, and have been uniformly acted upon and enforced as the by-laws of the association.—*Hagerman v. Ohio, etc., Ass'n*, 25 Oh. St. 186 (1874).

Building and Loan Associations, §§ 3836-4, 3836-5.

Estoppel to deny legality of constitution.

Where a member has long acquiesced in operations of the company according to its constitution, and many rights of third persons have intervened so that the acts cannot be undone or statu quo restored, such member is estopped from claiming such operations were contrary to statute.—See *Ruehlman v. Atlantic, etc., Co.*, 6 O. C. C. 285 (1892); s. c., 3 C. D. 456; *Deiringer v. Carlisle, etc., Ass'n*, 2 Dec. 543 (1893).

By-laws — duty to insure.

Where the by-laws of a company provide that in case a borrower fails to insure the mortgaged property, the company shall cause the same to be insured; the company after insuring property must attend to renewals and in case it fails to do so and the property is destroyed, it is liable for the loss.—*Geswine v. Star Building, etc., Co.*, 23 O. C. C. 477 (1902).

GENERAL POWERS. — All such other powers as are necessary and proper to enable such corporation to carry out the purpose of its organization. (May 1, 1891, 88 v. 469.)

Not banking powers.

The advancing of money by a building association to its members is not the exercise of banking powers.—*Forest City, etc., Ass'n v. Gallagher*, 25 Oh. St. 208 (1874).

Agents.

A representative of the company authorized to transact most of its business does not become the agent of a borrower by receiving a commission for making a loan.—See *McMullen v. Griggs*, 23 O. C. C. 417 (1902).

§ 3836-4. **DEPOSIT IN BANK AND CHECKS THEREON; TREASURER'S BANK BOOK; EXPENDITURES.** — The board of directors shall designate a bank or banks in which the treasurer shall deposit all funds in the name of such corporation. Such funds can then be withdrawn only by check signed by the president and financial secretary, or such other officers as the board of directors may designate. The treasurer's bank book shall be open to the inspection of any director at any time. No president or secretary or other officer shall sign any check unless the expenditure has been authorized by the board of directors.

BONDS OF OFFICERS; DIRECTORS INELIGIBLE AND PERSONALLY LIABLE. — All officers of such association who have charge or possession of money, securities, or property, shall give bond before entering upon their duties to the satisfaction of the board of directors, for the faithful performance of the same, and the safe-keeping and proper application of all moneys or property coming into their hands. All officers of such corporations on being re-elected to office shall renew their bonds. The bond may be increased or additional sureties required at any time by the board of directors. Directors shall not be eligible as bondsmen, and shall be individually liable for any loss to members, caused by their neglect to comply with the provisions of this section. (May 1, 1891, 88 v. 469.)

Official bonds.

See *Building Ass'n v. Cummings*, 45 Oh. St. 664 (1888).

Bond of attorney.

An attorney for an association is not an officer, and his bond is not an official bond. See further as to liability of sureties, *New German, etc., Co. v. Kuehnert*, 7 N. P. 264 (1896); s. c., 6 Dec. 502.

Set-off.

In an action by a withdrawing shareholder of a building association for the amount of his paid-up installments, with dividends, the association may plead, by way of set-off and affirmative relief, any claim which the association may have against such withdrawing shareholder by reason of moneys wrongfully and unlawfully paid out to him while acting as treasurer of such association.—*Gelhaus v. Allemania, etc., Ass'n*, 4 N. P. 235 (1897); s. c., 6 Dec. 443.

§ 3836-5. **FUND FOR CONTINGENT LOSSES.** — The amount to be set aside to the fund for contingent losses shall be determined by the board of directors, but in all permanent or perpetual associations, at least five per cent. of the net earnings shall be set aside each year to such fund until it reaches at least five per cent. of the outstanding loans. All losses shall be paid out of such fund until the same is exhausted, and whenever the amount in said fund falls below five per cent. of the loans as afore-

Building and Loan Associations, §§ 3836-6, 3836-7.

said, it shall be replenished by annual appropriations of at least five per cent. of the net earnings as hereinbefore provided until it again reaches said amount. (May 1, 1891, 88 v. 469.)

Who interested in reserve.

All members, whether borrowers or not, have a pro rata interest in the reserve fund.

—Seibel v. Building Ass'n, 43 Oh. St. 371 (1885).

§ 3836-6. **EARNINGS; APPLICATION OF.**—All expenses of such associations shall be paid out of the earnings only, and so much of the earnings as may be necessary shall be set aside each year for such purpose. But charges incident to a loan, if paid by the borrower, shall not be deemed a part of the current expenses.

DIVIDENDS.—A portion of the earnings, to be determined by the board of directors, shall also be reserved annually or semi-annually, for the payment of contingent losses, as provided in section five (§ 3836-5) of this act, and the residue of such earnings shall be transferred as a dividend annually, or semi-annually, in such proportion to the credit of all members, as the corporation by its constitution and by-laws may provide, to be paid to them at such time and in such manner in conformity with this act as the corporation by its constitution and by-laws may provide.

Estoppel as to dividends.

Where one on borrowing is fully advised as to how dividends are declared, and received them several years on that basis, and allowed other members to be dealt with in the same way, and it is impossible to recast accounts, he will be estopped to deny the legality of the division.—Ruehlman v. Atlantic, etc., Co., 6 O. C. C. 285 (1892); s. c., 3 C. D. 456. See Deiringer v. Carlisle, etc., Ass'n, 2 Dec. 543 (1893); s. c., 36 W. L. B. 328; Atlantic, etc.,

Co. v. Vogeler, 7 N. P. 605 (1895); s. c., 5 Dec. 581.

Dividends under prior act.

See Seibel v. Building Ass'n, 43 Oh. St. 371 (1885); Ruehlman v. Atlantic, etc., Co., 6 O. C. C. 285 (1892); s. c., 3 C. D. 456; Turner, etc., Verein v. Woodburn, 27 W. L. B. 409 (1892); Deiringer v. Carlisle, etc., Ass'n, 2 Dec. 543 (1893).

LOSSES.—All losses shall be assessed in the same proportion and manner on all members after the amount in the reserve fund has been applied to the payment of the same. (May 1, 1891, 88 v. 469.)

Losses shared by all members.

The members of a building association, whether borrowers or nonborrowers, must assist alike in bearing losses. Where a borrowing member's mortgage secured the payment of assessments, it secures an assessment made by a receiver against all members to equalize losses.—Eversmann v. Schmitt, 53 Oh. St. 174 (1895). See McKeon v. Irish, etc., Ass'n, 5 W. L. B. 52 (1880).

Basis of assessment.

The proper basis of assessment upon the stock of an insolvent association to pay its debts and equalize losses, both in case of borrowing and nonborrowing members, is dues and earnings which should stand to the credit of his stock.—Main Street, etc., Co. v. Richter, 16 O. C. C. 191 (1898); s. c., 9 C. D. 74. See *In re Building Ass'n*, 7 N. P. 518 (1897); s. c., 5 Dec. 556.

Notice of withdrawal does not cut off liability.

The notice to withdraw by a building association stockholder, depositor or member does not save him from liability in the loss which the association may suffer before he succeeds in withdrawing.—Harrison, etc., Ass'n v. Howell, 39 W. L. B. 386 (1898); s. c., 5 N. P. 273; s. c., 7 Dec. 353.

Mortgage not satisfied till losses prorated.

Though a certificate of stock may provide for full payment in a certain time, a mortgage given to secure an advance will not be satisfied until losses are prorated.—Haynes v. Peoples, etc., Ass'n, 2 N. P. 181 (1895); s. c., 3 Dec. 228.

§ 3836-7. **UNDRAWN SHARES LISTED AS CREDITS.**—The shares and loans, advanced to its members, shall be exempt from taxation, except shares of stock upon which no loans have been made or money advanced by the company, shall be considered and held as credits, and the said members individually shall list for taxation the number of shares held by them, and the true value thereof in money, on the day pre-

Building and Loan Associations, §§ 3836-8-3836-12.

ceding the second Monday in April in each year, and the same shall be assessed at such valuation for taxation and taxes as other property. (May 1, 1891, 88 v. 469.)

§ 3836-8. BUREAU OF BUILDING AND LOAN ASSOCIATIONS. — There is hereby established in the department of insurance a bureau to be known as the bureau of building and loan associations, which shall be charged with the execution of the laws of this state relating to building and loan associations. (May 1, 1891, 88 v. 469.)

Duties as to bond and investment companies. — See § 3821r et seq.

§ 3836-9. INSPECTOR; COMPENSATION; BOND; OATH. — The chief officer of said bureau shall be known as the inspector of building and loan associations; the superintendent of insurance, shall, ex-officio, be also the inspector of building and loan associations, and as compensation for his services as such inspector he shall be entitled to receive the sum of one thousand dollars per annum. Before entering upon his duties, he shall give bond to the state of Ohio in the sum of ten thousand dollars, to be approved by the governor, conditioned for the faithful discharge of his duties, and the bond, with his oath of office and the approval of the governor indorsed thereon, shall be filed with the secretary of state.

DEPUTIES; CLERKS. — The inspector may appoint a deputy, who shall be authorized to perform the duties attached by law to the office of inspector, during his absence or disability, and shall receive a salary of eighteen hundred dollars per year. He shall also appoint such other clerks or examiners as may be provided for by law. (May 1, 1891, 88 v. 469.)

§ 3836-10. OFFICES AND EXPENSE. — The adjutant-general shall provide suitable accommodations for the conduct of the business of the bureau in the office of the superintendent of insurance and furnish the necessary furniture, etc., and the expense for the same shall be paid out of the state treasury, on the certificate of the inspector and the warrant of the adjutant-general. (May 1, 1891, 88 v. 469.)

§ 3836-11. INSPECTOR MUST ENFORCE LAWS. — It shall be the duty of the inspector to see that all the laws of this state, relating to building and loan associations, are faithfully executed. (May 1, 1891, 88 v. 469.)

§ 3836-12. LAWS GOVERNING; AUTHORITY PROCURED BY DEPOSIT; BY FILING COPY OF CHARTER, AND BY PROVIDING FOR SUMMONS IN ACTIONS. — Foreign building and loan associations doing business in this state, shall conduct the same in accordance with the laws of the state governing domestic associations, and no such association shall do any business in this state until it procures from the inspector a certificate of authority to do so. To procure such authority, such association shall comply with the following provisions:

First. It shall deposit with the inspector one hundred thousand dollars, either in cash or bonds of the United States or of the state of Ohio, or of any county or municipal corporation in the state of Ohio, satisfactory to the inspector.

Second. It shall file with the inspector a certified copy of its charter, constitution and by-laws, and other rules and regulations showing its manner of conducting business together with a statement such as is required annually from all associations.

Third. It shall also file with the inspector a written instrument, duly executed, agreeing that a summons may issue against it from any county in this state directed to the sheriff of the county in which the office of inspector is situate, commanding him to serve the same by certified copy personally upon the inspector or by leaving a copy thereof at his office. The inspector shall, however, mail a copy of any papers

Building and Loan Associations, §§ 3836-13-3836-18.

served on him, postage prepaid, to the home office of such association. (May 1, 1891, 88 v. 469.)

Exemption from laws governing foreign corporations.— See §§ 14Sc and 14Sd.

§ 3836-13. **CERTIFICATE OF AUTHORITY TO DO BUSINESS.**— Whenever such association has complied with the provisions of this act, and the inspector is satisfied that such association is doing business according to the laws of this state, and is in sound financial condition, he shall issue his certificate of authority to such association to do business in this state. Annually thereafter, upon the filing of the annual statement herein provided for, if the inspector shall be satisfied as aforesaid, he shall issue a renewal of such certificate of authority. (May 1, 1891, 88 v. 469.)

§ 3836-14. **COLLECTION OF INTEREST AND EXCHANGE OF SECURITIES.**— Such foreign association may collect and use the interest on any securities so deposited, so long as it fulfills its obligations and complies with the provisions of this act. It may also exchange them for other securities of equal value and satisfactory to the inspector. (May 1, 1891, 88 v. 469.)

§ 3836-15. **SECURITIES LIABLE FOR CLAIMS.**— The deposit made with the inspector shall be held as a security for all claims of residents of this state against said association, and shall be liable for all judgments or decrees thereon, and subjected to the payment of the same in the same manner as the property of other non-residents. Should any association cease to do business in this state, the inspector may release securities in his discretion, retaining sufficient to satisfy all outstanding liabilities. (May 1, 1891, 88 v. 469.)

§ 3836-16. **TO BE FILED ANNUALLY; COPY OF CONSTITUTION AND BY-LAWS.**— Every building and loan association doing business in this state shall, annually, at the end of each fiscal year, or within forty days thereafter, make a full and detailed report in writing of the affairs and business of the association for the preceding year, and showing its financial condition at the end of said fiscal year. With the first report made by any association it shall also file a certified copy of its constitution and by-laws, or other rules and regulations, showing its manner of doing business. (May 1, 1891, 88 v. 469.)

§ 3836-17. **FORM; OATH AND ATTESTATION; FILING; POSTING ABSTRACT.**— The statement shall be in such form and contain such information as may be prescribed by the inspector of building associations. It shall be sworn to by the secretary, and its correctness attested by at least three directors, or an auditing committee appointed by the board. The original shall be filed with the inspector of building associations within forty days after the close of the fiscal year, and such an abstract thereof as the inspector may require shall be posted for sixty days in the office or meeting place of such association, and also published in some paper regularly issued in the county in which said association is located. (May 1, 1891, 88 v. 469.)

See § 3836-3.

§ 3836-18. **WHEN TO EXAMINE; EXPENSE THEREOF.**— The inspector, when he has reason to suspect the correctness of any statement of an association doing business in this state, or that its affairs are in an unsound condition, or that it is not conducting its business in accordance with law, may make or cause to be made by some person by him appointed for that purpose, an examination into the affairs of such association. The expense of all examinations provided for herein shall be paid by the state of Ohio; provided, that when, by the laws of any other state, district, territory or nation, examinations of such associations of this state are required or

Building and Loan Associations, §§ 3836-19-3836-22.

permitted to be made by any official or other authority of such other state, district, territory or nation, at the expense of such associations, then the expenses of all such examinations made by the inspector of this state, of such association of such state, district, territory or nation, shall be respectively charged to and collected from such associations so examined.

REVOCATION OF CHARTER FOR ILLEGAL PRACTICES.—Should the inspector, upon examination, find any domestic association conducting its business in whole or in part contrary to law, or failing to comply with the law, he shall so notify the board of directors of such association in writing, and if, after thirty days, such illegal practices or failure continue, he shall communicate the facts to the attorney-general, who shall cause proceedings to be instituted in the proper court to revoke the charter of such association.

DISSOLUTION IF CONDITION UNSOUND.—Should the inspector find, upon examination, that the affairs of any such association are in an unsound condition, and that the interests of the public demand the dissolution of such association, and the winding up of its business, he shall so report to the attorney-general, who shall institute the proper proceedings for that purpose. (May 12, 1902, 95 v. 614; May 1, 1891, 88 v. 469.)

When association not insolvent.

See *North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899); s. c., 8 Dec. 594.

§ 3836-19. EXAMINERS: POWERS OF.—Such examiners shall have access to and may compel the production of all the books, papers, securities and moneys, etc., of the association, under examination. They shall have power to administer oaths to, and examine the officers and agents of such association as to its affairs. (May 1, 1891, 88 v. 469.)

§ 3836-20. INSPECTOR MAY PUBLISH RESULT.—When the inspector deems it to the interest of the public, he may publish the results of such examination in some newspaper of general circulation in the county in which such association is located, if it be a domestic association, and in some newspaper in the city of Columbus, Ohio, if it be a foreign association. (May 1, 1891, 88 v. 469.)

§ 3836-21. MAY CANCEL AUTHORITY OF FOREIGN ASSOCIATIONS.—Should the inspector find, upon examination, that any foreign association does not conduct its business in accordance with the law, or that the affairs of any such association are in an unsound condition, or if such association refuses to permit examination to be made, he may cancel the authority of such association to do business in this state, and cause a notice thereof to be mailed to the home office of the association, and to be published in at least one newspaper published in the city of Columbus. After the publication of such notice it shall be unlawful for any agent of said association to receive any further stock deposits from members residing in this state, except payments on stock on which a loan has been taken. (May 1, 1891, 88 v. 469.)

§ 3836-22. FEES TO BE PAID TO INSPECTOR.—Foreign building and loan associations shall pay to the inspector the following fees, to-wit: For filing each application for admission to do business in this state, one hundred dollars. For each certificate of authority and annual renewal of same, fifty dollars; both foreign and domestic associations shall pay to the inspector for filing each annual statement, as follows: If the assets of the association, as shown by the statement filed, amount to \$50,000.00 or less, \$3.00; if more than \$50,000.00 and less than \$100,000.00, \$5.00; if more than \$100,000.00 and less than \$250,000.00, \$10.00; if more than \$250,000.00 and less than \$500,000.00, \$20.00; if more than \$500,000.00 and less than \$1,000,000.00, \$30.00; if more than \$1,000,000.00, \$50.00. For each copy of

Building and Loan Associations, §§ 3836-23-3836-25.

a paper filed in his office, twenty-five cents per folio. For affixing the seal of office and certifying any paper, one dollar. The fees provided for herein shall be deposited, by said inspector, with the state treasurer upon the warrant of the state auditor. (May 12, 1902, 95 v. 615; May 1, 1891, 88 v. 469.)

§ 3836-23. **SECURITIES TO BE DEPOSITED IN STATE TREASURY.**—All securities of cash deposited with the inspector shall be immediately deposited with the treasurer of state, who, with his sureties, shall be responsible for the safe-keeping thereof. The treasurer shall deliver such securities only upon the written order of the inspector of building associations. (May 1, 1891, 88 v. 469.)

§ 3836-24. **Sec. 24. PENALTIES AGAINST ASSOCIATION.**—It shall be unlawful for any building and loan association to do business in this state without having first complied with the provisions of this act, and any association violating any of the provisions of this act, or failing to comply with any of its provisions, shall be fined not less than fifty nor more than one thousand dollars, to be recovered by an action in the name of the state, and on collection paid into the state treasury; provided, that building and loan associations organized in other states, having heretofore transacted business in this state, which shall not have complied with the provisions of this act, shall have the right to close up their business, and fulfill their contracts, heretofore entered into with citizens of this state, through their duly authorized agents, without being subject to the penalties prescribed by this act. (May 1, 1891, 88 v. 469.)

§ 3836-25. **Sec. 25. PENALTIES AND CIVIL LIABILITY OF OFFICERS, AGENTS AND OTHERS; FORBIDDEN ACTS.**—Every president, director, trustee, member of any committee, secretary, treasurer, attorney or any other officer at any time created, or agent of any such corporation, who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of such corporation, or who issues or puts into circulation any warrant or other order, or who assigns, transfers, cancels or delivers up any note, bond, draft, mortgage, judgment, decree, or any other written instrument belonging to such corporation, or raises money otherwise, or receives money from any member or other person for and in the name of such corporation, unless duly authorized by the board of directors of such corporation; or who shall sign the name of any person to any order or warrant for the payment of money without proper power of attorney or written order from such person to whose order such warrant or order is made payable; or any member or members of the board of directors who shall vote to declare, or any financial or first secretary of such corporation who shall declare or advise the board of directors of such corporation to declare a greater dividend than what has been actually earned by the corporation, for the purpose of deceiving the people or defrauding the members of such corporation; or who certifies to or makes any false entry on any book, report, or statement of or to such corporation, with intent in either case to deceive, injure or defraud the corporation or any other company, body politic or corporate, or any individual person, or to deceive any one appointed to examine the affairs of such corporation; and every person who with like intent aids or abets any president, secretary, treasurer, committee or other officer or person in any violation of this section shall be deemed guilty of a felony, and shall be imprisoned not less than one year nor more than ten years, and shall be liable civilly to the party injured, to the extent of such damage thereby incurred, and suit may be brought against such person and the sureties on his bond given to such corporation for the faithful performance of his duty. Any officer whose duty it is, failing to make the reports required by this act, and any officer, employe, or other person, who solicits business for, aids or assists any building and loan association to do business contrary to the provisions of this act, or without having complied with its provisions, shall be guilty of a misdemeanor, and on conviction thereof shall be

Building and Loan Ass'ns — Trade Ass'ns — Common Carriers, §§ 3836-26-3838.

fined not more than five hundred dollars, or imprisoned not more than six months, or both. Such fines, when collected, to be paid into the state treasury. (May 1, 1891, 88 v. 469.)

§ 3836-26. Sec. 26. ANNUAL REPORT OF INSPECTOR. — The inspector shall keep and preserve in permanent form a full record of his proceedings, including a concise statement of each association examined, and he shall, annually, make a report to the legislature of the general conduct and condition of the building and loan associations doing business, in this state, with such suggestions as he may deem expedient. Such report shall also include the information contained in the statements required of the associations, and arranged in tabulated form. He shall also report the names and compensation of the clerks employed by him, the whole amount of the income, the source whence derived, and the expenses in detail, during the year ending on the thirty-first day of December. (May 1, 1891, 88 v. 469.)

§ 3836-27. Sec. 1. DISSOLUTION OR CONSOLIDATION OF BUILDING AND LOAN ASSOCIATIONS. — Building and loan associations shall be authorized to provide in their constitutions and by-laws for the time and terms of the dissolution of such corporations; and also for the consolidation of two or more of such corporations into one, upon such terms and conditions as may be determined upon by their boards of directors; also, in case of the dissolution of any such corporation, its board of directors may, by a majority vote, be authorized to sell and transfer its mortgage securities or other property, or both, to another corporation, person or persons, subject always to the vested and accrued rights of the mortgagors. (April 27, 1893, 90 v. 315; May 1, 1891, 88 v. 469; April 11, 1889, 86 v. 238, § 3835j.)

§ 3837. CO-OPERATIVE TRADE ASSOCIATIONS. — An association incorporated for the purpose of purchasing, in quantity, grain, goods, groceries, fruits, vegetables, provisions, or any other articles of merchandise, and distributing the same to consumers at the actual cost and expense of purchasing, holding, and distributing the same, may employ its capital and means in the purchase of such articles of merchandise as it deems best for the company, and in the purchase or lease of such real and personal estate, subject always to the control of the stockholders, as may be necessary or convenient for purposes connected with and pertaining to its business, and may adopt such plan of distribution of its purchases among the stockholders and others as it deems most convenient, and best adapted to secure the ends proposed by the organization; and any profits that may arise from the business of the company may be divided among the stockholders from time to time, as it deems expedient, in proportion to the several amounts of their respective purchases. (April 13, 1867, 64 v. 145, §§ 2, 5.)

§ 3838. COMMON CARRIERS COMPANIES. — A corporation organized as and for a common-carrier company shall have the following powers:

1. To make all contracts that it shall be lawful for natural persons to make for the carriage of persons, and the storage, forwarding, carriage, and delivery of property, but subject to the same liabilities.

2. To lease, and to hold and operate, any line of railway and its appendages, either before or after its completion, owned by a municipal corporation of this state, and any railway connected therewith, lying without this state, and such portion of any railway within this state as may be necessary for the convenient dispatch of its business.

3. To construct, or complete and equip, any railway and its appendages which it is authorized to lease.

4. To borrow money, not exceeding its authorized capital stock, at a rate of interest not exceeding seven and three-tenths per cent. per annum, and execute bonds or

Common Carriers—Dock Co's—Elevator Co's—Farm Laborers' Ass'ns, §§ 3839-3844.

promissory notes therefor, payable in gold or lawful money, in sums of not less than one hundred dollars, and secure the payment thereof by mortgage or pledge of its property then or thereafter acquired, and its income and franchises, including the franchise to be a corporation; but no mortgage bonds shall be sold at less than par in lawful money, without the consent of a majority in interest of the stockholders, given at a meeting of the stockholders, or in writing. (April 12, 1877, 74 v. 84, § 4.)

§ 3839. ANY COMPANY MAY SUBSCRIBE TO ITS STOCKS.—Any company incorporated or organized under the laws of this state may subscribe for or become the owner of stock in such corporation; but before any such subscriptions shall be made, the directors of the company subscribing shall be authorized to make the same by a vote of the majority in interest of its stockholders, or obtain their consent thereto in writing. (April 12, 1877, 74 v. 84, § 9.)

§ 3840. DOCK COMPANIES.—A company organized for the purpose of constructing and establishing docks in and adjacent to any of the navigable waters in or bordering upon this state, may construct or purchase any dock or docks, and erect thereon any structure suitable for receiving, storing, and delivering produce, and goods of whatever description, and may repair and protect such dock or docks and structures, and sell the same in such manner as may be prescribed by the by-laws of the company. (March 16, 1865, 62 v. 43, § 4.)

§ 3841. ELEVATOR COMPANIES.—A company or association organized as an elevator company may purchase and hold real and personal estate, erect or purchase, and own, the necessary buildings, offices, and machinery for the purpose of carrying on the business of receiving, storing, delivering and forwarding grain of all kinds, may add to and connect with the same the business of general storage, warehouseman, and forwarders of all kinds of produce and merchandise, but shall not, on its own account, nor for others, deal as buyers or sellers; and in the prosecution of its business it shall be governed by the same laws, not inconsistent with this section, which govern individuals in such employment. (March 29, 1867, 64 v. 85, § 3.)

§ 3842. WHEN RAILROAD COMPANY MAY TAKE STOCK IN SUCH COMPANY.—When any such company erects or owns an elevator building, and uses the same for the purpose of receiving or delivering grain from or to any railroad company, as freight carried or to be carried over its roads, or any part thereof, such railroad company may subscribe to or purchase shares in the capital stock of the elevator company, to an amount not exceeding one-third of the entire capital stock of the elevator company, in the name of its president or other officer, and hold the same as trustee, and shall be liable upon such stock, in its corporate capacity, to the same extent and in the same manner as in the case of a natural person. (March 29, 1867, 64 v. 85, § 4.)

§ 3843. FARM LABORERS' ASSOCIATION.—No association incorporated for the purpose of promoting the interests of agriculture, and for the relief of distressed farm laborers, or their widows and orphans, whether such widows and orphans are members of such association or not, and for any other charitable purpose, shall take or hold any real estate, except such as may be actually occupied in the exercise of its legitimate business, and such as it may acquire in securing for or satisfaction of debts justly due it; but real estate so occupied shall not in any case exceed in value the sum of fifty thousand dollars. (May 7, 1877, 74 v. 204, § 5.)

§ 3844. WHAT INVESTMENT IT MAY MAKE.—Such associations shall, after paying their expenses, invest their funds exclusively for the purposes mentioned in their articles of incorporation, and may invest the same in mortgages upon real estate,

Farm Laborers' Ass'ns — Ferry Co's — Firemen's Relief Ass'ns, §§ 3845-3850.

or in county, state, or United States securities; they may, in their articles of incorporation, designate the kinds of securities in which their funds shall be invested, in which case no part thereof shall be invested in securities other than those named therein; but they shall not make any loan to any of their trustees or officers; and they may take by gift, subscription, purchase, devise, or loan; but no loan shall be taken for a less term than three years nor for a greater term than twenty years, nor to an amount exceeding one hundred thousand dollars, nor at a rate of interest greater than four per centum, payable semi-annually. (May 7, 1877, 74 v. 204, § 6.)

§ 3845. **MUST REPORT TO ATTORNEY-GENERAL.** — Every such association shall make, annually, and transmit to the attorney-general, under the signatures of a majority of the trustees, attested by the clerk, a full and true statement of its condition and affairs; and for any willful neglect to make such report within one month after its annual meeting, the attorney-general may proceed against such association for the forfeiture of its charter for such neglect. (May 7, 1877, 74 v. 204, § 7.)

§ 3846. **CONSOLIDATION OF TWO ASSOCIATIONS.** — Any unincorporated association or society organized for any purpose named in section thirty-eight hundred and forty-three may be consolidated with an association incorporated for a purpose named therein, by a resolution of each, adopted by not less than two-thirds of its members, at a meeting called for that purpose; such resolutions, and the votes thereon, shall be recorded by the clerk of the corporate association, and the consolidated association shall thereupon assume the name or title of the corporate association, and be entitled to all its privileges; but the members of the consolidated association shall not be liable for the debts or obligations of the unincorporated association or society. (May 7, 1877, 74 v. 204, § 8.)

§ 3847. **ATTORNEY-GENERAL TO REPORT ANNUALLY.** — The attorney-general shall, annually, report to the general assembly, in a condensed form, the number and condition of such associations, as derived from the annual reports of the trustees. (May 1, 1877, 74 v. 204, § 9.)

§ 3848. **MAY MAINTAIN LIBRARIES, ETC.** — All such incorporated associations may keep and maintain libraries, and a museum of art consisting of models of such improved instruments and machinery as are best calculated to promote the interests of agriculture, for the benefit of such associations, under such rules and regulations as its members from time to time adopt, and may make all needful by-laws for the good government and regulation of the same. (May 1, 1877, 74 v. 204, § 11.)

§ 3849. **FERRY COMPANIES.** — A corporation organized for the purpose of carrying on the ferry business on any of the water-courses in this state, or bordering thereon, may build, purchase, and hold steam ferry-boats, and other vessels and floats, real estate, landings, wharves, docks, and other property, in this state or elsewhere, deemed advisable and proper to carry on its business, buy or lease, and use, let, or otherwise dispose of the same, or any part thereof, in such manner as it deems advisable, carry on the ferry business at the place named in its articles of incorporation, transport persons and property, and receive such compensation therefor as may be lawful, and shall be governed by the laws that govern natural persons in such employments. (April 11, 1865, 62 v. 114, § 4.)

§ 3850. **FIREMEN'S RELIEF ASSOCIATION.** — An association of members of any regular fire, hose, or hook and ladder company, incorporated for the purpose of affording relief to firemen disabled while on duty, and making donations to indigent, sick firemen, and to the widows and orphans of deceased firemen, may provide for the election of its directors or trustees at separate elections, to be held by the members

Firemen's Relief Ass'ns — Fishery Co's — Waterway Co's — Mfg. Co's, §§ 3851-3856.

in good and regular standing of each fire, hose, or hook and ladder company who are members of the corporation, and fix the number to be elected by each such company. (March 13, 1861, 58 v. 37, §§ 1, 5, 6.)

§ 3851. **CERTAIN POWERS OF SUCH ASSOCIATIONS.** — Such corporations may decide what officers they will have, and prescribe the manner of their election, and their duties, may make regulations for the relief of firemen disabled while on duty, and provide for such entrance fee for members, and such weekly, monthly, or yearly assessment upon members, as it deems best. (March 13, 1861, 58 v. 37, § 6.)

§ 3852. **THEIR POWER TO ACQUIRE AND DISPOSE OF PROPERTY.** — Such corporation may acquire, hold, enjoy, dispose of, and convey all property, real or personal, which it may acquire by purchase, contribution, donation, assessment upon its members, or otherwise, for the purpose of carrying out the objects of the corporation, but it shall not acquire or hold property for any other purpose; and for the purpose of increasing its funds it may loan its money upon bond and mortgage, under such rules and regulations as may be prescribed, and at an annual interest not exceeding six per cent. per annum. (March 13, 1861, 58 v. 37, § 5.)

§ 3853. **FISHERY COMPANIES.** — When a company organized for the purpose of propagating fish and establishing fisheries in this state acquires the right to use any stream, canal, or reservoir, from the owner of the land adjoining thereto, for the establishment of a fishery to be owned, maintained, and used for the purpose of propagating fish, no person shall fish therefrom without first obtaining authority from such company; and a person who violates the provisions of this section shall be liable to such company in trespass, or to such fines as may be authorized by law against persons trespassing upon lands; but the navigable streams and public canals in this state shall not be subject to the provisions of this section, and nothing in this section shall be so construed as to prohibit the privilege of any person to use or fish from any lake, river, stream, or reservoir which, by custom or usage, has been used for the purpose of fishing therefrom as regulated by law. (January 15, 1873, 70 v. 9, §§ 2, 6.)

§ 3854. **COMPANIES FOR IMPROVEMENT OF NAVIGABLE STREAMS.** — The directors of a company incorporated for the purpose of improving any stream of water, or any part thereof, declared navigable by any law of this state, may prescribe the rates of toll the company shall be entitled to receive for the passage of any boat or other watercraft through any lock upon such improvement, or for the running of any boat or other watercraft between the locks on the same. (April 6, 1859, 56 v. 239, § 7.)

§ 3855. **MANUFACTURING COMPANIES MUST KEEP CERTAIN ACCOUNTS.** — Every manufacturing company shall establish and keep, at some place within one of the counties in which its business is carried on, a principal office, at which shall be kept accurate accounts exhibiting the financial condition of the corporation, and of its capital stock or shares, and of all its property of every description, and credits, subject to taxation, which accounts shall at all times be subject to the inspection of any assessor lawfully authorized to assess such property and credits; notice of the place where such office is established, and of any change thereof, shall be published in some newspaper of general circulation in such county; and the principal accounting officer of such company shall be a resident of this state. (March 30, 1857, 54 v. 72, § 82.)

Construction.

See *Mercantile Trust Co. v. Etna Iron Works*, 4 O. C. C. 579, 587 (1890); s. c., 2 C. D. 718.

§ 3856. **MAY EXTEND THEIR OPERATIONS.** — A company incorporated for manufacturing purposes may, upon a vote of the holders of a majority of its stock,

Iron Co's — Market-house Co's — Mining and Manufacturing Co's, §§ 3857-3862.

extend its manufacturing operations to articles in the same line of business that are not authorized by the terms of the original articles of incorporation; and after making a certificate of such vote, and specifying therein how far the manufacturing operations are to be extended, verified by the oath of its president, and filing the same in the office of the secretary of state, such company may manufacture and sell such articles as shall be named or otherwise provided for in such certificate. (April 19, 1861, 58 v. 58, § 1.)

§ 3857. COMPANY TO MANUFACTURE IRON MAY MAKE STEEL. — Any company incorporated for manufacturing iron may, upon a vote of the holders of a majority of its stock, engage in and carry on the business of manufacturing steel in its various branches. (April 2, 1866, 63 v. 67, § 1.)

§ 3858. MARKET-HOUSE COMPANIES. — A company incorporated for the purpose of constructing and maintaining a market-house may construct, erect, establish, and maintain, at the place named in its articles of incorporation, a suitable building or buildings to be appropriated and used exclusively as a public market-house, for the sale and vending of meats, vegetables, and all other kinds of provisions, and of fruits, plants, and flowers, and all other articles commonly sold and vended in public market-houses or spaces, on market days, in market hours. (April 19, 1861, 58 v. 92, §§ 1, 2.)

§ 3859. POWERS OF SUCH COMPANIES. — Such companies may rent, lease, sell, or dispose of stalls, cellar vaults, or other divisions or spaces in their buildings, in such manner, and upon such terms and conditions, as the directors shall determine; but a uniform rule in renting or leasing such stalls, cellar vaults, or other divisions or spaces, shall be established, printed, and hung in conspicuous places in the buildings, and the same may be changed, from time to time, by the directors thereof; and no preference shall be made, by any variation or difference in rates or prices, in favor of citizens of the city or village wherein the buildings are erected, and against farmers, butchers, or producers not residing in such city or village, and no rule, regulation, order, or condition shall be made or exacted by any company to prevent farmers, butchers, or other persons from disposing of their produce, meats, vegetables, or other articles, in such quantities and upon such terms as they may deem proper; but such companies shall prohibit and prevent in their buildings the use of false weights or measures, the exposure or sale of any diseased or decaying meats or vegetables, and any offensive or injurious articles. (April 19, 1861, 58 v. 92, § 5.)

§ 3860. MAY KEEP STREETS UNOBSTRUCTED. — Such companies may keep the streets, alleys, or avenues in front of their buildings free, open, and clear of any and all obstruction from stoppage of wagons, carriages, or vehicles of any kind, or of horses, mules, or cattle, on market days, in market hours. (April 19, 1861, 58 v. 92, § 6.)

§ 3861. MAY CONSTRUCT SEWERS. — When any such company erects its buildings in a city or village having a sewer with which the company may connect sewers of its own construction sufficient to drain its buildings, it shall construct such sewers, and so connect them; and in cities and villages not having sewers, such companies may construct sewers for the drainage of their buildings, and charge and receive a compensation for the tapping and use of the same, or portions thereof. (March 13, 1861, 58 v. 92, § 7.)

§ 3862. POWERS OF MINING AND MANUFACTURING CORPORATIONS. — Any company heretofore incorporated or that may hereafter be incorporated under the laws of this state, for the purpose of mining or boring for petroleum or rock oil, or coal

Mining and Manufacturing Companies, §§ 3863-3866.

oil, salt or other vegetable, medicinal or mineral fluid, in the earth, or for refining or purifying the same, quarrying stone, marble, or slate, mining coal, iron, copper, lead or other minerals, or manufacturing the same, or engaged in the manufacturing of articles composed in the whole of iron or part of iron and wood, or for manufacturing cotton or woolen fabrics in whole or in part, or both, and carrying on business connected with the main objects of such corporation may, in its corporate name, take, hold, and convey such real estate and personal estate as is necessary or convenient for the purpose for which it was incorporated, and may carry on its business, or so much thereof as is convenient, in any county in this state, or beyond the limits of this state, and may there hold any real or personal estate necessary or convenient for conducting the same. (March 26, 1883, 80 v. 76; R. S. 1880; April 13, 1874, 71 v. 69, § 1; April 13, 1865, 62 v. 143, § 1.)

§ 3863. MAY SUBSCRIBE FOR STOCK IN TRANSPORTATION COMPANIES.

— The directors of any such company may authorize its president, or other proper officer, to purchase or subscribe for, in the name of the company, such an amount of the stocks of any railroad, or other transportation company, as they deem necessary, in order to procure proper facilities for transportation for the manufactories, mines, or other works of the company; but the written consent of the holders of two-thirds the capital stock of the company to such subscription or purchase must first be had. (April 13, 1874, 71 v. 69, § 2.)

May mortgage property to aid railroad.

See Central Trust Co. v. Columbus, etc., Ry. Co., 87 Fed. 815 (1898).

§ 3864. CERTAIN COMPANIES MAY CONSOLIDATE. — Any two or more such corporations may be consolidated in the manner and to the effect provided in sections thirty-three hundred and eighty-one and thirty-three hundred and eighty-two. (April 3, 1868, 65 v. 50, § 1.)

Consolidation of street-railroad companies.

See § 2505b and § 3380.

§ 3865. CERTAIN CONVEYANCES MUST BE MADE. — When such agreement for consolidation has been duly ratified in the manner specified in the preceding section, the president and secretary of the company which, by the agreement, surrenders its name, properties, rights, and franchises, shall execute and deliver to the consolidated corporation proper deeds, assignments, and transfers, conveying to the consolidated corporation all of the rights, property, and effects of the corporation so surrendering its name and property, and from and after the execution of such transfers the corporation so agreeing to surrender its name and rights shall cease to be a corporation, and to exercise corporate rights. (April 3, 1868, 65 v. 50, § 4.)

§ 3866. MAY BUILD A RAILROAD. — Companies organized for the purpose of mining, quarrying, or manufacturing, may, when such purpose is stated in the articles of incorporation, construct a railroad, with a single or double track, with such side-tracks, turnouts, offices, and depots as they deem necessary to carry out the objects of the incorporation, from any mine, quarry, or manufactory, to any other railroad, or any canal, slack-water navigation, or other navigable water or place within or upon the borders of this state, and shall, in respect to such railroad, be subject to and governed by the provisions of chapter two. (April 8, 1856, 53 v. 103, § 3.)

Appropriation of land.

This act does not authorize such mining companies to appropriate lands.— Miami Coal Co. v. Wigton, 19 Oh. St. 560 (1869).

Application of § 3311 to such companies.

See § 3311, note; but as to manufacturing companies, see, also, § 3855.

Branch roads to mines, etc.

See § 3280.

Stock-yard companies may lease railroad.

See § 3876.

Mining Companies — Museum, Park, Rink, etc., Companies, §§ 3867-3870.

§ 3867. MINING COMPANIES MAY ACQUIRE ADDITIONAL POWERS. — A company organized for the purpose of mining coal, or for the purpose of mining iron ores and coal, or a part of whose business is the mining of iron ores and coal, may, upon a vote of the holders of two-thirds of its capital stock, engage in the business of manufacturing iron from ores, or engage in any other branch of the manufacture of iron; but before it shall engage in such manufacture it shall, by its president, execute a certificate, under the corporate seal of the company, setting forth the particular branch or branches of the manufacture of iron in which it purposes to engage, and the place or places where the business, or any part thereof, is to be located, the same to be verified by the oath of the president, and acknowledged, certified, and forwarded to the secretary of state; and thereupon the company may carry on the business named in such certificate, in addition to the business named in the original articles of incorporation. (January 24, 1877, 74 v. 21, § 1.)

§ 3868. MUSEUM, PARK, POND, AND RINK COMPANIES. — When a corporation organized for the purpose of constructing and conducting a museum to be used for the exhibition and preservation of works of nature and art, and for instruction in connection therewith, or a public hall of any kind, or a park, pond or rink to be used for skating or other lawful sports, or for holding fairs, festivals, public meetings, concerts or entertainments of any kind not prohibited by law, provides in its articles of incorporation that its buildings, or designated part thereof, shall be devoted to the use of the public for all purposes set forth in its articles, free from all costs, charges, and expense, except such as may be necessary for providing the means to keep such buildings, or such designated part thereof and its grounds in proper condition and repair, and to pay the expenses of insurance, care, management and attendance, so that the public may have the benefit thereof for all the legitimate uses set forth in its articles at as little expense as possible, and that no stockholder, subscriber, trustee, director or member shall receive any compensation, gain or profit from the corporation for such public use of its buildings or such designated part thereof, the authorities of any city, village or county in which the corporation is located, may appropriate to such use and grant the right and permit such corporation to erect and perpetually maintain its buildings on any of the parks, lands, lots or grounds which, or the use of which belong to or are subject to the control of such city, village or county or the authorities thereof, and to control the same on the terms and conditions which may be agreed upon between such public authorities and the corporation; and in every such case it shall be lawful for the public authorities and the said corporation to agree that additional trustees of said corporation may be appointed by such public authorities, and upon the number of such trustees and the method of their appointment, and they may agree that any officer or officers of said city, village or county to be designated by them may act ex-officio as such trustees. (April 12, 1881, 78 v. 127; R. S. 1880; February 12, 1876, 73 v. 8, § 1; March 8, 1872, 69 v. 20, § 1.)

§ 3869. MAY PROVIDE FOR REVERSION OF STOCK, ETC. — Such corporation may provide in its organization a limit as to the number of shares which each stockholder may own, the conditions on which such shares may be held or transferred, and for the reversion thereof to the corporation in case of the death or disqualification of a stockholder. (February 12, 1876, 73 v. 8, § 2.)

§ 3870. PENALTIES FOR TRESPASSES UPON PROPERTY OF SUCH COMPANIES. — Whoever breaks, throws down, or injures any gate, fence, inclosure, embankment, or erection of any kind, upon the ground of any such corporation, or forcibly or fraudulently passes such gate, or over such fence, or into such inclosure or building, without having paid the charge demanded for entry therein, shall, for each offense, forfeit to the party injured the sum of twenty-five dollars, in addition to the damages resulting from such wrongful act. (April 5, 1867, 64 v. 182, § 7.)

Sewerage Companies — Stock-yard Companies, §§ 3871-3876.

§ 3871. **SEWERAGE COMPANIES.** — A company organized for the purpose of draining the streets, alleys, lots, commons, wharves, landings, or buildings of any city or village in this state, may construct and maintain sewers and drains, and lay conductors or pipe for conveying water and other liquid matter from the lots, houses, and streets, through and under the streets, side-walks, public highways, alleys, commons, wharves, or landings of any city or village in this state; upon application by such company the council of any city, or the trustees of any village, may grant to it the privilege of exercising its corporate powers within the limits of such city or village, for such term of years, and upon such conditions and limitations, as may be deemed expedient; and the city council, or the council of the village, may require from the company such reasonable security as they deem necessary for the faithful performance of the duties imposed upon it by law; but no grant shall be made to any company, and no power or privilege shall be conferred upon or exercised by any company, which will interfere with the rights of any other corporation, or any person, and no person shall be taxed without his consent for any drainage or sewerage constructed by any such company; and such companies shall be liable for all damages occasioned by their acts, neglects, or defaults to the rights of persons and other corporations. (April 8, 1856, 53 v. 137, § 5.)

§ 3872. **WHEN MUNICIPALITY MUST BUY OUT COMPANY.** — When a city or village which has granted to any such company, for any term, the rights and privileges mentioned in the preceding section, and, at the expiration of the term, fails or refuses, upon petition of the company, to renew the grant, the city or village shall purchase of the company its property, consisting of sewers, drains, and pipes actually laid and constructed, with the appurtenances, and the materials and fixtures appertaining to the same, on hand at the time of the expiration of such terms, at a price not exceeding the actual cost thereof, for the use and benefit of the city or village. (April 8, 1856, 53 v. 137, § 5.)

§ 3873. **MUNICIPALITY MAY CONTRACT WITH COMPANY.** — The council of any city, or the council of any village, in which any such company is organized, may contract with the company for the construction and use of such sewers or drains, for draining the streets, alleys, lots, commons, wharves, or grounds within the limits of the municipal corporation; and the city or village shall not use such sewers or drains in any manner except by and with the consent of the company, and in the manner, and upon the terms and conditions, which are mutually agreed upon by the company and the city or village. (April 8, 1856, 53 v. 137, § 6.)

§ 3874. **COMPANIES MAY PRESCRIBE RATES.** — Such companies may prescribe the terms upon which owners and occupants of houses or lots may obtain the use of their sewers and drains for private purposes, and the rate of charge annually for such use, and also the terms upon which the city or village may use the sewers and drains for public purposes. (April 8, 1856, 53 v. 137, § 7.)

§ 3875. **POWERS OF MUNICIPALITIES NOT LIMITED.** — Nothing in the four preceding sections shall be construed to prevent any city or village from constructing sewers, or establishing and maintaining a system of sewerage, under the direction and by the authority of the municipal authorities thereof, not interfering, however, with the work of such company. (April 8, 1856, 53 v. 137, § 8.)

§ 3876. **STOCK-YARD COMPANIES.** — A company incorporated for the purpose of purchasing or leasing real estate, and erecting thereon pens and buildings for the safe keeping of live stock intrusted to it on sale, may lease or purchase, and operate, such portion of any railway leading to or connected with its stock-yards as may be necessary for the convenient dispatch of its business; but the number of miles so

Transportation Companies — Pipe Line Companies, §§ 3877, 3878.

leased or purchased shall not exceed thirty, and such lease or purchase shall not be made without the consent of the holders of a majority of the stock in such company, and in the company leasing or selling such railway. (April 3, 1876, 73 v. 162, § 3.)

§ 3877. **TRANSPORTATION COMPANIES.** — A company organized for the purpose of transporting freight, or for towing purposes, on any of the navigable rivers of this state, or the lakes and navigable rivers bordering thereon, may build, purchase, and hold such number of steamboats, barges, or other vessels, and such other personal property, and such real estate, in this and other states, as it deems necessary for commencing and conducting its business, and may sell the same, or any part thereof, in such manner and for such purpose as may be prescribed by the rules and regulations of the company, not inconsistent with the laws of this state; and the company may carry any articles of freight or produce, tow any barge or other vessel upon any of the navigable streams in this state, and on any of the lakes or navigable rivers bordering thereon, and shall be governed by the same laws, not inconsistent with this section, which govern individuals in such employments. (April 3, 1876, 73 v. 162.)

§ 3878. **COMPANIES FOR TRANSPORTATION OF NATURAL GAS, OIL, OR WATER; RIGHT OF EMINENT DOMAIN; HOW RIGHT TO OCCUPY PUBLIC WAYS MAY BE ACQUIRED; FILLING IN EXCAVATIONS; FOR WHAT PURPOSES SUCH COMPANIES ARE COMMON CARRIERS** -- A municipal corporation or a company organized for the purpose of transporting natural gas, petroleum, or water through tubing or pipes or for the purpose of storing and transporting water, may enter upon any land for the purpose of examining and surveying a line for its tubing and pipes, or for a reservoir, and may appropriate so much thereof as may be deemed necessary for the laying down of such tubing and pipes, and for the erection of tanks, and reservoirs for the storage of water for transportation, and the location of stations along such line, and the erection of such buildings as may be necessary for the purpose aforesaid; such appropriation shall be made and conducted in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations; and so far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the council of municipal corporations as to streets and alleys, in their respective jurisdiction, may, subject to such regulations and restrictions as they may prescribe, grant to such company, the right to lay such tubing and pipe therein; provided, however, the right to appropriate for any of the purposes hereinabove specified, shall not include or extend to the erection of any tank, station, reservoir, or building, or lands therefor, or to more than one continuous pipe, or tubing, or land therefor, in or through a municipal corporation, without the council first consent thereto; provided, however, that no reservoirs for the storage and transportation of water shall be constructed within the corporate limits of any municipal corporation, or any public park, and all excavations, except reservoirs for storage and transportation of water shall be well filled by such company and so kept by it, in all cases, and such company shall, for the purpose of transporting natural gas, oils and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state. (March 24, 1888, 85 v. 114, 115; R. S. 1880; March 30, 1875, 72 v. 151, §§ 1, 2; April 29, 1872, 69 v. 194, § 4; April 16, 1900, 94 v. 382.)

Does not include city water works.

See *State ex rel. v. Salem Water Co.*, 5 O. C. C. 58 (1890).

Suit for conversion of oil; counter-claim.

When a company is sued for storage of oil,

it may counterclaim for the agreed charges for storage and evaporation.—*Cow Run Co. v. Lehmer*, 41 Oh. St. 384 (1884).

Right to lay pipes in streets.

See *Webb v. Ohio Gas Fuel Co.*, 16 W. L. B. 121 (1886).

Pipe Line Companies — Women's Homes, etc.— Wrecking Companies, §§ 3879-3882.

§ 3879. **MAY HOLD CERTAIN PROPERTY.** — Any such company may take, by purchase or otherwise, and hold, such real and personal estate, and erect or purchase the necessary buildings and machinery for carrying on the business, including all the necessary equipments and appendages of the business, such as tubing, pumps, tanks, telegraph apparatus, and engines, as may be necessary to transport oils and water through tubes and pipes. (April 25, 1868, 65 v. 109, § 2.)

§ 3880. **FURTHER POWER OF SUCH COMPANIES.** — Any such company or municipal corporation may transport, store, insure and ship natural gas, petroleum or water, and transport and store water, for the purpose of furnishing the same to engineers employed in developing for, or in the production and transportation of petroleum, and for that purpose may lay down, construct and maintain the necessary pipes, tubing, tanks, machinery and arrangements. (March 24, 1880, 85 v. 114, 115; R. S. 1880; March 30, 1875, 72 v. 151, § 2; April 16, 1900, 94 v. 382.)

§ 3881. **HOMES FOR AGED AND INDIGENT WOMEN.** — Corporations designated as the widows' home, and asylum for aged and indigent women, may, in addition to the estates, real, personal, or mixed, which they are otherwise allowed by law to hold, take by purchase, gift, or devise, and hold, use, and dispose of, and convey, in all lawful ways, any estate, real, personal, or mixed, which may be convenient or necessary for the use of the corporation, or for the investment of its funds; but no part of such estate, nor of the income thereof, shall be used for any purpose or business other than in providing a suitable asylum, the support and maintenance thereof, and the support and maintenance of such aged and indigent women as are admitted into the same under the by-laws thereof. (February 27, 1878, 75 v. 14, § 1.)

§ 3881-1. **CONTRACT FOR CARE AND MAINTENANCE OF INDIGENT DEAF AND DUMB.** — That any incorporated association organized for the purpose of providing a home for deaf and dumb persons may enter into a contract with the board of county infirmary directors of any county, or with the proper officers of any corporation infirmary, for the care and maintenance at such home of any deaf and dumb person who may be an inmate of said county or corporation infirmary, or who may, under the laws of the state, be entitled to admission thereto. And in every such case the said county or corporation infirmary shall, during the period such person may remain in such home, pay to such association, annually, a sum equal to the per capita cost of maintaining inmates in the said county or corporation infirmary. Provided, that whenever any such deaf and dumb person is maintained in any county or corporation infirmary in this state, and who, in the judgment of the board of state charities, should be removed from such infirmary to a home organized under provision of this section, that said board of state charities may order the removal of said person from said infirmary to said home; and where any such person is removed on the order of said board of state charities from an infirmary to said home, then the transportation of said person to said home and his (or her) maintenance shall be paid by the infirmary directors of said county infirmary or the proper officers of said corporation infirmary as heretofore provided in this section. (April 22, 1898, 93 v. 212; April 27, 1896, 92 v. 419; April 16, 1900, 94 v. 369.)

§ 3882. **WRECKING COMPANIES.** — Any company or association organized for the purpose of wrecking boats and vessels, and saving the same, and the property thereon, or property lost by damage or injury to boats or vessels, may build, purchase, and hold such number of boats, vessels, diving-bells, and other appliances and property as it deems necessary for commencing and conducting the business of the association, and may sell and dispose of the same, or any part thereof, and contract for salvage or compensation for saving boats, vessels, and other property, and demand, recover, and receive salvage, or such compensation when entitled thereto by contract

Fruit Co's — Embalm'g Co's — Build'g Co's — Cincin'ti Orphan Asy'm, §§ 3883-3884-1.

or otherwise, and shall be governed by the same laws not inconsistent with this section which govern individuals in such business or employment. (March 11, 1867, 64 v. 44, §§ 2, 4.)

§ 3883. FRUIT COMPANIES. — Any companies organized for the purpose of cultivating, canning, shipping, and dealing in fruit, may purchase, hold, and convey real and personal property for the purpose of conducting and carrying out the objects of the company, and may hold the same without the state.

§ 3884. COMPANIES FOR PROTECTING AND PRESERVING DEAD BODIES. — Any association organized for the purpose of preserving and protecting bodies of deceased persons before burial may purchase, or take by devise, or gift, hold, and convey real estate, not exceeding one acre of land, and may erect thereon suitable buildings, and construct and maintain vaults, and such other appliances as may be necessary to carry out the objects of such association, and such property shall be exempt from execution, from taxation, and from being appropriated to any other public purpose, if used exclusively for the purposes herein described.

§ 3884a. AUTHORIZING CERTAIN CORPORATIONS TO PURCHASE OR LEASE REAL ESTATE. — A corporation organized for the purpose of constructing and maintaining buildings to be used for hotels, store-rooms, offices, ware-houses, factories, shall be authorized to acquire by purchase or lease, and to hold, use, mortgage and lease all such real estate or personal property as may be necessary, for the purpose herein before mentioned; provided, however, that no such corporation shall acquire or mortgage any real or leasehold estate, or lease the same for a period exceeding (with all privileges of renewal) the term of five years, without the consent of the holders of two-thirds of the stock, obtained at a meeting called for that purpose, written notice of which shall have been given to each stock-holder, either personally, or deposited in the post-office, properly addressed and duly stamped, not less than ten days before the day fixed for such meeting. Nothing herein shall be construed as authorizing corporations to buy and sell, or to deal in real estate for profit. (April 15, 1889, 86 v. 375, 376.)

General power to hold real estate.

See § 3239, notes.

§ 3884-1. Sec. 1. CINCINNATI ORPHAN ASYLUM; INCREASE IN NUMBER OF MANAGERS; SAME TO BE CLASSIFIED; ANNUAL ELECTION; POWER TO REQUIRE INCREASED OR DIMINISHED NUMBER OF MANAGERS. — In any city of the first class and of the first grade of such class, any orphan asylum therein legally named and known as the Cincinnati Orphan Asylum, incorporated and conducted under the act of Jan. 25, 1833, to establish an orphan asylum in Cincinnati, which asylum was created before the present constitution of this state was adopted, is now and ever since it was created has been conducting and transacting its functions as an orphan asylum under said act, has not by election or by any other act come to be governed by laws since passed, but all the time has been and is controlled and governed by laws then in force, and the valid modifications since enacted; such orphan asylum from and after the date of the enactment of this act, shall be empowered and authorized by its lady managers, at any meeting reasonably convened and notified for that purpose, if deemed expedient, to increase the number of managers for the institution to eighteen. In the event of an increase in the number of managers to eighteen, they shall, by drawing lots or otherwise, be classified so that the time of service of one-third of the number shall expire at the end of one year, one-third of the number at the end of two years, and one-third of the number at the end of three years from the period of the commencement of the respective terms of service. At the annual meeting of the members of the corporation, there shall be elected each year,

Cincinnati Orphan Asylum, §§ 3884-2-3884-5.

managers to fill the places made vacant by expiration of term of service or otherwise; provided, nevertheless, it shall be in the discretion of the lady managers, at any meeting of the managers reasonably notified and convened for that purpose, to require an increased or diminished number of managers, at and after their next election; but the number as increased or diminished shall be such as to be divisible by three into corresponding classes, whose terms shall expire, and with reference to which elections shall be held as before provided. (April 14, 1888, 85 v. 278.)

§ 3884-2. **MEMBERSHIP; ELIGIBILITY TO OFFICE; LIFE AND HONORARY MEMBERSHIPS.** — From and after the date of this act, and from expirations of the current subscriptions, no person shall be entitled to membership in the corporation or to hold office in it other than annual subscribers and contributors in at least the sum of five dollars per annum; such subscriptions and payments to be made in conformity with rules prescribed by the managers; provided, however, that any present lady member who has held her membership and regularly paid her annual subscription for ten years last preceding the passage of this act may, at her option, continue her membership by paying the same amount per annum as heretofore required. But nothing herein shall prevent the membership or qualification for office of persons who have become life members under the provisions authorizing them to do so, on the payment of fifty dollars; nor prevent the creation of other life memberships on the payment of one hundred dollars or valuable service rendered; nor shall anything herein be held to prohibit honorary memberships, without the right to vote, from being conferred by the managers upon friends of the institution, whose services and influence deserve such honor. (April 14, 1888, 85 v. 278.)

§ 3884-3. **RIGHT TO OWN PROPERTY; TO RECEIVE AND ADMINISTER ENDOWMENTS IN OTHER STATES.** — That said corporation shall be capable of purchasing, taking, holding and conveying any estate, real, personal or mixed in this state, and of accepting, holding, and administering or conveying any amount of endowment or income in any other state given to it for its uses, and which may be available for its uses, but in any case and always for the sole object and purpose of increasing the usefulness of the institution as an orphan asylum, nor shall any part of its property or income be used for any purpose or object other than the legitimate objects of the institution. (April 14, 1888, 85 v. 278.)

§ 3884-4. **PLACING OF CHILDREN IN SUCH ASYLUM.** — That any child or person by law entitled, or subject to be placed in any children's home in the county of Hamilton, may, by the same method of procedure, and on the same terms and conditions, subject to the consent of the managers of the Cincinnati Orphan Asylum, be placed in said asylum. (April 14, 1888, 85 v. 278.)

§ 3884-5. **AN AGREEMENT BETWEEN THE TRUSTEES AND COUNTY COMMISSIONERS FOR THE ADMINISTRATION OF CERTAIN TRUSTS.** — That when, and if, the commissioners of Hamilton county shall accept or have accepted, a devise or devises under the last will and testament of any devisor, or have accepted or shall accept property of any kind in trust, whether conveyed by will, deed of conveyance or other lawful transfer, for the purpose, specified in an act "to authorize county commissioners in certain cases to accept devises and legacies, and to erect and maintain an orphan asylum in connection with a children's home," passed February 11, 1869 (66 O. L. 8), and the amendment thereto, passed February 4, 1885 (82 O. L. 41), it shall be lawful for the county commissioners and the trustees of the Cincinnati Orphan Asylum to agree, and if deemed expedient, they are authorized to agree for the administration of such trust or trusts and the care of beneficiaries of the trust or trusts, in accordance with the terms of the bequest, by said orphan asylum; but in

Cincinnati Orphan Asylum — Transportation of Cattle, §§ 3884-6 4211-22.

no event shall the Cincinnati Orphan Asylum, without the assent of the managers of said asylum, undertake such trusts. (April 14, 1888, 85 v. 278.)

§ 3884-6. **ADOPTION AND BINDING OUT OF ORPHAN CHILDREN.** — The managers of the Cincinnati Orphan Asylum, in the exercise of their discretion, are authorized to place children who are in charge of the asylum, whether orphans, half-orphans or merely destitute children, in homes, and consent to their adoption by suitable persons, or to bind them out to trades or service; such adoption or binding out being in conformity with the statutes relating to adoption, and binding out in force at the time the transaction shall be made. (April 14, 1888, 85 v. 278.)

Whereas, All cattle wintered in the states of Florida, South Carolina, North Carolina, Georgia, Alabama, Mississippi, Louisiana, Tennessee, Arkansas, Texas and the Indian territory, are infected with a germ which renders them capable, except during the frost of winter, of infecting northern cattle with a malady commonly known as "Texas fever," while they show no manifestation of disease; therefore,

§ 4211-19. **Sec. 1. THE DRIVING OF CATTLE FROM CERTAIN STATES FORBIDDEN DURING CERTAIN MONTHS; CONVEYANCE BY RAILWAY FORBIDDEN, EXCEPT.** — During the months of March, April, May, June, July, August, September and October, no cattle shall be permitted to be driven into this state from any of the above mentioned states or Indian territory, or that shall have been wintered therein, nor shall any person or company bring, or cause to be conveyed into this state by railway or otherwise, any such cattle under said conditions, except as specified in the next section of this act. (March 14, 1888, 85 v. 83.)

§ 4211-20. **Sec. 2. UNLOADING OF CERTAIN CATTLE IN CERTAIN MONTHS FORBIDDEN, EXCEPT.** — Any railroad or other transportation company conveying into or through this state, or any stock-yard company receiving such cattle during the months aforesaid will not be permitted to unload the same in this state for any other purpose than to be fed and watered or for immediate slaughter, and in yards and premises especially provided for that purpose, into which northern cattle will not be permitted to enter. And the location and arrangement of the said yards and premises and the disinfection of the cars and quarters used in the transportation of such cattle shall be governed by the rules and regulations prescribed by the board of live stock commissioners. (April 23, 1891, 88 v. 352; March 14, 1888, 85 v. 83.)

Scope of laws — liability.

See *Neal v. Cincinnati Stockyard Co.*, 12 Dec. 533 (1902).

§ 4211-21. **Sec. 3. PENALTY.** — Any person or corporation that shall bring or cause to be brought or driven into this state, any cattle wintered in the states or territory above mentioned, or to be driven or conveyed otherwise than as herein specified, shall, upon conviction thereof, be fined in any sum not less than one hundred dollars, nor more than one thousand dollars, and shall, moreover, be liable for all damages that may be occasioned on account of other cattle being infected with said disease. (March 14, 1888, 85 v. 83.)

§ 4211-22. **Sec. 4. DUTY OF TRANSPORTATION COMPANIES; PENALTY FOR VIOLATION OF SUCH DUTY.** — It shall be the duty of all railway and other transportation companies bringing into and unloading in this state cattle, otherwise than as specified in section two (§ 4211-20) of this act, during the months above specified, to require a statement to be made in their shipping bills, showing in what state or territory the cattle shipped were wintered; and it shall be the duty of every railroad company bringing into this state cattle, which may unload such cattle for any other purpose than to be fed and watered as specified in section two (§ 4211-20) of this act, to leave at the office of such company nearest the point where such cattle

Transportation of Cattle — Enlarging Bridges, etc., §§ 4211-23-4495.

may be unloaded, a copy for public inspection of the statement above required, showing where the same were wintered; and any company or corporation neglecting to comply with the provisions of this section, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars. (March 14, 1888, 85 v. 83.)

§ 4211-23. Sec. 5. PROSECUTION FOR OFFENSES HEREUNDER. — Upon the request of the board of live stock commissioners it shall be the duty of the prosecuting attorney of any county in which the suit may be brought to begin and prosecute any action for the violation of the provisions of this act and the rules and regulations of the board of live stock commissioners. Proceedings against any railway company under this act may be had in any county in this state through which any portion of such company's road may pass, or in which its principal office may be situated; and process may be served by leaving a copy at the office of such company within such county. (April 23, 1891, 88 v. 353; March 14, 1888, 85 v. 83.)

§ 4495. COMMISSIONERS MAY REQUIRE ANY BRIDGE OR CULVERT TO BE ENLARGED. — The commissioners of any county, at any regular or called session, may in the manner provided in this chapter, so far as applicable when the same is necessary to the public health, convenience or welfare, cause to be located, constructed, deepened, widened or enlarged any bridge or culvert, made necessary by the crossing of any ditch, drain, watercourse or stream of water, by any railroad, turnpike, plankroad, or other road of any corporation, at the expense of said corporation, and the necessity for making any improvement herein provided for, may be heard and determined at the same time and under the same petition as provided for in section 4447 of this chapter.

DIMENSIONS OF IMPROVEMENT DETERMINED BY COMMISSIONERS; CORPORATIONS AFFECTED TO MAKE SAME. — If the commissioners find for the improvement, they shall, by an order entered on their journal, determine the dimensions of said improvement and that said improvement shall be made by the corporation affected thereby, within three months from the making of such order according to the plans and specifications, and of such materials, as the board may approve and select;

FAILURE OF CORPORATION TO MAKE IMPROVEMENT. — Provided, that if said corporation shall not within ten days from the date of such order, in writing, elect to make said improvement as ordered, such fact shall be taken as a refusal to do the same, and thereupon, the county commissioners shall at once by an order duly entered upon their journal, specify the materials to be used in the construction of said improvement, and directing the county surveyor, or an engineer, to make suitable surveys and to prepare plans and specifications for the making of said improvement so ordered, which shall be filed with the county auditor within twenty days from the making of such order, who shall thereupon fix a date for a hearing thereon.

EXCEPTIONS TO PLANS AND SPECIFICATIONS, ETC. — At any time on or before the day set for said hearing said corporation may, in writing, file exceptions to said plans and specifications, or ask for any change or alteration thereof, and of the materials out of which the same is ordered to be constructed, which may be granted or refused by said commissioners as may seem just and proper.

LETTING OF IMPROVEMENT; COSTS ASSESSED AGAINST CORPORATION. — Upon the approval of such plans and specifications as made, or as may be changed at said hearing, the commissioners shall, at once, proceed to fix a time for the letting of said improvement by bids as provided in § 4475 of this chapter, and as soon as said improvement is completed assess said corporation with the cost of constructing and letting the same, and such assessment shall be a lien upon the property of the corporation, and be collected as other taxes, or they may order the same to be collected from such corporation by an action at law, as they deem proper. Such corporations shall be served as in other cases. (April 25, 1898, 93 v. 373; R. S. 1880.)

 Railroad Companies — Obstruction of Roads, etc., §§ 4748-4939.

§ 4748. **OBSTRUCTION OF ROAD BY RAILROAD AGENTS.** — If any person or corporation, or a conductor of any train of railroad cars, or any other agent or servant of any railroad company, obstruct, unnecessarily, any public road or highway authorized by any law of this state, by permitting any railroad car or locomotive to remain upon or across the same for a longer period than five minutes, or permit any timber, lumber, wood, or other obstructions to remain upon or across the same to the hindrance or inconvenience of travelers, or any person passing along or upon such road or highway, every person or corporation so offending shall forfeit and pay, for every such offense, any sum not exceeding twenty nor less than two dollars, and shall be liable for all damages arising to any person from such obstruction, or injury to such road or highway, to be recovered by an action at the suit of the trustees of the township in which the offense is committed, or of any person suing for the same before a justice of the peace within the county where the offense is committed, or by indictment in the court of common pleas in the proper county; every twenty-four hours such person or corporation, after being notified, suffers such obstruction to remain, shall be deemed an additional offense against the provisions of this section; and all fines accruing under this section, when collected, shall be paid to the treasurer of the township in which the offense was committed, and be applied by the trustees to the improvement of roads and highways therein. (March 9, 1868, 65 v. 14, § 31.)

Necessity.

See *Lake Erie, etc., Ry. Co. v. Mackey*, 53 Oh. St. 370, 381 (1895).

Action to recover penalty.

See *Higgins v. Grove*, 40 Oh. St. 521 (1884); *Hill v. Supervisor*, 10 Oh. St. 621 (1858); *Bisher v. Richards*, 9 Oh. St. 495 (1859).

Proximate cause of injury.

See *Railway Co. v. Staley*, 41 Oh. St. 118 (1884).

§ 4749. **COMPANY LIABLE FOR FINES AGAINST EMPLOYEES.** — Every railroad company or other corporation, the servant, agent, or employe of which in any manner, obstructs any public road or highway, shall be liable to pay all fines which may be assessed against such servant, agent, or employe for so obstructing the same, and such liability may be enforced by execution issued against such corporation on the judgment rendered against such servant, agent, or employe. (March 9, 1868, 65 v. 14, § 32.)

§ 4939. **JOINT COUNTY AND RAILROAD BRIDGES.** — The commissioners of any county may contract with any railroad company for the construction, use, and maintenance of wagon tracks in connection with railroad bridges. (May 1, 1873, 70 v. 245, § 1.)

PART XXIII.

CODE OF CIVIL PROCEDURE.

- § 4988. When attempt equivalent to commencement; if corporation in receiver's hands; receiver of railroad.
- § 4991. Saving in case of reversal, etc., if corporation in receiver's hands; receiver of railroad.
- § 5023. Actions against corporations other than those mentioned in sections 5022, 5025, R. S.; where to bring.
- § 5024. Against railroad, street railroad, electric traction, and stage companies.
- § 5025. Against turnpike companies.
- § 5026. When this chapter does not apply.
- § 5027. Further provisions as to nonresidents.
- § 5030. Change in venue in suit by or against a corporation — cost of summoning jury and jury fees — how paid.
- § 5041. How summons served upon corporation.
- § 5042. How served upon an insurance company.
- § 5043. On foreign corporation.
- § 5045. When corporation may be served by publication.
- § 5102. Pleadings to be subscribed and verified.
- § 5465. Garnishment against railroad companies.
- § 5521. Attachments, grounds.
- § 5534. How corporation served as garnishee.

§ 4988. WHEN ATTEMPT EQUIVALENT TO COMMENCEMENT; IF CORPORATION IN RECEIVER'S HANDS; RECEIVER OF RAILROAD. — An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days. And if the defendant is a corporation, whether foreign or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, and such corporation passes into the hands of a receiver before the expiration of said sixty days, then service following such attempt to commence the action may, within said sixty days, be made upon such receiver, or his cashier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such agents or officers of such receiver with the person having charge thereof; and if such corporation is a railroad company, summons may be served upon any regular ticket or freight agent of said receiver, and if there is no such agent, then upon any conductor of said receiver, in any county in the state in which such railroad is located, and the summons shall be returned as if served upon said defendant. (March 16, 1894, 91 v. 72; R. S. 1880; 51 v. 57, § 20.)

See *Collins v. Baltimore, etc., R. R. Co.*, 7 N. P. 270 (1898); s. c., 7 Dec. 445. { **As against federal receivers.**
See *Baltimore, etc., R. R. Co. v. Freeman*, 112 Fed. Rep. 237 (1901).

§ 4991. SAVING IN CASE OF REVERSAL, ETC., IF CORPORATION IN RECEIVER'S HANDS; RECEIVER OF RAILROAD. — If, in an action commenced, or attempted to be commenced, in due time a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the

Actions Brought where, § 5023.

commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after such date, and this provision shall apply to any claim asserted in any pleading by a defendant. And if the defendant is a corporation, whether foreign or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, and such corporation passes into the hands of a receiver before the expiration of said year, then service to be made within said year following such original service or attempt to commence the action may be made upon such receiver or his cashier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such agents or officers of such receiver with the person having charge thereof, and if such corporation is a railroad company, summons may be served upon any regular ticket or freight agent of said receiver, and if there is no such agent, then upon any conductor of such receiver, in any county in the state in which such railroad is located, and the summons shall be returned as if served upon said defendant. (March 16, 1894, 91 v. 72; R. S. 1880; 51 v. 57, § 23.)

See *Collins v. Baltimore, etc.*, R. R. Co., 7 N. P. 270 (1898); s. c., 7 Dec. 445; *Pittsburg, etc., Ry. Co. v. Bemis*, 45 W. L. B. 155 (1901).

§ 5023. ACTIONS OTHER THAN THOSE MENTIONED IN SECTIONS 5019-5022 R. S. AGAINST CORPORATIONS; WHERE TO BRING. — An action other than one of those mentioned in the four preceding sections, against a corporation created under the laws of this state, may be brought in the county in which such corporation is situated, or has or had its principal office or place of business, or in which such corporation has an office or agent, or in any county in which a summons may be served upon the president, chairman or president of the board of directors or trustees or other chief officer; but if such corporation is an insurance company, the action may be brought in the county wherein the cause of action, or some part thereof, arose; and if such corporation be organized for the purpose of mining or operating for petroleum oil or gas, either exclusively or in connection with other business, the action may be brought in any county where such corporation owns or operates a mine or a well for petroleum oil or gas, and the cause of action, or some part thereof, arose. (February 15, 1877, 74 v. 29, § 48; R. S. 1880, § 5026; January 16, 1885, 82 v. 5; April 19, 1898, 93 v. 125; April 16, 1900, 94 v. 270, § 5023; April 23, 1902, 95 v. 237.)

Meaning of word "may."

The word "may" in this section should be read "must." An Ohio corporation can be sued only in the county in which such corporation is situated, or has or had its principal place of business, or in which an office or agent is maintained.—*Stanton v. Enquirer Co.*, 7 N. P. 589 (1899); *Kinsey v. Burgess Iron Works*, 4 N. P. 293 (1897); s. c., 6 Dec. 446.

Where there is a special provision.

This section was not intended to apply to statutory actions in which a different rule or mode of proceeding is specially authorized.—*Muskingum County Infirmary v. Toledo*, 15 Oh. St. 409 (1864).

Construction of "has or had principal office."

Such words contemplate a suit against a company in a county in which it had its prin-

cipal place of business, though it may have abandoned the same.—*Campbell v. Woodsdale, etc.*, Park Co., 3 N. P. 159 (1896); s. c., 4 Dec. 152. See *Snow Fork, etc., Coal Co. v. Hocking Coal Co.*, 7 N. P. 191 (1897); s. c., 6 Dec. 178.

Life insurance companies within this section.

This section authorizes an action upon a policy of life insurance issued by a company organized under the laws of this state, to be brought in the county where the death of the party insured occurred.—*Union Central Insurance Co. v. Pyers*, 36 Oh. St. 544 (1881). See *Householder v. Kansas Life Association*, 6 N. P. 520 (1898); s. c., 8 Dec. 321.

When companies having special rights come under this section.

See *Knox County Insurance Co. v. Bow-ersox*, 6 O. C. C. 275 (1892); s. c., 3 C. D. 451.

Actions Brought where, §§ 5024-5027.

Receivers of a company not entitled to benefits of this or next section.

See *Rogers v. Akron, etc.*, R. R. Co., 6 N. P. 291 (1899); s. c., 8 Dec. 107.

When may be sued in other counties.

Whenever suit is rightly brought in one county against a defendant, process may issue to another county to bring in a corporation.—*Baldwin v. Wilson*, 7 N. P. 506 (1900); *Stanton v. Enquirer Co.*, 7 N. P. 589 (1899).

§ 5024. **AGAINST RAILROAD, STREET RAILROAD, ELECTRIC TRACTION, AND STAGE COMPANIES.**—An action against the owner or lessee of a line of mail stages, or other coaches, for an injury to person or property upon the road or line, or upon a liability as carrier, and an action against a railroad company or street railroad company, owning or operating a railroad or street railroad within the state, or against a transportation company owning or operating an electric traction road located upon either bank of any canal belonging to the state, may be brought in any county through or into which such line, railroad, street railroad or electric traction road passes or extends. (April 3, 1866, 63 v. 87, § 49; R. S. 1880, § 5027; April 16, 1900, § 5C24; April 23, 1902, 95 v. 258.)

Nature of action does not change rule.

A railroad company may be sued in any county through or into which the road passes, without regard to the nature of the cause of action.—*Railway Co. v. Jewett*, 37 Oh. St. 649 (1882).

May be sued where it operates a leased road.

See *C. C. C. & I. Ry. Co. v. McLean*, 1 O. C. C. 112 (1885); s. c., 1 C. D. 67; affirmed 19 W. L. B. 217; *Swan v. Railroad Co.*, 4 Dec. 71 (1895).

When may be sued in other counties.

A railroad company may be served with summons in a county through which it does not run when properly joined as a codefendant.—*Baltimore, etc.*, R. R. Co. v. McPeck, 16 O. C. C. 87 (1898); s. c., 8 C. D. 742.

Foreign railroad companies.

An action against a foreign railroad company may be brought in a county through which its road passes.—*Swan v. Railroad Co.*, 4 Dec. 71 (1895).

Entry of appearance in other counties — pleading.

This section relates solely to the jurisdiction of the person, and it is not necessary that the petition should state that its road passes into or through the county where the action is brought; a railroad company, like a natural person, submits itself to the jurisdiction of the court by appearing for any other purpose than to object to such jurisdiction.—*Railroad Co. v. Morey*, 47 Oh. St. 207 (1890).

§ 5025. **AGAINST TURNPIKE COMPANIES.**—An action other than one of those mentioned in the first four sections of this chapter, against a turnpike road company, may be brought in any county in which any part of the road lies. (March 14, 1853, 51 v. 57, § 50; R. S. 1880, § 5028; April 16, 1900, 94 v. 270, § 5025.)

§ 5026. **WHEN THIS CHAPTER DOES NOT APPLY.**—When the charter of a corporation created under the laws of this state prescribes the place where suit must be brought, that provision shall govern. (March 14, 1853, 51 v. 57, § 51; R. S. 1880, § 5029; April 16, 1900, 94 v. 270, § 5026.)

Certain special acts.

Under the charter of the Portage County Mutual Insurance Company suit can only be brought in Portage county.—*Portage Co. Insurance Co. v. Stukey*, 18 Oh. 455 (1849); *Portage, etc.*, Insurance Co. v. West, 6 Oh. St. 599 (1856).

When special charter lost.

This section is not applicable, if the company has acted under general laws, and thus lost its special rights.—*Knox Co. Insurance Co. v. Bowersox*, 6 O. C. C. 275 (1892); s. c., 3 C. D. 451.

§ 5027. **FURTHER PROVISIONS AS TO NON-RESIDENTS.**—An action other than any of those mentioned in the first four sections of this chapter, against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of, or debts owing to, the defendant, or where such defendant is found, or where the cause of action, or some part thereof arose. (March 14, 1853, 51 v. 57, § 52; R. S. 1880, § 5030; April 16, 1900, 94 v. 270, § 5027; April 17, 1902, 95 v. 203.)

Change of Venue, etc., § 5030.

Meaning of foreign corporation.

The words "foreign corporation" in attachment cases mean foreign to the state, not foreign to the county.—*Boley v. Ohio, etc., Trust Co.*, 12 Oh. St. 139 (1861).

Foreign corporation may be sued where found.

See *Swan v. Railroad Co.*, 4 Dec. 71 (1895); *Mohr Distilling Co. v. Insurance Co.*, 7 W. L. B. 335 (1882).

Causes arising in this state.

The general rule here declared has no reference to actions upon causes arising in this state. No matter where the cause arose, if the subject-matter be within the jurisdiction of the court. Nor is the rule confined to corporations other than insurance companies. Any foreign corporation which may be found in this state, may be sued in any county in this state in any court having jurisdiction of the subject-matter of the suit.—*Hardy v. Insurance Co.*, 37 Oh. St. 366, 371 (1881).

Foreign insurance company.

The last clause was intended to give an additional remedy against foreign insurance

companies doing business in this state, namely, to make them liable to actions in the county where the causes of action arose, although they might not have property or debts due in such county or might not even be found in such county.—*Hardy v. Insurance Co.*, 37 Oh. St. 366, 371 (1881). See *Osborn v. Lidy*, 51 Oh. St. 90, 96 (1894).

Application to life insurance companies.

An action against a foreign life insurance company may be brought where the death of the insured occurred.—*Householder v. Kansas Life Association*, 6 N. P. 520 (1898); s. c., 7 Dec. 544. See § 5026.

Action where debts owing to foreign corporation.

Where a foreign corporation has its offices and business in one county, and has a debtor in another county, it may be sued and the debts attached in the latter county, personal service being had in the county where its offices were situated.—*Rainey v. Jefferson Iron Works*, 8 O. C. C. 674 (1894); s. c., 4 C. D. 231.

§ 5030. CHANGE OF VENUE IN SUIT BY OR AGAINST A CORPORATION — COST OF SUMMONING JURY AND JURY FEES — HOW PAID. — When a corporation having more than fifty stock-holders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that one cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties; and the cost of summoning and impaneling a jury, and the fees of said jury sitting in the trial of the case in the court of the county to which the venue is changed, shall be allowed and paid by the commissioners of the county from which said action is sent. (50 v. 100, § 1; R. S. 1880, § 5033; 94 v. 271, § 5030; 94 v. 378, § 5033.)

Constitutionality.

This act is not in conflict with either the state or federal constitutions.—*Snell v. Cincinnati, etc., Ry. Co.*, 60 Oh. St. 256 (1899).

When statute mandatory.

It is not necessary, to entitle the applicant to the benefit of the statute in a case for which it provides, that his affidavit shall state the grounds of his belief that he cannot have a fair and impartial trial in the county in which the action is pending, nor that the sustaining affidavits shall state the ground of their belief; it is sufficient that the affidavit of the applicant state that he cannot, "as he believes," have a fair and impartial trial in that county, and his application is "sustained within the purview of the statute," when there is filed the several affidavits of five credible persons residing in the county, stating that they entertain the same belief when so compelled with the statute is mandatory.—*Snell v. Cincinnati, etc., Ry. Co.*, 60 Oh. St. 256 (1899).

Credibility of affiants.

See *Snell v. Cincinnati, etc., Ry. Co.*, 60 Oh. St. 256 (1899).

Burden of proof.

See *Snell v. Cincinnati, etc., Ry. Co.*, 60 Oh. St. 256 (1899).

See generally *State ex rel. v. Wilson*, 12 O. C. C. 636 (1896); s. c., 7 C. D. 17; *Sauer v. Cincinnati, etc., Ry. Co.*, 4 N. P. 252 (1896); s. c., 7 Dec. 19; *Sterner v. Cincinnati, etc., Ry. Co.*, 5 N. P. 419 (1898); 8 Dec. 514; *Dodds v. Mt. Eden, etc., Ry. Co.*, 41 W. L. B. 209 (1899); s. c., 20 O. C. C. 709.

What is most convenient.

The words "most convenient," as used in this section, are to be taken in the sense of most suitable, becoming or appropriate, and not in the sense of promotion of physical ease.—*Wilson v. Cincinnati, etc., Ry. Co.*, 7 N. P. 511 (1899).

Service of Summons, § 5041.

§ 5041. **HOW SUMMONS SERVED UPON CORPORATION.**—A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof; and if such corporation is a railroad company, whether foreign or created under the laws of this state, and whether the charter thereof describes the manner and place, or either, of service of process thereon, or, if such corporation be a street railroad company, owning or operating a street railroad passing through two or more counties, or a transportation company owning or operating an electric traction road located upon either bank of any canal belonging to the state, the summons may be served upon any regular ticket or freight agent of such railroad company or street railroad company or transportation company; or, if there be no such agent, then upon any conductor in charge of any train or car upon such railroad or street railroad, or upon any motorman or other person in charge of any electric traction car, engine or motor upon any such electric traction road, in any county in this state, in which such railroad, street railroad, or electric traction road is located, or through which it passes; but if the defendant is an incorporated river transportation company, whether organized under the laws of this or another state, the service of a summons may be upon the master, or other chief officer, or any of its steamboats or other craft, or upon any of its authorized ticket or freight agents, at any port where it transacts business. (65 v. 116, § 66; 76 v. 145, § 10; R. S. 1880, § 5044; 94 v. 273, § 5041; April 23, 1902, 95 v. 258.)

Return of service on subordinate officers or by leaving copy.

When service is made upon a subordinate officer, it must appear from the return that the chief officer of the corporation could not be found. When made by copy left at the office or usual place of business of such corporation, with the person having charge thereof, it must show that none of the specified officers, neither chief nor subordinate, could be found in the county.—*Fee v. Big Sandy Iron Co.*, 13 Oh. St. 563 (1862); *Bucket Pump Co. v. Eagle Iron Co.*, 21 O. C. C. 229 (1900). See *Parker v. Van Dorn Iron Works*, 23 O. C. C. 444 (1902).

Return of service.

A service of summons on a corporation "by delivering a true copy of this writ, with all indorsements thereon, to John Doe, secretary of the company, no other chief officer being found," is a compliance with the statute.—*Cincinnati Hotel Co. v. Central Trust Co.*, 25 W. L. B. 375 (1891); s. c., 25 W. L. B. 295.

Service on president, where made.

Where a suit has been rightfully brought against a corporation, service may be made on the president in that or any other county, or if service can be otherwise made in the county by serving other officers, etc., it is not necessary to follow the president to another county.—*Campbell v. Woodsdale Park Co.*, 3 N. P. 159 (1896); s. c., 4 Dec. 152.

Service on lessee of railroad.

Service on a company operating a railroad under a lease is good if made on a ticket agent.—*C. C. C. & I. Ry. Co. v. McLean*, 1 O.

C. C. 112 (1885); s. c., 1 C. D. 67. See, also, § 3305.

Service on lessor of railroad.

See § 3305. See *Collins v. Baltimore, etc.*, R. R. Co., 7 N. P. 270 (1898); s. c., 7 Dec. 445.

Foreign railroad company—traveling passenger agent.

Services cannot be made on a foreign railroad company by serving the writ upon a mere traveling solicitor of business for such company.—*Wilson v. Northern Pacific R. R. Co.*, 16 W. L. B. 6 (1886).

Foreign railroad company.

So far as this section provides for service on foreign railroad companies, it is cumulative and not restrictive or exclusive, and does not affect § 5043.—See *Wheeling, etc., Co. v. Baltimore, etc.*, R. R. Co., 1 C. S. C. 311, 32 Oh. St. 135 (1877).

Return must show service on "regular agent."

In an action against a railroad company, a return that the summons was served upon a "ticket agent and general agent" is defective in not showing that the person served was "its regular ticket agent."—*Tallman v. Baltimore, etc.*, R. R. Co., 45 Fed. 156 (1891); s. c., 6 O. F. D. 728.

Ticket agent need not be employed on line of road.

Service on a ticket agent was held sufficient though the company had no line of road and did not operate in the county.—See *Woodcock v. Baltimore, etc.*, R. R. Co. (U. S. C. C.), 46 W. L. B. 121 (1901).

Service of Summons, §§ 5042, 5043.

Suit by resident of Ohio against Ohio corporation in foreign state — service.

See Cincinnati, etc., R. R. Co. v. Emery, 17 W. L. B. 154 (1887).

When there is no agent — service.

See § 5045.

Joint-stock companies — service.

A joint-stock company, organized under the laws of the state of New York, and having substantially the character and powers of a corporation, may be served with summons in this state in the same manner as corporations are served.—Express Co. v. State, 55 Oh. St. 69 (1896).

Service on defunct company.

As the last directors of a defunct corporation are in effect the corporation, service on them is sufficient.—Warner v. Callender, 20 Oh. St. 190 (1870).

Township ditches, notice, how served.

See Caldwell v. Trustees, 2 O. C. C. 10 (1886); s. c., 1 C. D. 332.

§ 5042. **HOW SERVED UPON AN INSURANCE COMPANY.**—When the defendant is an insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency. (51 v. 57, § 67; R. S. 1880, § 5045; April 16, 1900, 94 v. 273, § 5042.)

This is cumulative.

See Householder v. Kansas, etc., Life Association, 6 N. P. 520 (1898); s. c., 8 Dec. 321.

§ 5043. **ON FOREIGN CORPORATION.**—When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. (51 v. 57, § 68; R. S. 1880, § 5046; 94 v. 274, § 5043.)

Foreign railroad companies may be served under this section.

The provisions of § 5041 as to service of foreign railroad corporations are not exclusive, and the service of summons on such a company may be made by delivering the writ to its managing agent, whose business it is to contract for freight and to attend to transfers of freight.—Wheeling, etc., Co. v. Baltimore, etc., R. R. Co., 1 C. S. C. 311; s. c., 32 Oh. St. 116, 135 (1877).

Traveling passenger agent is not a managing agent.

See Wilson v. Northern Pacific R. R. Co., 16 W. L. B. 6 (1886).

Sales agent is not managing agent.

The fact that a foreign corporation has an agent here merely to receive what is sent to him, and to remit back the proceeds, is not sufficient, and such agent is not a managing agent.—Gibbin v. Kanawha, etc., Coal Co., 2 C. S. C. 75 (1870). See Bucket Pump Co. v. Eagle Iron Co., 21 O. C. C. 229 (1900).

Who is managing agent of insurance company.

A service upon "J. P. W., agent of said

Agent of receiver is not agent of company.

The service of a summons on a regular ticket and freight agent, at and in charge of an established station, the road being in the hands of a receiver, and such agent being an agent of the receiver, is not good service as against the company.—Cleveland, etc., R. R. Co. v. Orme, 1 O. C. C. 511 (1885); s. c., 1 C. D. 285; Collins v. Baltimore, etc., R. R. Co., 7 N. P. 270 (1898); s. c., 7 Dec. 445. But see § 4991.

Where company enters jurisdiction by ferry.

Where a railroad enters the jurisdiction by ferryboat only, service on a ticket agent located in his township is sufficient.—Williams v. Chesapeake, etc., R. R. Co., 31 W. L. B. 115 (1894).

Who is managing agent.

See § 5043, notes.

Appointment of agent.

See §§ 3607, 3617.

Lamar Insurance Co., and the chief officer of its agency in the city of Cincinnati, no chief officer of said company found," is good as service upon a managing agent.—Mohr Distilling Co. v. Lamar Insurance Co., 7 W. L. B. 341 (1882).

Who is managing agent.

A local agent of an express company who keeps an office, receives and forwards packages, and does all the business of the company at a certain place, is a managing agent.—American Express Co. v. Johnson, 17 Oh. St. 641 (1867). See Wheeling, etc., Co. v. Baltimore, etc., R. R. Co., 1 C. S. C. 311, 32 Oh. St. 135 (1877).

Service on foreign insurance company.

A foreign insurance company may be served either under this section or the preceding section, as they are cumulative and designed to facilitate service.—Householder v. Kansas, etc., Life Association, 6 N. P. 520 (1898); s. c., 8 Dec. 321; Mohr Distilling Co. v. Lamar Insurance Co., 7 W. L. B. 341 (1882).

Service by Publication, § 5045.

Return must show service on managing agent.

While only substantial compliance with the statute is sufficient, a return which does not show that service was had upon the managing agent of the company in the state, but simply "upon defendant's agent," is not sufficient.—*Fleckmeyer Wheel Co. v. Commercial Wheel Co.*, 7 N. P. 613 (1897); s. c., 8 Dec. 686.

Service on foreign corporation under § 5041.

Except as specially provided a foreign corporation cannot be served with process under § 5041.—*Barney v. New Albany, etc., R. R. Co.*, 1 Handy, 571 (1855).

Foreign dissolved corporation, how served.

See *Vallette v. Kentucky Trust Co.*, 2 Handy, 1 (1855).

Attachment by notice to managing agent.

See *Rocke v. Raney*, 15 W. L. B. 333 (1886).

Designation of agent upon whom process can be served.

See § 148d. See generally § 148c, notes.

Service on foreign corporation after agent designated.

Service may be made on managing agent notwithstanding an agent has been appointed and his name filed with secretary of state.—*Lesser Cotton Co. v. Yates*, 63 S. W. 997 (Ark.).

Validity of service on Ohio corporation in foreign state.

See *Cincinnati, etc., R. R. Co. v. Emery*, 17 W. L. B. 154 (1887).

§ 5045. WHEN CORPORATIONS MAY BE SERVED BY PUBLICATION.—

Service may be had by publication in either of the following cases:

1. In actions under the first three sections of the last chapter, when the defendant resides out of the state, or his place of residence can not be ascertained.

2. In actions to establish or set aside a will, and in actions authorized by section six thousand two hundred and two, when a defendant resides out of the state, or his place of residence can not be ascertained.

3. In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when the defendant is a foreign corporation, or a non-resident of this state, or the defendant's place of residence can not be ascertained.

4. In actions against a corporation organized under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made as provided by section five thousand and forty-one, and which has no place of doing business in this state.

5. In actions which relate to or the subject of which is real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence cannot be ascertained.

6. In actions against executors, administrators, or guardians, when the defendant has given bond as such in this state, but at the time of the commencement of the action is a non-resident of the state, or his place of residence can not be ascertained.

7. In actions where the defendant, being a resident of this state, has departed from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of summons, or keeps himself concealed with like intent.

8. When a defendant in a petition in error has no attorney of record in this state, and is a non-resident of and absent from the same, or has left the same to avoid the service of summons in error, or so conceals himself that such process can not be served upon him.

9. In an action or proceeding under chapter six, division four, of this title, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when a defendant is a non-resident of the state.

When, in any such case, the residence of a defendant is known, it must be stated in the publication; and immediately after the first publication, the party making the service shall deliver to the clerk copies of the publication, with the proper postage, and the clerk shall mail a copy to each defendant, directed to his residence

Verification of Pleadings — Attachment, §§ 5102-5521.

named therein, and make an entry thereof on the appearance docket; and in all other cases, the party who makes the service, his agent or attorney, shall before the hearing, make and file an affidavit that the residence of the defendant is unknown, and can not with reasonable diligence, be ascertained. (65 v. 208, § 1; 74 v. 151, § 70; R. S. 1880, § 5048; 77 v. 45; 87 v. 225; 94 v. 274, § 5045.)

§ 5102. **PLEADING TO BE SUBSCRIBED AND VERIFIED.**— Every pleading and motion must be subscribed by the party or his attorney, and every pleading of fact, except as provided in the next section, must be verified by the affidavit of the party, his agent or attorney; when a corporation is the party, the verification may be made by an officer thereof, its agent or attorney; and when the state, or any officer thereof in its behalf, is the party, the verification may be made by any person acquainted with the facts, the attorney prosecuting or defending the action, the prosecuting attorney, or the attorney-general. (March 14, 1853, 51 v. 57, § 106; 70 v. 54, § 105.)

§ 5109 does not limit this section.

Under this section the pleading of a corporation may be verified by the affidavit of its officer, agent, or attorney, and the provisions of § 5109 do not apply.—Northern

National Bank v. Maumee Rolling Mill Co., 2 N. P. 260 (1894); s. c., 2 Dec. 67.

Answers to interrogatories, how verified.

See § 5099.

§ 5465. **GARNISHMENT AGAINST RAILROAD COMPANIES.**— The plaintiff, or his agent or attorney, in a judgment against a railroad company, rendered in any court, upon a claim due to common laborers for work and labor performed for the company, or for cross-ties, lumber, or wood furnished thereto, to be used in the construction, repair, or operation of its road or for the erection of fences along the line of its road, required by law to be erected, or upon a note, or other evidence of indebtedness given for the considerations aforesaid, may file with a precept for execution upon such judgment his affidavit, setting forth the claim upon which the judgment is founded, that he has no knowledge of any property of the defendant liable to levy and sale upon the execution, and that a person or corporation, to be therein named, and within the jurisdiction of the officer to whom the execution is to be directed, is indebted to the defendant, or has property or claims of the defendant in his possession or under his control, as agent of the defendant, or otherwise; and thereupon the clerk shall issue a notice to each person or corporation named, to the effect that he is required to pay over and deliver to the officer holding such writ the money, property, and claims of the defendant, in his possession or under his control, or which may come into his possession or under his control, at any time before the satisfaction of the judgment, not exceeding an amount sufficient to pay the same and costs. (April 5, 1866, 63 v. 126, § 1.)

See § 5466 et seq., for practice.

§ 5521. **ATTACHMENT, GROUNDS.**— That in a civil action for the recovery of money the plaintiff may, at or after the commencement thereof, have an attachment against the property of the defendant upon the grounds herein stated.

1. When the defendant, or one of several defendants, is a foreign corporation, except as provided by an act entitled "An act to further supplement section 148 of the Revised Statutes," passed May 16, 1894 (91 O. L. 272). and except as provided by an act entitled "An act to amend section 1 of an act," etc., passed May 19, 1894 (91 O. L. 355) [§§ 148c, 148d;] or a non-resident of this state; or

2. Has absconded with the intent to defraud his creditors; or

3. Has left the county of his residence to avoid the service of a summons; or

4. So conceals himself that a summons cannot be served upon him; or

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or

Attachment, etc., § 5534.

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or

7. Has property or rights in action, which he conceals; or

8. Has assigned, removed, disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; or

9. Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; or

10. That the claim is for work or labor, or for necessities.

But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of this state, for any claim other than a debt or demand arising from contract, judgment or decree, or for causing death or a personal injury, by a negligent or wrongful act. (March 20, 1900, 94 v. 44; 93 v. 318; 88 v. 65; R. S. 1880; 61 v. 10, § 191.)

No bonds required.

See § 5523.

Practice.

See Vallette v. Kentucky, etc., Bank, 2 Handy, 1 (1855).

Foreign corporation may be made garnishee, service of order.

Rainey v. Maas, 28 W. L. B. 246 (1892). See Roche v. Rainey, 15 W. L. B. 333 (1886); Pennsylvania R. R. Co. v. Peoples, 31 Oh. St. 537 (1877); Baltimore, etc., R. R. Co. v. May, 25 Oh. St. 347 (1874).

See Riter-Conley Mfg. Co. v. Mzik, 13 C. D. 164 (1901).

Where suit brought when debts due foreign corporation are attached.

See Rainey v. Jefferson Iron Works, 8 O. C. C. 674 (1894); s. c., 4 C. D. 231. See Kelley Co. v. Garvin Machine Co., 6 N. P. 350 (1896).

See Riter-Conley Mfg. Co. v. Mzik, 13 C. D. 164 (1901).

Action for injury to passenger may be on contract.

See Pennsylvania R. R. Co. v. Peoples, 31 Oh. St. 537 (1877).

Malicious prosecution of civil action.

An attachment cannot issue in an action against a foreign corporation to recover damages for bringing suit in violation of a con-

tract for the extension of the time of payment on a note, and maliciously attaching property. McCracken v. Covington Nat. Bank, 4 Fed. 602 (1880).

How corporation served as garnishee.

See § 5534; Union Bank v. Union Bank, 6 Oh. St. 254 (1856); Conahan v. Collin, 2 Dis. 1 (1871).

Creditors filing claims with receivers of foreign corporations are estopped from attaching.

See Rice v. Farnham, 7 N. P. 189 (1896); s. c., 4 Dec. 217; Barbour v. Lockard, 11 W. L. B. 319 (1884); Wilson v. Gifford, 12 O. C. C. 597 (1896); s. c., 5 C. D. 680; President, etc., of Manhattan Co. v. Maryland Steel Co., 31 W. L. B. 100 (1894); s. c., 1 Dec. 286.

Creditors in same jurisdiction as receiver of corporation cannot attach.

See Besuden v. Besuden Co., 3 N. P. 165 (1896); s. c., 4 Dec. 406.

Application for receiver, when fraud.

An application for the appointment of a receiver consented to by the company may amount to an attempt to dispose of the property with intent to defraud creditors.—Bacon v. Northwestern Stove Co., 5 O. C. C. 289 (1891); s. c., 3 C. D. 551.

§ 5534. HOW CORPORATION SERVED AS GARNISHEE.—If the garnishee is a person, the copy of the order and notice shall be served upon him personally or be left at his usual place of residence; if a partnership garnisheed by its company name, they shall be left at its usual place of doing business or with any member of such partnership; and if a corporation, they shall be left with the president or other principal officer, or the secretary, cashier or managing agent thereof; and if such corporation is a railroad company, they may be left with any regular ticket or freight agent thereof, in any county in which the railroad is located. (April 16, 1900, 94 v. 283; March 31, 1881, 78 v. 93; R. S. 1880; May 16, 1868, 65 v. 213.)

What is improper return.

The following return of service does not comply with the statute: "The attachment was served upon the following persons and firms: The Sandusky Gas Light Co." Prant v. Post, 12 Dec. 141 (1900).

See Riter-Conley, etc., Co. v. Mzik, 13 C. D. 164 (1901).

See notes to § 5521.

PART XXIV.

RECEIVERS OF CORPORATIONS.

- § 5587. When and how a receiver may be appointed.
- § 5588. Who ineligible as receiver.
- § 5589. Oath and undertaking by receiver.
- § 5590. Powers of receiver.
- § 5591. Investment of fund by receiver.
- § 5592. Disposition of property in hands of trustee.
- § 5593. How certain orders of court may be enforced.

§ 5587. **WHEN AND HOW A RECEIVER MAY BE APPOINTED.**—A receiver may be appointed by the supreme court or a judge thereof, the circuit court or a judge thereof in his circuit, a common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured.

2. In an action by a mortgagee, for the foreclosure of his mortgage, and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply the property in satisfaction of the judgment.

5. In the cases provided in this title, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of equity. (February 7, 1885, 82 v. 16, 35; R. S. 1880; 51 v. 57, § 283.)

Action cannot be maintained for the sole purpose of appointing a receiver.

The appointment of a receiver is merely a provisional remedy, ancillary and auxiliary to the main action, and can only be made in an action brought to obtain some other equitable relief, which the court has a right to grant, and where it appears to be necessary to make such appointment in order to preserve the property during the litigation, so that the relief awarded by the final judgment if any, may be effective.—*Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618. See *Cincinnati, etc., R. R. Co. v. Sloan*, 31 Oh. St. 1, 7 (1877); *Schone v. Con-*

solidated, etc., Co., 4 N. P. 216 (1897); s. c., 6 Dec, 246; *Callahan v. Ice Co.*, 13 O. C. C. 479 (1897); s. c., 7 C. D. 349.

What cases within subd. 5 of this section.

Subdivision 5 of this section does not authorize the appointment of a receiver, except in cases provided for in this title (1), or by special statutes, and does not include an action by a stockholder for the appointment of a receiver because of fraud of directors.—*Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618.

Appointment, etc., of Receiver, § 5587.

Propriety of appointing receiver to run business.

While the appointment of a receiver for an insolvent private corporation may be, and doubtless often is, a beneficent remedy for all interested parties, where a bona fide winding up of affairs and distribution of its assets to those who show a right to them is the object sought and steadily kept in view, yet, on the other hand, to employ that extraordinary remedy as a means by which to indefinitely prolong, by aid of a friendly receiver, the substantial control of an insolvent private corporation over its assets and business, can be justified, in the absence of statutory authority, by circumstances only, if there can be any, that most unequivocally demand such action, or by the consent of all parties in interest.—Peter v. Farrell, etc., Machine Co., 53 Oh. St. 534, 551 (1895).

Simple contract creditor cannot have receiver appointed.

A simple contract creditor who has not recovered a judgment against a corporation and exhausted his remedies at law, has no right to have the affairs of a corporation placed in the hands of a receiver on the grounds that it is insolvent.—North Fairmount, etc., Co. v. Rehn, 6 N. P. 185 (1899); s. c., 8 Dec. 594.

When a creditor may have a receiver appointed.

It is not a sufficient averment for the appointment of a receiver to allege that the corporation is insolvent, or that it has no goods or property subject to levy. The reason is that a corporation may have nothing upon which levy may be made, and yet be the owner of equitable rights sufficient to satisfy all debts.—Fox River Paper Co. v. Snider Paper Co., 36 W. L. B. 329 (1896).

Right of directors to apply for receiver.

The court has no power on the application of the directors of a building association, as such, and who assert no individual rights in the property of the corporation, to divest the stockholders, without notice or consent, of the control of their property and place it in the hands of an officer of the court for management and administration.—Schone v. Consolidated, etc., Co., 4 N. P. 216 (1897); s. c., 6 Dec. 246.

When receiver appointed on the ground of misconduct of directors.

A court of equity has authority, at the suit of a stockholder, to enjoin unlawful conduct on the part of the directors of a corporation, and if in such actions it may be made clearly to appear to the court that the appointment of a receiver is really necessary to effect the purpose of the suit, as, for instance, if it clearly appear that unless the property is placed in the hands of an officer of the court it will be fraudulently and instantly disposed of by the directors, a receiver may be appointed. But in the absence of such necessity, and where full relief may be afforded by in-

junction, the appointment of a receiver is an abuse of discretion.—Cincinnati, etc., R. R. Co. v. Duckworth, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618; North Fairmount, etc., Co. v. Rehn, 6 N. P. 185 (1899); s. c., 8 Dec. 594; s. c., 5 N. P. 314; s. c., 7 Dec. 398. See Robison v. Cleveland, etc., Ry. Co., 5 N. P. 293 (1898); s. c., 7 Dec. 312; Equitable Nat. Bank v. Guckenberger, 5 N. P. 319; s. c., 5 Dec. 438; Straman v. North Baltimore, etc., Co., 8 O. C. C. 89 (1893); s. c., 4 C. D. 339; Behrens v. Equality Bldg. Ass'n, 2 N. P. 259 (1895); s. c., 3 Dec. 275; Merrill v. Lake, 16 Oh. 373, 403 (1847); Baker v. Fraternal Mystic Circle, 32 W. L. B. 84 (1894); s. c., 1 Dec. 579; Goebel v. Herancourt Brewing Co., 7 N. P. 230; s. c., 2 Dec. 377 (1893).

Where stockholder entitled to appointment of receiver.

Chancery will not, at the suit of a stockholder, take jurisdiction of distinct and separate matters and unite with them the settlement of the transactions of a corporation in one suit, because such single litigation may prevent a sacrifice of property, and be most beneficial to stockholders and creditors.—Merrill v. Lake, 16 Oh. 373 (1847).

Receiver not appointed because creditors are pressing claims.

See Moss Nat. Bank v. Lakeside Co., 19 O. C. C. 365 (1900); Merrill v. Lake, 16 Oh. 373, 403 (1847).

Not appointed when voluntary liquidation is possible.

A receiver will not be appointed to wind up the affairs of a debenture company which is desirous of going into voluntary liquidation, the liabilities of which do not appear to exceed its assets by an amount greater than can be collected from its solvent stockholders who stand ready to pay.

Quere.—Can the corporation be required to give bond for faithful administration?—See Everhardt v. United States Investment, etc., Co., 8 N. P. 463 (1901).

An application for a receiver may be such fraud as to creditors as to justify an attachment.

See Bacon v. Northwestern Stove Co., 5 O. C. C. 289 (1891); s. c., 3 C. D. 143.

When surety of corporation may have receiver appointed.

Where an insolvent corporation is sued by one of its sureties under § 5845, as a means of protecting the funds, a receiver may be appointed.—Barbour v. National Exchange Bank, 45 Oh. St. 133 (1887).

Action to enforce stockholders' liability.

In an action to enforce payment of the statutory liability of stockholders in an Ohio corporation, a receiver may be appointed by the court to collect and distribute the funds, and such receiver may be authorized to maintain in his own name actions to enforce pay-

Appointment, etc., of, § 5587.

ment of judgments rendered for statutory liability.—*Zieverink v. Kemper*, 50 Oh. St. 208 (1893). See *Clarke v. Thomas*, 34 Oh. St. 46 (1877).

Receiver will be appointed for a bond company operating on a lottery basis.

Where a bond and investment company is operated on a lottery basis, a court of equity will appoint a receiver to preserve the funds for distribution among those interested.—*Shaw v. Interstate, etc., Co.*, 5 N. P. 411 (1898); s. c., 8 Dec. 510; *Central, etc., Co. v. Jones*, 36 W. L. B. 87 (1896).

Appointment of receiver without notice.

The appointment of a receiver to take from the defendant the possession of its property cannot be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.—*Railway Co. v. Jewett*, 37 Oh. St. 649 (1882).

Consent of company.

Where there is no ground for the appointment of a receiver, the consent of the company cannot confer jurisdiction upon the court.—*Moss Nat. Bank v. Lakeside Co.*, 19 O. C. C. 365 (1900); s. c., 10 C. D. 542.

Where property is in another county.

When after the appointment of a receiver it will be necessary to commence ancillary proceedings in another county to determine property rights, the matter of the appointment of a receiver will be left to the court having jurisdiction of the property.—*Moss Nat. Bank v. Lakeside Co.*, 19 O. C. C. 365 (1900); s. c., 10 C. D. 542.

Insolvency, how proved.

When the insolvency of a corporation is one of the essential elements, constituting the basis of the plaintiff's claim for relief against the corporation, such insolvency must be proven by a preponderance of the testimony. It will not be sufficient by the proof to merely raise a doubt as to the solvency of the corporation.—*North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899); s. c., 8 Dec. 594.

Action for receiver — parties.

The creditors are proper parties to an action which seeks the appointment of a receiver.—*Walbridge v. Union Mfg. Co.*, 7 N. P. 430; s. c., 5 Dec. 203.

Actions against company while in receiver's hands.

See *Mather v. Cincinnati Ry. Co.*, 3 O. C. C. 284 (1888); s. c., 2 C. D. 161. See also § 4991.

Power of corporation over property in hands of receiver.

See *Donner v. Dayton, etc., R. R. Co.*, 1 C. S. C. 130 (1871).

Title to property.

See *Lafayette Bank v. Buckingham*, 12 Oh. St. 419, 425 (1861); *Phoenix Ins. Co. v. Bowerson*, 6 O. C. C. 1, 5 (1891); s. c., 3 C. D. 321.

Receiver is not the agent of the company.

See *Consolidated Coal Co. v. Cincinnati, etc., R. R. Co.*, 10 W. L. B. 42 (1883).

Liability of receiver for negligence.

See *Murphy v. Holbrook*, 20 Oh. St. 137 (1870); *Potter v. Bunnell*, 20 Oh. St. 150 (1870).

Power of court to wind up corporation.

In the absence of statutory authority, a court of equity has no right, at the suit of a stockholder, to take any step for the sole purpose, or the primary object of which is to wind up the affairs of a corporation, or in ordinary cases take the control and management thereof from the directors, even on the ground of fraud or mismanagement, or the insolvency of the company.—*Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618; *North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899); s. c., 8 Dec. 594; *Cronin v. Potters' Co-Op. Co.*, 29 W. L. B. 52 (1892).

But see *Everhardt v. United States Investment Co.*, 8 N. P. 525 (1901).

When creditor cannot attach in foreign state.

The court appointing a receiver has power to order a creditor, residing within the jurisdiction, to dismiss attachment proceedings begun by him in a foreign state.—*Besuden v. Besuden Co.*, 3 N. P. 165 (1896); s. c., 4 Dec. 144.

Lien of attaching creditor as against receiver.

Where, before the appointment of a receiver, an attachment and levy are made by a creditor on the assets of a corporation, carrying on its business, though in fact insolvent, the receiver's rights will be subject to the lien obtained by attachment.—*Ford v. Lamson*, 17 O. C. C. 539 (1899). See *New York Rubber Co. v. Gandy Belting Co.*, 11 O. C. C. 618 (1896); s. c., 5 C. D. 286.

Liability for receivers for taxes.

See *McNeill v. Hagerly*, 51 Oh. St. 255, 265 (1894); *Sandheger v. Banner Brewing Co.*, 6 N. P. 410 (1899); s. c., 8 Dec. 592.

Receivers of railroads.

See § 3415 et seq.

Propriety of appointing receiver of insolvent corporation.

See *Cheney v. Maumee Cycle Co.*, 20 O. C. C. 19 (1900); s. c., Sup. Ct. 1901, 45 W. L. B. 175.

Receiver, Eligibility, Oath, Bond, Powers, etc., §§ 5588-5591.

§ 5588. **WHO INELIGIBLE AS RECEIVER.**—No party, attorney, or person, interested in an action, shall be appointed receiver therein, except by consent of the parties. (March 14, 1853, 51 v. 57, § 254.)

Stockholders and directors ineligible.

The appointment of one who at the time of his appointment as receiver was a stockholder, director and treasurer of the corporation, is

within the direct prohibition of this section.—*Moss Nat. Bank v. Lakeside Co.*, 19 O. C. C. 365 (1900); s. c., 10 C. D. 542.

§ 5589. **OATH AND UNDERTAKING BY RECEIVER.**—The receiver, before he enters upon his duties, must be sworn to perform them faithfully, and, with surety approved by the court, judge, or clerk, execute an undertaking to such person, and in such sum, as the court or judge shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. (March 14, 1853, 51 v. 57, § 255.)

§ 5590. **POWERS OF RECEIVER.**—The receiver shall have power, under the control of the court, to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect, compound for, and compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize. (March 14, 1853, 51 v. 57, § 256.)

Powers of foreign receivers.

See *Bank v. McLeod*, 38 Oh. St. 174 (1882); *Barbour v. Lockard*, 11 W. L. B. 319 (1884); *Wilson v. Gifford*, 12 O. C. C. 597 (1896); *President, etc., of Manhattan Co. v. Maryland Steel Co.*, 31 W. L. B. 100 (1894); s. c., 1 Dec. 286; *Besuden v. Besuden Co.*, 3 N. P. 165 (1896); s. c., 4 Dec. 144.

Akron, etc., R. R. Co., 6 N. P. 291 (1899); s. c., 8 Dec. 107.

Same subject — may set aside judgment.

A receiver appointed for a corporation has authority under the control of the court, in his name as such receiver, to file a motion to set aside a judgment entered against the corporation.—*Smead Foundry Co. v. Chesbrough*, 18 O. C. C. 733 (1895); s. c., 6 C. D. 670.

Power to sell property.

A receiver acts under orders and directions of the court, and the only title or property he can convey is that ordered by the court to be sold; therefore, should he include in the sale property not ordered sold, and such sale is afterward confirmed by the court, it must be considered as confirmed inadvertently.—*Cincinnati, etc., R. R. Co. v. Cincinnati, etc., Ry. Co.*, 6 N. P. 427 (1899); s. c., 9 Dec. 493.

Suit to set aside fraudulent conveyance.

Where a receiver fails to sue to set aside a fraudulent conveyance, a creditor may commence such suit making the receiver and all interested parties, such action being substantially an application to the court for an order on the receiver.—*Monitor Farnace Co. v. Peters*, 40 Oh. St. 575 (1884).

Power over real estate.

See *Cheney v. Maumee Cycle Co.*, 45 W. L. B. 175 (1901).

Mandamus against receiver.

Where the court of common pleas, having jurisdiction in an action against a railroad corporation, has appointed a receiver, who is in possession and is operating the road under the orders of the court, a mandamus will not be issued against such corporation and receiver directing their conduct in operating the road.—*State ex rel. v. Marietta, etc., R. R. Co.*, 35 Oh. St. 154 (1878).

Receiver succeeds to rights of all parties—may set aside invalid mortgages.

A receiver for the property of an insolvent corporation appointed in a suit in behalf of its general creditors succeeds to the rights of the creditors as well as of the corporation, and may avoid a chattel mortgage given by the corporation, void as to creditors under a state statute for want of filing, though it is valid as against the corporation.—*Bayne v. Brewer Pottery Co.*, 90 Fed. 754 (1898).

Unrecorded mortgage, priority of receiver.

See *Cheney v. Maumee Cycle Co.*, 45 W. L. B. 175 (1901).

Same subject.

Receivers of corporations are not the representatives of the corporation alone, but are also representatives of its creditors, subject to the orders of the courts.—See *Rogers v.*

Receiver may sue in name of company.

See *Ohio, etc., R. R. Co. v. Indianapolis, etc., R. R. Co.*, 5 A. L. Reg. 733 (1866); *Miami Exporting Co. v. Gano*, 13 Oh. 269 (1844).

§ 5591. **INVESTMENT OF FUNDS BY RECEIVER.**—Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order shall

Orders of Court as to Funds, etc., §§ 5592, 5593.

be made except upon the consent of all the parties to the action. (March 14, 1853, 51 v. 57, § 257.)

§ 5592. **DISPOSITION OF PROPERTY IN HANDS OF TRUSTEE.**— When it is admitted by the pleading or on the examination of a party that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court (March 14, 1853, 51 v. 57, § 258.)

§ 5593. **HOW CERTAIN ORDERS OF COURT MAY BE ENFORCED.**— When a court, in the exercise of its authority, orders the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience as for a contempt, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it in conformity with the direction of the court. (March 14, 1853, 51 v. 57, § 259.)

PART XXV.

DISSOLUTION OF CORPORATIONS.

- ✓ § 5651. When corporation may petition for dissolution.
- § 5652. What the petition must contain.
- § 5653. Affidavit to be attached to petition.
- § 5654. Notice of the pendency of the petition.
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- ✗ ~~§ 5674a.~~ Inactive corporations, surrender of corporate powers.
- ✓ § 5675. Directors at time of dissolution may settle affairs of corporation.
- § 5676. When the last board is without a quorum.
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- § 5685. Judgments for or against may be revived.
- § 5686. Error may be prosecuted on judgments for or against.
- ✓ § 5687. Directors may appoint trustees to settle affairs of corporation.
- § 5688. Removal and duties of trustees.

§ 5651. **WHEN CORPORATION MAY PETITION FOR DISSOLUTION.**— When a majority of the directors, trustees, or other officers having the management of the concerns of any corporation, or stockholders representing not less than one-third of the capital stock of any corporation, organized under the laws of the state, discover that the stock, property, and effects of the corporation have been so far reduced by losses or otherwise that it will not be able to pay all just demands to which it may

Petition for, to Contain, etc., § 5652.

be liable, or to afford a reasonable security to those who may deal with it, or deem it beneficial to the interests of the stockholders that the corporation be dissolved, or when such directors, trustees, or other officers are authorized, by a majority of the stockholders, to apply for a judgment as hereinafter provided, or when the objects of the corporation have wholly failed, or are entirely abandoned, or it is impracticable to accomplish such objects, they may apply to the court of common pleas of the county, or the superior court of the city or county in which the principal place of conducting the business of the corporation is situate, by petition, for the dissolution of such corporation, pursuant to the provisions of this chapter. (March 29, 1875, 72 v. 138, § 1.)

Modes of dissolution before Code.

Before the Code, the modes by which private corporations were dissolved were first, by the death of its members; second, surrender of its franchises, and third, a judgment of forfeiture for nonuser or abuse.—*Trustees, etc. v. Zanesville, etc., Co.*, 9 Oh. 203 (1839).

Removal from state does not effect dissolution.

Lander v. Burke, 65 Oh. St. 532 (1902).

Dissolution by sale of property.

A corporation is not dissolved by a sale of all its property.—*See Donner v. Dayton, etc., R. R. Co.*, 1 C. S. C. 130, 139 (1871).

Power of court to wind up corporation.

In the absence of statutory authority, a court of equity has no right, at the suit of a stockholder, to take any step for the sole purpose, or the primary object of which is, to wind up the affairs of a corporation.—*Cincinnati, etc., R. R. Co. v. Duckworth*, 2 O. C. C. 518 (1887); s. c., 1 C. D. 618; *North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899); s. c., 8 Dec. 594; *Robison v. Cleveland, etc., Ry. Co.*, 5 N. P. 293 (1899); s. c., 7 Dec. 312; *Cronin v. Potters' Co-op. Co.*, 29 W. L. B. 52 (1892); *Goebel v. Herancourt Brewing Co.*, 7 N. P. 231 (1893); s. c., 2 Dec. 377; *Schone v. Consolidated, etc., Co.*, 4 N. P. 216 (1897); s. c., 6 Dec. 246; *Woods v. Equitable Debenture Co.*, 8 N. P. 125 (1900).

Question of jurisdiction—how determined.

Where the question, whether the court in an action for the dissolution of a corporation had jurisdiction of the subject-matter thereof, is raised by the pleadings in the case, it is to be tried and determined as any other issue of fact arising thereon.—*Mercantile Trust Co. v. Aetna Iron Works*, 4 O. C. C. 579 (1890); s. c., 2 C. D. 718.

Principal place of conducting business—meaning.

The "principal place of this section is the same as principal office" of § 3855.—*Mercantile Trust Co. v. Aetna Iron Works*, 4 O. C. C. 579, 588 (1890); s. c., 2 C. D. 718.

§ 5652. WHAT THE PETITION MUST CONTAIN.—Such application shall contain a statement of the reasons which induce the applicants to desire a dissolution of the corporation, and there shall be annexed thereto—

Parties—lienholders.

In an action for the dissolution of a corporation, the holders of liens on the real estate or personal property of the corporation are proper if not necessary parties.—*Mercantile Trust Co. v. Aetna Iron Works*, 4 O. C. C. 579 (1890); s. c., 2 C. D. 718.

Appeal and error.

Appeal from the court of common pleas to the court of the circuit does not lie in proceedings under this section.—*Brown v. Sayler*, 54 Oh. St. 246 (1896).

Costs.

Where the directors of a company file a petition under this section, and it appears to the court that the corporation has no property liable to execution for the payment of costs of the proceedings, the court may order that the directors pay such costs (masters' fees), and that in default of such payment execution should issue against them therefor.—*Godley v. Pugh*, 29 Oh. St. 438 (1876).

Dissolution of building and loan associations.

See § 3836-3.

Dissolution of railroad companies.

See § 3363.

Dissolution does not terminate liability.

Where a corporation is liable in damages to an agent for having wrongfully discharged him from its service under a contract for a definite period, and is subsequently dissolved on petition of its stockholders, it remains liable to the party injured notwithstanding the dissolution.—*Tiffin Glass Co. v. Stoehr*, 54 Oh. St. 157 (1896).

When equity will interfere.

Where a corporation is proceeding in good faith, under the statute, to wind up its affairs, a court of equity will not interfere unless it appears that the remedy furnished by the statute is inadequate.—*North Fairmount, etc., Co. v. Rehn*, 6 N. P. 185 (1899).

Affidavit to Petition, Notice, Hearing, Judgment, etc., §§ 5653-5656.

1. A full, just, and true inventory of all the estate, both real and personal, in law and equity, of the corporation, and of all the books, vouchers, and securities relating thereto.

2. A full, just, and true account of the capital stock, if any, of the corporation, specifying the names of the stockholders, their residence when known, the number of shares belonging to each, the amount paid in upon such shares respectively, and the amount still due thereon.

3. A statement of all the incumbrances on the property of the corporation, and of all engagements entered into by it which have not been fully satisfied or canceled, specifying the place of residence of each creditor, and of every person to whom such engagements were made, if known, and if not known, the fact to be so stated, and the sum owing to each creditor, the nature of each debt or demand, and the true cause and consideration of such indebtedness. (April 15, 1867, 64 v. 153, § 2.)

Accounts must be set forth in petition.

A petition under this section must contain the amounts and inventories of all the estate of the corporation. There is no provision of the statute for substituting an excuse for not doing what the statute requires shall be done. It is within the power of the court to give the

petitioners access to the books of the corporation to enable them to furnish the material required to be set forth, but until such material is set forth, the court has no authority to make an order under § 5654.—*Fitch v. Sprague Carriage Co.*, 19 O. C. C. 296 (1900); s. c., 10 C. D. 520.

§ 5653. **AFFIDAVIT TO BE ATTACHED TO PETITION.**—To every such petition there shall also be annexed an affidavit of one or more of the applicants, or in case they are all non-residents of the county in which the petition is filed, then an affidavit of the agent or attorney of one or more of the applicants, that the facts stated in the application, and the accounts, inventories, and statements contained therein or annexed thereto, are just and true, so far as the affiant knows, or has the means of knowing. (April 25, 1902, 95 v. 274; April 15, 1867, 64 v. 153.)

§ 5654. **NOTICE OF THE PENDENCY OF THE PETITION.**—Upon such petition, accounts, inventories, and affidavit being filed, an order shall be entered requiring all persons interested in the corporation to show cause, if any they have, why it should not be dissolved, before some referee or master commissioner appointed by the court, and to be named in the order, at a time and place therein to be specified, not less than three months from the date thereof; and a notice of the contents of such order shall be published once in each week, for three weeks successively, in some newspaper published and of general circulation in the county wherein the principal place of business of the corporation is situate. (April 15, 1867, 64 v. 153, §§ 4, 5.)

§ 5655. **HEARING BEFORE THE MASTER.**—On the day appointed in the order the referee or master shall proceed to hear the allegations and proofs of such parties, take testimony in relation thereto, and, with all convenient speed, report the same to the court, with a statement of the property, effects, debts, credits, and engagements of the corporation, and of all other matters and things pertaining to its affairs. (April 15, 1867, 64 v. 153, § 6.)

§ 5656. **WHEN A JUDGMENT FOR DISSOLUTION TO BE RENDERED.**—When the report is made, if it appear to the court that the corporation is insolvent, or that a dissolution thereof will be beneficial to the stockholders, and not injurious to the public interest, or that the objects of the corporation have wholly failed, or been entirely abandoned, or that it is impracticable to accomplish such objects, a judgment shall be entered dissolving the corporation, and appointing one or more receivers of its estate and effects; and the corporation shall thereupon be dissolved and shall cease. (April 15, 1867, 64 v. 153.)

When receivers can be appointed.

Until after an order has been made dissolving the corporation, no receiver can be appointed. Section 5587 does not apply.—

Ordinary receiver

Bacon v. Northwestern Stove Co., 5 O. C. C. 289 (1891); s. c., 3 C. D. 143; *Mercantile Trust Co. v. Etna Iron Co.*, 4 O. C. C. 579 (1890); s. c., 2 C. D. 718.

Receiver; Appointment, Duties, etc., §§ 5657-5661.

§ 5657. **WHO MAY BE APPOINTED RECEIVER.**—A director, trustee, or other officer of the corporation, or any of its stockholders, may be appointed a receiver; and a receiver shall, before entering upon the duties of his appointment, give such security to the state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of his appointment, and for the due accounting for all money received by him. (April 15, 1867, 64 v. 153, § 8.)

§ 5658. **POWERS OF RECEIVER.**—Such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of his having filed the security hereinbefore required, and shall be trustee of such estate for the benefit of the creditors of the corporation and its stockholders; and he shall have all the power and authority conferred by law upon trustees to whom assignments are made for the benefit of creditors. (April 15, 1867, 64 v. 153, §§ 9, 10.)

How receiver forced to set aside transfer.

Where a receiver, appointed on the dissolution of a company, takes no step to set aside a fraudulent conveyance of corporate property, a creditor may commence an action to accomplish that purpose, making the receiver and other interested persons parties.—See *Monitor Furnace Co. v. Peters*, 40 Oh. St. 575 (1884).

Property rights acquired by receiver.

There passes to the receiver the property and rights of the corporation, precisely in the same condition, and subject to the same equities, as they were held by the corporation.—*Falkenbach v. Patterson*, 43 Oh. St. 359, 367 (1885). See *Smith v. Johnson* 57 Oh. St. 486, 488 (1898).

§ 5659. **UNPAID SUBSCRIPTION TO BE COLLECTED.**—If there be any sum remaining due upon any share of stock subscribed in the corporation, the receiver shall immediately proceed and recover the same, unless the person so indebted is wholly insolvent, and for that purpose may commence and prosecute an action for the recovery of such sum, without the consent of any creditor of the corporation. (April 15, 1867, 64 v. 153, § 11.)

Dues in loan associations.

Payment of dues in building and loan associations are payments upon stock subscriptions analogous to such payments in other stock corporations upon capital stock. When such associations go into liquidation under this act, dues are no longer payable except as ordered by court for the purpose of paying debts and equalizing all the stockholders.—*Hinman v. Ryan*, 3 O. C. C. 529 (1888); s. c., 2 C. D. 305.

Collection of subscriptions — action.

An action to collect an unpaid subscription to the capital stock of a corporation com-

menced by a receiver under this section is a suit at law to recover a money judgment.—*Smith v. Johnson*, 57 Ohio St. 486 (1898).

Joinder of parties.

It is not proper practice for such receiver to join in one action all delinquent stockholders as defendants, those who reside out of the county where the suit is brought as well as those who reside within such county, and issue summons to another county to obtain service upon such nonresidents, and where this is done a proper motion to set aside service will be sustained.—*Smith v. Johnson*, 57 Oh. St. 486 (1898).

§ 5660. **DUTIES OF RECEIVERS.**—The receiver shall, immediately on his appointment, give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors, and in addition thereto it shall notify all persons holding any open or subsisting contract of the corporation to present the same to him, in writing, and in detail, at the time and place in such notice specified, which shall be published for three weeks in some newspaper printed and of general circulation in the county wherein the principal place of business of the corporation is situate. (April 15, 1867, 64 v. 153, § 12.)

§ 5661. **TRANSFERS PENDING THE ACTION VOID.**—All sales, assignments, transfers, mortgages, and conveyances, of any part of the estate, real or personal, including things in action, of every description, made after the petition for the dissolution of the corporation is filed, in payment of or as security for any existing or

Receiver; Duties as to Creditors, Compensation, etc., §§ 5662-5666.

prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receiver appointed on such petition, and as against the creditors of the corporation. (April 15, 1867, 64 v. 153, § 13.)

What is a preference before filing petitions.

A mortgage given to secure a creditor, made prior to the filing of a petition under this act, but in contemplation thereof, is fraudulent as to creditors.—See *Damarin v. Huron Iron Co.*, 47 Oh. St. 581 (1890).

Assignments after filing petition—void.

When proceedings to dissolve a building and loan association are pending, an attempted assignment of a mortgage by the officers of the corporation is void.—*Hinman v. Ryan*, 3 O. C. C. 529 (1888); s. c., 2 C. D. 305.

§ 5662. DUTIES OF CREDITORS AND OTHER PERSONS.—After the first publication of the notice of the appointment of a receiver, every person having possession of any property belonging to the corporation, and every person indebted thereto, shall account and answer to the receiver for the amount of such debt, and for the value of such property; and all the provisions of law in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to such receiver, and to the property of the corporation, except as otherwise provided herein. (April 15, 1867, 64 v. 153, §§ 14, 15.)

§ 5663. MEETING OF CREDITORS.—The receiver shall call a general meeting of the creditors of the corporation within four months from the time of his appointment, at which all accounts and demands for and against the corporation, and all its open and subsisting contracts, shall be ascertained and adjusted, as fully as may be, and the amount of money in the hands of the receiver declared, and he may settle controversies that arise between him and the debtors or creditors of the corporation by arbitrament or reference. (April 15, 1867, 64 v. 153, §§ 15, 16.)

§ 5664. HOW CONTINGENT ENGAGEMENTS DISCHARGED.—If there be any open and subsisting engagements on contracts of the corporation which are in the nature of insurance, or contingent engagements of any kind, the receiver may, with the consent of the party holding such engagements, cancel and discharge the same by refunding to such party the premium or consideration paid thereon by the corporation, or so much thereof as shall be in the same proportion to the time which remains of any risk assumed by such engagements, as the whole premium bears to the whole term of such risk; and upon such amount being paid by the receiver to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against the receiver. (April 15, 1867, 64 v. 153, § 17.)

§ 5665. RECEIVER'S COMPENSATION.—The receiver shall, in addition to his actual disbursements, be entitled to such commissions as the court shall allow, not exceeding the sum allowed to executors or administrators, as well as reasonable counsel fees for services rendered him. (April 15, 1867, 64 v. 153, § 18.)

§ 5666. RECEIVER TO RETAIN MONEY FOR CERTAIN PURPOSES.—The receiver shall retain out of the money in his hands a sufficient amount to pay the sums which he is hereinbefore authorized to pay, for the purpose of canceling and discharging any open or subsisting engagements; and if any suit be pending against the corporation or the receiver, for any demand, he may retain the proportion which would belong to such demand if established, and the necessary costs of the proceedings, to be applied according to the event of such suit, or to be distributed in a second or other dividend. (April 15, 1867, 64 v. 153, §§ 19, 20.)

Receiver; Distribution, Account, etc., §§ 5667-5672.

§ 5667. **HOW DISTRIBUTION TO BE MADE.**—The receiver shall distribute the residue of the money in his hands in the payment of obligations of the corporation which have been exhibited by creditors, and ascertained, in the following order:

1. Debts entitled to a preference under the laws of the United States.
2. Mortgages, judgments, and other liens on the real estate of the corporation, in the order of their priority.
3. Debts which are liens upon the capital stock or property of the corporation, other than real estate, in the order of their priority, and the extent of the value of the stock or other property on which they are liens. (April 15, 1867, 64 v. 153, § 21.)

§ 5668. **WHEN DIVIDEND MAY BE MADE.**—The receiver may, from time to time, make dividends of the money in his hands, among the creditors of the corporation, until they are paid in full; but no dividend shall be made to the stockholders of the corporation, until after the final dividend to creditors; and if, after such final dividend is made, there remain any surplus in the hands of the receiver, he shall distribute the same among the stockholders of the corporation, in proportion to the respective amounts paid in by them severally on their shares of stock. (April 15, 1867, 64 v. 153, §§ 21, 22.)

Distribution among building and loan association members.

See *In re Home, etc., Ass'n*, 3 N. P. 145 (1896); s. c., 4 Dec. 272.

§ 5669. **RECEIVER TO ACT ON ORDER OF COURT.**—The receiver shall be subject to the direction and control of the court as to the time of making dividends, both to the creditors and stockholders of the corporation, and as to the time of closing up the concerns of the corporation, and rendering his final accounts, and may be compelled to account at any time; and he may be removed by the court, and any vacancy created by such removal, or by death, or otherwise, may be filled by the court. (April 15, 1867, 64 v. 153, §§ 24, 25.)

§ 5670. **ACCOUNT OF RECEIVER TO COURT.**—When required by the court the receiver shall render a full and accurate account of all his proceedings to the court, on oath, which may be referred to a referee or master commissioner to examine and report thereon; but before he renders any such account he shall insert a notice of his intention to present the same, once a week, for three consecutive weeks, in some newspaper printed and of general circulation in the county wherein the principal place of business of the corporation is situate, specifying the time and place at which such account will be rendered. (April 15, 1867, 64 v. 153, §§ 26, 27.)

§ 5671. **REPORT OF REFEREE ON RECEIVER'S ACCOUNT.**—The referee to whom such account is referred shall hear and examine the proofs, vouchers, and documents offered for or against the same, and shall report thereon fully to the court; and when the report is made the court shall hear the allegations of all concerned therein, and shall allow or disallow the account, and may decree the same to be final and conclusive upon all the creditors of the corporation upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of the corporation. (April 15, 1867, 64 v. 153, §§ 28, 29.)

§ 5672. **FURTHER DUTIES OF RECEIVER.**—The receiver shall also account, from time to time, in the same manner, and with like effect, for all money which comes to his hands after such account is rendered, and for all money retained by him for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends. (April 15, 1867, 64 v. 153, § 29.)

Dissolution by Vote of Stockholders; by Surrender of Charter, etc., §§ 5673, 5674.

§ 5673. **WHEN ONE-FIFTH OF STOCKHOLDERS MAY REQUIRE A DISSOLUTION.**—When stockholders owning one-fifth or more of the paid-up stock of a corporation organized for manufacturing or mining file in the office of the clerk of one of the courts mentioned in section 5651, their petition containing the statement that the corporation is insolvent, or that the dissolution thereof will be beneficial to the stockholders, or that the objects of the corporation have wholly failed or been entirely abandoned, or that it is impracticable to accomplish such objects; or that the profits of the business are being diverted from the best interests of the stockholders equally or that the business of the corporation cannot be profitably conducted and that they therefore desire a dissolution of the corporation the court shall, if it deem it beneficial to the interest of the stockholders make an order requiring the officers of the corporation within reasonable time to file in court the inventories, accounts and statements required by section 5652 and upon the filing thereof the court shall proceed as provided in section 5654 requiring all persons interested in the corporation to show cause if any they have why such corporation should not be dissolved and the court shall, if it deem it beneficial to the interests of the stockholders, adjudge the dissolution of the corporation in conformity with the provisions of this chapter made upon finding that the statements contained in the petition are true and upon such proceeding being had such other and further proceeding shall, in the judgment of the court, be had for the final settlement and adjustment of the affairs of the corporation as are hereinbefore provided should be had. (April 10, 1896, 92 v. 138; March 20, 1875, 72 v. 67, § 1.)

Only legal owners of stock can take proceedings.

Only the registered legal stockholders, and not equitable stockholders, can take proceedings under this section.—*Armstrong v. Herancourt Brewing Co.*, 26 W. L. B. 39 (1891).

Stockholders may withdraw from the petition.

It seems that any of the petitioning stockholders may withdraw and cease to prosecute the proceeding at any time before dissolution is ordered.—See *Herancourt Brewing Co. v. Armstrong*, 3 O. C. C. 468 (1892); s. c., 3 C. D. 541.

Ownership of one-fifth of stock—how tried.

On the filing of a petition which fills all the requirements of the statute in form, it is the duty of the court to order the filing of inventories, and before the trial on the merits, under § 5655 and § 5656, the corporation cannot question the ownership of stock.—See *Armstrong v. Herancourt Brewing Co.*, 53 Oh. St. 467, 477 (1895).

Lienholders are proper parties.

In a proceeding under this section persons holding liens on the property of the defendant company are proper if not necessary parties.—*Mercantile Trust Co. v. Aetna Iron Works*, 4 O. C. C. 579 (1890); s. c., 2 C. D. 718.

Motion for new trial.

Before proceedings in error can be taken a motion for a new trial must be made.—*Mercantile Trust Co. v. Aetna Iron Works*, 4 O. C. C. 579, 589 (1890); s. c., 2 C. D. 718.

Jurisdiction as to subject-matter—how tried.

See *Mercantile Trust Co. v. Aetna Iron Works*, 4 O. C. C. 579 (1890); s. c., 2 C. D. 718.

Discretion of court as to making order on officers.

See *Fitch v. Sprague Carriage Co.*, 19 O. C. C. 296 (1900); s. c., 10 C. D. 520.

Cross-petition by creditor to reach stockholders' liability.

In an action under this section a creditor may by cross-petition reach stockholders' liability.—See *Peter v. Farrell, etc., Co.*, 53 Oh. St. 534 (1895).

When proceedings reviewable on error.

An Ohio corporation has not the right to refuse to make a disclosure of its condition in an action under this section, and therefore an order upon officers of a corporation requiring them to file in court an inventory, etc., is not an order affecting a substantial right, and is not reviewable on error.—*Armstrong v. Herancourt Brewing Co.*, 53 Oh. St. 467 (1895).

§ 5674. **HOW CERTAIN CORPORATIONS MAY SURRENDER CHARTER.**—

When a majority of the directors, trustees, or other officers of a corporation not for profit desire to abandon its corporate existence and no debts have been incurred which are unpaid, or in case of a corporation for profit when a majority of such officers become satisfied that the objects of the corporation cannot be accomplished,

Inactive Companies — Settlement of Affairs, §§ 5674a, 5675.

and that no installment of the capital stock of such corporation has been paid and no investments have been made and no debts incurred which are unpaid, they, or the president of the board of directors, trustees, or other officers, may call a meeting of the members or stockholders of the corporation at such time and place as he or they may designate by at least two weeks' publication in a newspaper published and of general circulation in the county wherein the principal office is located; and if a majority of the members of a corporation not for profit present at such meeting desire such abandonment, or a majority in amount of the stockholders of a corporation for profit present in person or by proxy decide that the objects of such corporation cannot be accomplished, then such corporation shall be abandoned or dissolved upon the filing of a certificate of such abandonment or dissolution with the secretary of state in the manner provided by law. (April 18, 1902, 95 v. 208; May 4, 1869, 66 v. 94.)

✓ § 5674a. **INACTIVE CORPORATIONS.**—When a majority of the directors or other officers having the management of the concerns of any corporation for profit, which has completely closed its business, and paid all the debts and liabilities incurred by such corporation desire to surrender its corporate authority and franchises, they, or the president of said board of directors, may call a meeting of the stockholders at such time or place as he or they may designate by publication for four weeks in some newspaper published and of general circulation in the county wherein the principal office of the corporation is located and by written notices addressed to each of the stockholders whose residence is known, of the object, time and place of said meeting; and if all the stockholders present at such meeting in person or by proxy decide to surrender and abandon its corporate authority the corporation shall be abandoned and dissolved upon the filing of a certificate of such abandonment or dissolution with the secretary of state in the manner provided by law. Provided that a corporation entitled at the date of the passage of this act to surrender its charter under the provisions of this section, having no living president of its board of directors and a majority of whose directors are deceased, may surrender its corporate charter by an application of one or more of the resident stockholders thereof, setting forth the facts required by this section, duly filed with the secretary of state. (April 18, 1902, 95 v. 208.)

§ 5675. **DIRECTORS AT TIME OF DISSOLUTION MAY SETTLE AFFAIRS OF CORPORATION.**—Upon the dissolution of a corporation by the expiration of the terms of its charter, or otherwise, and unless other persons be appointed by the legislature, or by the stockholders, directors, or trustees of the corporation, or by a court of competent authority, the directors, trustees, or managers of the affairs of such corporation, acting last before the time of its dissolution, by whatever name they may be known in law, and their survivors, shall be the trustees of the creditors and stockholders of the dissolved corporation, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts and divide among the stockholders the money and other property remaining, in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses; the persons so constituted trustees may sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of the corporation, describing it by its corporate name, and they shall be jointly and severally responsible to the creditors and stockholders of the corporation, to the extent of its property and effects that come into their hands; such trustees may be made or become parties to any action, by or against the corporation; and all liens of judgment existing at the time of the dissolution either in favor of or against the corporation, shall continue in force in the same manner as if the dissolution had not taken place. (March 21, 1850, 48 v. 90, § 5; March 7, 1842, 40 v. 67, § 14.)

Settlement of Affairs, §§ 5676-5680.

Warrant of attorney to confess judgment.

The trustees may have judgment entered on a cognovit note owned by the corporation at the time of its dissolution.—*Martin v. Trustees of Belmont Bank*, 13 Oh. 250 (1844).

How suit brought.

The trustees may sue in their collective names, not in their individual names.—*Martin v. Trustees of Belmont Bank*, 13 Oh. 250 (1844).

Service of process.

In proceedings or actions against defunct corporations, service of process upon the members of its last acting board of directors is sufficient, under the statute, to give the court jurisdiction.—*Warner v. Callender*, 20 Oh. St. 190 (1870); *Vallette v. Kentucky Trust Co.*, 1 Handy, 571 (1855).

Suits against defunct corporation.

See *Renick v. Bank of West Union*, 13 Oh. 298 (1844).

§ 5676. **WHEN THE LAST BOARD IS WITHOUT A QUORUM.**—When the last board of directors or trustees of an expired or dissolved corporation becomes unable, by the refusal or neglect of a part of such trustees to act, or for want of a quorum, to act as trustees for closing the affairs of the corporation, any number of such last board of directors or trustees may apply to the court of common pleas of the proper county to declare vacant the places of such directors or trustees as refuse or neglect to act, and such court may empower the remaining directors or trustees, not less than two in number, or appoint any other number of persons, not exceeding three, to perform the duties of trustees under the preceding section. (February 21, 1849, 47 v. 15, § 1.)

§ 5677. **PETITIONS UNDER PRECEDING SECTION.**—All applications made under the preceding section shall be by petition, and the court hearing the same may, on the same petition, make needful orders against any former trustees, or against any assignees of such corporation, for the conveyance of property by them held, and for the assignment of all rights in them vested, and also for the delivery of all books and papers touching the affairs of the corporation, which order may be enforced by process, or by its terms operate as a conveyance and transfer. (February 21, 1849, 47 v. 15, § 2.)

§ 5678. **TRUSTEES APPOINTED SUCCEED TO RIGHTS OF PREDECESSOR.**—The trustees so appointed, and all successors of such trustees, shall succeed to all the rights vested in their predecessors, whether trustees or assignees; and all securities and effects by them held or acquired, and all judgments recovered, whether in favor of the corporation to which they succeed, or in the names of the trustees of such corporation, shall inure to the succeeding trustees, and pass by operation of law as fully as if the same were assigned. (February 21, 1849, 47 v. 15, § 3.)

§ 5679. **NO ACTION SHALL ABATE BY DISSOLUTION OF CORPORATION.**—No action pending in any court in favor of or against any corporation shall be discontinued or abate by the dissolution of the corporation, whether the dissolution occur by the expiration of its charter or otherwise; but all such actions may be prosecuted to final judgment by the creditors, assignees, receivers, or trustees having the legal charge of the assets of the corporation, in its corporate name. (March 10, 1843, 41 v. 52, § 1; 40 v. 67, § 14.)

Construction of former acts.

See *Renick v. Bank of West Union*, 13 Oh. 298 (1844); *Miami Exporting Company v. Gano*, 14 Oh. 269 (1844); *Stetson v. City*

Bank, 2 Oh. St. 167 (1853); *Stetson v. City Bank*, 12 Oh. St. 577 (1861).

No actions abate.

See *Lake Superior Iron Co. v. Brown*, 44 Fed. 539 (1890).

§ 5680. **JUDGMENTS BY OR AGAINST SUCH CORPORATIONS MAY BE ENFORCED.**—Upon all judgments in favor of or against any such corporation, whether such judgments exist at the time of the dissolution, or are obtained afterward in actions pending at the time of the dissolution, execution may be had, and

Settlement of Affairs, §§ 5681-5686.

satisfaction or performance of the same enforced, by the creditors, assignees, receivers, or trustees having the legal charge of the assets of the dissolved corporation, in the corporate name of the dissolved corporation. (March 10, 1843, 41 v. 52, § 2.)

§ 5681. **TITLE TO PROPERTY OF CORPORATION TO PASS TO TRUSTEES.**—The title to all real estate belonging to any such corporation shall, at the time of the dissolution of the same, pass to the trustees of the corporation, who may sell and dispose of the same in such manner, and upon such terms, as they deem best for the interest of the creditors and stockholders, and, upon any such sale, make a good and sufficient deed therefor. (March 10, 1843, 41 v. 52, § 4.)

§ 5682. **TRUSTEES PERSONALLY LIABLE FOR AN ABUSE OF TRUST.**—The trustees of any such corporation shall be subject to the control of the court of common pleas, and be liable to be sued on behalf of any person interested, on account of any neglect or omission of duty, or abuse of trust; in case of the removal of any such trustee by the court for an abuse of trust, it may appoint a suitable person to fill the vacancy; and any such trustee may, for reasonable cause, upon the application of any creditor or stockholder, be required by the court to give bond and security, in such amount, and subject to such conditions, as it may direct. (March 10, 1843, 41 v. 52, § 5.)

§ 5683. **DISSOLVED CORPORATION MAY PROSECUTE ACTION IN ITS OWN NAME.**—A corporation may, at any time after its dissolution, whether the dissolution occur by the expiration of its charter or otherwise, prosecute any action in and by its corporate name, for the use of the party entitled to receive the proceeds of such action, upon any and all causes of action accrued, or which, but for such dissolution, would have accrued, in favor of the corporation, in the same manner, and with the like effect, as if it were not dissolved. (March 21, 1850, 48 v. 90, § 1.)

§ 5684. **MAY BE SUED BY CORPORATE NAME; SERVICE OF PROCESS.**—Any such dissolved corporation may be sued by its corporate name, for or upon any cause of action accrued, or which, but for the dissolution, would have accrued against it, in the same manner, and with the like effect, as if it were not dissolved; and all process by which an action is instituted against such corporation may be served by the sheriff, or other proper officer, by delivering to any one of the assignees, trustees, receivers, or persons having charge of its assets, a copy thereof, or by leaving such copy at the residence of any such assignee, trustee, receiver or person. (March 21, 1850, 48 v. 90, § 2.)

See *Tiffin Glass Co. v. Stoehr*, 54 Oh. St. 157 (1896).

§ 5685. **JUDGMENTS FOR OR AGAINST MAY BE REVIVED.**—Judgments in favor of or against a dissolved corporation, whether rendered before or after its dissolution, and which become dormant, may be revived in favor of or against it, as the case may be, in and by its corporate name, in the same manner, and with the like effect, as if the corporation were not dissolved; and in all cases of such judgments against any such corporation the writ of summons or other process shall be served in the manner prescribed in section fifty-six hundred and eighty-four. (March 21, 1850, 48 v. 90, § 3.)

§ 5686. **ERROR MAY BE PROSECUTED ON JUDGMENTS FOR OR AGAINST.**—Petitions in error upon judgments may be prosecuted in favor of or against any such dissolved corporation, and by its corporate name, in the same manner, and with the like effect, as if it were not dissolved; and process thereon against it shall be served in the manner prescribed in section fifty-six hundred and eighty-four. (March 21, 1850, 48 v. 90, § 4.)

Settlement of Affairs, §§ 5687, 5688.

✓ § 5687. **DIRECTORS MAY APPOINT TRUSTEES TO SETTLE AFFAIRS OF CORPORATION.**—The board of directors or other officers having the control and management of any corporation in this state, may appoint three trustees to adjust and settle the affairs of such corporation, and the trustees so appointed shall be authorized to use the corporate name of the corporation, for such period as may be necessary for the adjustment and settlement of its affairs, by suit or otherwise. (May 1, 1852, 50 v. 272, § 2.)

§ 5688. **REMOVAL AND DUTIES OF TRUSTEES.**—The trustees so appointed shall report annually to the stockholders of the corporation a full and succinct statement of its affairs; and a majority in interest of the stockholders may remove a trustee, or appoint a person to a vacancy occasioned by the death, resignation, or removal of a trustee. (May 1, 1852, 50 v. 272, §§ 3, 4.)

PART XXVI.

PROCEEDING TO CURE CERTAIN DEFECTS, ERRORS AND OMISSIONS.

- § 5867. When court must give effect to the intention of the parties.
- § 5868. Certain errors, defects, and omissions may be corrected by action.
- § 5869. In what county petition to be filed.
- § 5870. How service to be made.
- § 5871. Judgment of the court and its effect.

§ 5867. **WHEN COURT MUST GIVE EFFECT TO THE INTENTION OF THE PARTIES.**— When, in an instrument in writing, or in a proceeding, there is an omission, defect, or error, by reason of the inadvertence of an officer, or a party, person, or body corporate, whereby the same is not in strict conformity with the laws of this state, the courts of this state may give full effect to such instrument or proceeding, according to the true and manifest intention of the parties thereto. (March 10, 1859, 56 v. 40, § 1.)

See Warner v. Callender, 20 Oh. St. 190 (1870); Spinning v. Home, etc., Ass'n, 26 Oh. St. 483 (1875); Clarke v. Thomas, 34 Oh. St. 46, 59 (1877).

§ 5868. **CERTAIN ERRORS, DEFECTS, AND OMISSIONS MAY BE CORRECTED BY ACTION.**— When any such error, omission, or defect occurs in an instrument or proceeding which is required to be made a matter of record, any party, person, body corporate, or persons intending and undertaking to become a body corporate, having or claiming an interest in the correction of such error, omission, or defect, may file a petition in the court of common pleas, setting forth particularly the error, defect, or omission complained of, and asking an order for the correction thereof. (March 10, 1859, 56 v. 40, § 2.)

§ 5869. **IN WHAT COUNTY PETITION TO BE FILED.**— When the record to be corrected is in any way connected with a body corporate, the petition shall be filed in the county wherein the principal office of such corporation is located, and in all other cases in the county wherein the record is kept. (March 10, 1859, 56 v. 40, § 3.)

§ 5870. **HOW SERVICE TO BE MADE.**— When the application is made by a body corporate, or by persons intending and undertaking to become a body corporate, notice of the application, specifying the error, defect, or omission complained of, and the time and place of hearing the same, shall be published for six consecutive weeks in some newspaper of general circulation in the county where the application is made; and in all other cases service shall be made in the manner prescribed by law for making service in civil actions. (March 10, 1859, 56 v. 40, § 2.)

§ 5871. **JUDGMENT OF THE COURT AND ITS EFFECT.**— The court, upon being satisfied that such mistake, error, or omission has been made, shall grant and make an order to correct the same, which order shall be filed in the office in which such record is required to be kept; and from and after such filing, such record, and the order correcting the same, shall be received as evidence in all cases, in all courts, the same as if no such error, omission, or defect had ever existed. (March 10, 1859, 56 v. 40, § 2.)

PART XXVII.

APPEOPRIATION OF PROPERTY.

- § 6414. Appropriations to be made as provided in this chapter.
- § 6415. When appropriation can be made.
- § 6415a. Appropriation of property of minor, etc.
- § 6416. Petition for appropriation, and in what court to be filed.
- § 6417. In what county petition to be filed.
- § 6418. Summons; its command, and service thereof.
- § 6419. Service by publication.
- § 6420. Jurisdictional questions to be first determined.
- § 6421. Jurors to be drawn from the box, and venire issued.
- § 6422. Who entitled to separate trial, and how trial conducted.
- § 6423. The court may allow any amendment.
- § 6424. Time of trial, adjournment, and discharge of juries.
- § 6425. How panel to be filled; jurors to be interrogated by court.
- § 6426. Challenges to jurors, and how vacancies in jury box filled.
- § 6427. The oath to be administered to jury.
- § 6428. The form of writ to sheriff.
- § 6429. Judge must deliver certain copies to sheriff.
- § 6430. Witnesses may be examined before jury.
- § 6431. When a structure is partly on land sought to be appropriated.
- § 6432. Verdict and confirmation thereof.
- § 6433. When and how corporations may have possession.
- § 6434. When and how corporation may abandon proceedings.
- § 6435. When action may be brought for costs and expenses.
- § 6436. New trial; proceedings thereon.
- § 6437. Either party may file a petition in error.
- § 6438. Proceedings in the common pleas on error.
- § 6439. How school land may be appropriated.
- § 6440. When proceedings to appropriate private property may be commenced in court of common pleas.
- § 6441. Court to appoint attorney for party absent or under disability.
- § 6442. Conflicting claims not to be passed upon.
- § 6443. But to be adjudicated in the common pleas.
- § 6444. Such proceeding a civil action.
- § 6445. Unfinished road-bed of railroad company may be condemned.
- § 6446. Proceedings in such case.
- § 6447. In what court such proceedings may be commenced.
- § 6448. Proceedings when land is held without agreement by a corporation.
- § 6449. Summons in such case; judgment and execution.
- § 6450. When injunction may issue against corporation.
- § 6451. Fees of witnesses, officers, and probate judge, and how costs adjudged.
- § 6452. When costs may be apportioned.
- § 6453. When this chapter does not apply.

APPROPRIATION OF PROPERTY.

§ 6414. APPROPRIATIONS TO BE MADE AS PROVIDED IN THIS CHAPTER.

— Appropriations of private property by corporations must be made according to the provisions of this chapter. (April 23, 1872, 69 v. 88, § 1.)

Made when, §§ 6415, 6415a.

These statutes should be strictly construed.

The rule that statutes conferring the power of eminent domain are to be strictly construed is one not to be asserted and then disregarded, but to be rigidly enforced.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228, 244 (1885).

Power not conferred by constitution.

Neither section of the constitution confers the power of eminent domain; they simply prescribe modes for and limitations upon its exercise. The power itself is an inseparable incident of sovereignty, and its exercise was delegated by the sovereign power to the general assembly in the grant of legislative authority. In this state the power is lodged with the general assembly, to be used when necessary to the attainment of its lawful purposes.—*Giesy v. Cincinnati, etc.*, R. R. Co., 4 Oh. St. 308, 323 (1854).

Purpose for which power may be exercised.

The power may be used to appropriate lands for a public highway of any kind; and this whether the road is built and owned by the public or by a corporation as a public instrumentality.—*Giesy v. Cincinnati, etc.*, R. R. Co., 4 Oh. St. 308, 324 (1854).

Function of legislature and judiciary.

The power may be exercised directly or indirectly by the legislature, without the intervention of the judiciary, except for determining the amount of compensation. But the courts possess full power to determine its proper limits, and to prevent abuses in its exercise.—*Giesy v. Cincinnati, etc.*, R. R. Co., 4 Oh. St. 308 (1854).

Appropriations for depots.

Depots being essential to the practical operation of railroads, the appropriation of land for depot purposes is authorized under this act.—*Giesy v. Cincinnati, etc.*, R. R. Co., 4 Oh. St. 308 (1854).

Appropriation to divert streams.

When it becomes necessary to divert a stream from its course a company may appropriate land necessary for a new channel.—*Valley Ry. Co. v. Bohm*, 34 Oh. St. 114 (1877).

Appropriation of highways.

The fact that a road has been occupied by a company under an agreement with the officials in charge of the road, as provided in § 3283, does not in any way affect the right of the owner in fee of the soil of the road or the rights of abutting owners, to be compensated for the appropriation of his property.—*Railroad Co. v. O'Harra*, 48 Oh. St. 343, 353 (1891). See *Railway Co. v. Gardner*, 45 Oh. St. 309, 318 (1887); *Kramer v. Toledo, etc.*, R. R. Co., 53 Oh. St. 436, 444 (1895); *Railway Co. v. Lawrence*, 38 Oh. St. 41 (1882); *Railroad Co. v. Hambleton*, 40 Oh. St. 496, 501 (1884). See *Behmer v. Cincinnati, etc.*, R. R. Co., 10 W. L. B. 232 (1883); *Cincinnati, etc., Ry. Co. v. Pfitzer*, 1 Goebel, 248 (1889).

Appropriation of street-car tracks.

Where one company desires to appropriate the tracks of another company under § 3440, it may institute proceedings under this section.—*Street R. R. Co. v. Street Ry. Co.*, 50 Oh. St. 603 (1893); s. e., 6 O. C. C. 362. See *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 10 O. C. C. 168 (1895); *Consolidated, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 N. P. 537 (1892); *Kinsman, etc., R. R. Co. v. Broadway, etc.*, R. R. Co., 36 Oh. St. 239 (1880).

§ 6415. WHEN APPROPRIATION CAN BE MADE.—Appropriations can only be made when the corporation is unable to agree with the owner, or his guardian or trustee, as to the compensation to be paid for the property, or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown. (May 4, 1891, 88 v. 555; R. S. 1880; April 23, 1872, 69 v. 88, § 2.)

Agreement with guardian.

Where the road passes through land owned by minors, the right of way cannot be secured by a deed executed by the guardian of such

minors without authority from the probate court.—See *State v. Commissioners*, 39 Oh. St. 58 (1883).

§ 6415a. APPROPRIATION OF PROPERTY OF MINOR, ETC.—Whenever under this chapter the property of any minor, idiot, imbecile, or insane person, or any easement or interest therein, is sought to be appropriated by a corporation and there is a legally appointed guardian of the person and estate or of the estates or a trustee of such minor, idiot, imbecile or insane person, and the said guardian has agreed with said corporation upon the amount of compensation to be paid for such property, easement, or interest therein, he may file with the probate court of the county wherein said property is situated, a written application for authority to convey to said corporation the said property or interest; which said application shall fully describe the property, right, easement or interest therein, sought to be conveyed, and shall fully set out the price agreed to be paid for the same, the probate judge shall order said

 Petition for Appropriation, § 6416.

guardian to give such notice as said judge shall deem reasonable, to the said ward, of the filing of said application and of the time set for the hearing of the same. At the time set for the hearing of said application, if the judge shall find that notice was given as ordered of the time set for the hearing of the same, and that the price to be paid is reasonable and just, and that the said conveyance would be to the best interest of said ward, he shall order said guardian to make and execute a deed to said corporation for said property or interest upon the payment of the said price agreed upon by said guardian and said corporation. (May 4, 1891, 88 v. 554.)

§ 6416. **PETITION FOR APPROPRIATION, AND IN WHAT COURT TO BE FILED.**—In any such case the corporation may file with the probate judge a petition, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which the same is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as the same can be ascertained, and a prayer for the appropriation of the property. (April 23, 1872, 69 v. 88, §§ 2, 19.)

Jurisdiction — constitutionality.

This act is a constitutional enactment under article 4, § 8, of the constitution.—Giesy v. Cincinnati, etc., R. R. Co., 4 Oh. St. 308 (1854). See Railroad Co. v. O'Harra, 48 Oh. St. 343 (1891).

Removal to federal court.

It has been held by Wing, J., in the United States circuit court (N. D. O. W. D.) on a motion to remand, that appropriation cases are not removable from the probate court.—Toledo Ry. & Terminal Co. v. Ann Arbor R. R. Co.

Mode of exercising jurisdiction.

The probate court under this act has a special and limited jurisdiction, to be exercised in the cases and in the mode prescribed in the act; and that court cannot, under an order of the court of common pleas, and to carry into effect that order, take jurisdiction of a case or proceed in a mode not authorized by the act.—Dayton, etc., R. R. Co. v. Marshall, 11 Oh. St. 497 (1860).

Pleadings after petition not required.

See Cincinnati, etc., Ry. Co. v. Pfitzer, 1 Goebel, 248 (1889).

Rules of pleading.

As to whether the rules of code pleading are applicable to a petition to appropriate private property for public uses, filed under the statute, in the probate court, *quære*. In case of doubt, the judgment rendered in such proceeding will not be reversed for failure to strictly observe such rules.—Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 O. C. C. 362 (1892).

Object and purpose of section.

See Pittsburg, etc., R. R. Co. v. Perkins, 22 O. C. C. 630 (1888).

Description of lands must be certain.

See Cleveland, etc., R. R. Co. v. Prentice, 13 Oh. St. 373 (1862).

Proof of land desired.

Where the company files a written statement, specifically describing the property sought to be appropriated, no further written or record evidence of the line of the road is essential to the right of the company to have compensation fixed.—Powers v. Hazelton, etc., Ry. Co., 33 Oh. St. 429 (1878).

Purpose and necessity must be alleged.

The purpose and necessity of the appropriation must be clearly stated to enable the court to determine the necessity and to secure fair compensation to the owner.—Valley Ry. Co. v. Bohm, 34 Oh. St. 114 (1877).

Necessity.

The power of eminent domain is based upon the public necessity, and can only be exercised where such necessity exists, but this necessity relates rather to the nature of the property and the uses to which it is applied than to the exigencies of the particular case; and it is no objection to the exercise of the power that lands, equally feasible, could be obtained by purchase.—Giesy v. Cincinnati, etc., R. R. Co., 4 Oh. St. 308 (1854); Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 O. C. C. 362, 389 (1892); *s. e.*, 26 W. L. B. 172; Powers v. Hazelton, etc., Ry. Co., 33 Oh. St. 429 (1878).

See also statutes, act of April 30, 1852, 50 v. 201, §§ 6416, 6420.

Note.—In a recent case in the Lucas county common pleas court (Ann Arbor Ry. Co. v. Toledo Ry. & T. Co.), Kinkade, J., held that the question of necessity includes the question whether or not any railroad is required by the public between the termini named, and if so, whether or not the particular property described and sought to be taken is necessary.

Amount that can be taken.

The quantity of land that may be appropriated is left very indefinite, but only so

Petition and Summons in, §§ 6417, 6418.

much can be taken as is necessary to be used, and if more is taken than can be used, the owner may recover such excess.—See *Platt v. Pennsylvania Co.*, 43 Oh. St. 228 (1885); *Giesy v. Cincinnati, etc., R. R. Co.*, 4 Oh. St. 308 (1854).

Company cannot be made to appropriate more land on motion.

See *Schaible v. Lake Shore, etc., R. R. Co.*, 10 O. C. C. 334 (1895).

Company cannot sell land unnecessarily taken.

Where a corporation appropriates more land than is necessary, it cannot subject the landowner to the additional burden of another railroad by selling such additional land to such other road.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228 (1885). See *Pittsburg, etc., Ry. Co. v. Garlick*, 20 O. C. C. 561 (1900).

What interest can be appropriated.

Only such interest in lands can be taken as will answer the public wants, and it can only be held so long as it is used by the public, and cannot be diverted to any other purpose.—*Giesy v. Cincinnati, etc., R. R. Co.*, 4 Oh. St. 308 (1854). See *Pittsburg, etc., Ry. Co. v. Garlick*, 20 O. C. C. 561 (1900).

Rights retained by owners.

Where the interest acquired is only an easement, the owner of the fee retains every right in the land appropriated, not inconsistent with the paramount authority of the company freely and unobstructedly to build, repair and operate its railroads, and use therefor material fairly within the condemnation. One of the rights so retained is that of access to lands severed by the strip appropriated.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228, 244 (1885).

Permanent interest must be taken.

The company cannot appropriate anything but a permanent estate in the lands upon which its right of way is to be constructed.—*Gorrill v. Toledo, etc., Ry. Co.*, 4 O. C. C. 398, 403 (1890).

Interest of remainderman must be appropriated.

A railroad cannot appropriate a temporary interest, therefore, though it has full rights as against the tenant for life, it must appro-

priate as against the remainderman, or he is entitled to restrain the use of the land until his interest has been paid.—*Gorrill v. Toledo, etc., Ry. Co.*, 4 O. C. C. 398 (1890).

Property subject to public use cannot be taken.

It is a well-settled rule that property already appropriated, in the proper exercise of the power of eminent domain, cannot be taken for another public use which will wholly defeat or supersede the former use, unless power to make such second appropriation be granted expressly, or by necessary implication.—*Railroad Co. v. Village of Belle Center*, 48 Oh. St. 273 (1891); *Little Miami, etc., R. R. Co. v. Dayton*, 23 Oh. St. 510 (1872).

Land used for parks may be taken.

See *Colby v. Toledo*, 22 O. C. C. 732 (1901).

Land not used and unnecessary subject to second appropriation.

Where land is held by a corporation, whether acquired by purchase or appropriation, which is not employed in or needed for the proper exercise of its franchises, such land is not within the general rule which prohibits the appropriation of land already subject to a public use.—*Railroad Co. v. Village of Belle Center*, 48 Oh. St. 273 (1891).

Rights of lessees.

See *Foote v. Cincinnati*, 11 Oh. 408 (1842); *Cleveland v. Cuyahoga, etc., Society*, 41 Oh. St. 600 (1885).

Mortgagees must be made party.

See *Harrison v. Village of Sabina*, 14 W. L. B. 27 (1885).

Revivor on death of defendant.

On the death of a defendant, revivor of the proceedings must be had in the name of the heirs or devisees, and not of the administrator of the deceased.—*Valley Ry. Co. v. Bohm*, 29 Oh. St. 633 (1876).

When company may dismiss proceedings.

In a proceeding to appropriate property the company is the actor, and may discontinue the proceedings at any time, at least before the matter is submitted to the jury.—*Dayton, etc., R. R. Co. v. Marshall*, 11 Oh. St. 497 (1860).

§ 6417. **IN WHAT COUNTY PETITION TO BE FILED.**—The petition may include one or more of the parcels of property, rights, or interests in the county in which it is filed; and when any such parcel, right, or interest is situated in two or more counties, the petition may be filed in either of the counties in which an owner is resident, and if no owner is resident therein, it may be filed in either. (March 23, 1875, 72 v. 71.)

§ 6418. **SUMMONS: ITS COMMAND, AND SERVICE THEREOF.**—Upon the filing of a precept therefor, the probate judge shall issue summons for the owners,

Appropriation; Service and Trial in, §§ 6419-6421.

and persons named in the petition as residents of the state and having an interest, which may be directed to the sheriff of any county, and shall command him to notify the persons named therein of the filing of the petition, and to appear thereto at a time to be fixed by the judge, and named therein, not less than five nor more than fifteen days from the date thereof, and which shall be served and returned as in a civil action. When a writ is returned "not summoned," other writs may be issued, until the parties are duly summoned. (March 23, 1875, 72 v. 71, § 1.)

§ 6419. **SERVICE BY PUBLICATION.**—When a person having an interest is unknown, or his residence is beyond the state, or unknown, the corporation may make service by publication against him, by publishing in a newspaper of general circulation in the county where the petition is filed, for four consecutive weeks, a notice containing a summary statement of the object and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten or more than twenty days after the last publication; and the fact of publication may be proved by the affidavit of any person knowing the same. (March 23, 1875, 72 v. 71, § 3.)

§ 6420. **JURISDICTIONAL QUESTIONS TO BE FIRST DETERMINED.**—On the day named in any summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon these questions the burden of proof shall be upon the corporation, and any interested person shall be heard. (March 23, 1875, 72 v. 71, § 4.)

Proof of existence.

It is essential to the exercise of the right of eminent domain for the company to prove that it has fully organized by the election of directors, and that the company, through its board of directors, has been unable to agree with the landowners.—*Powers v. Hazelton, etc., Ry. Co.*, 33 Oh. St. 429 (1878); *Atlantic, etc., R. R. Co. v. Sullivan*, 5 Oh. St. 276 (1855); *Atkinson v. Marietta, etc., R. R. Co.*, 15 Oh. St. 21 (1864).

Proof of existence of corporation.

Proof of the existence of a corporation may be made by offering a certified copy of articles of incorporation, and such parts of the corporate records as are pertinent.—*Toledo Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362, 391 (1892); s. c., 26 W. L. B. 172; *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 12 O. C. C. 367, 384 (1893).

Incorporation for private benefit.

It is incompetent for a landowner to prove for the purpose of defeating the proceeding,

that the corporation procured the incorporation of the company, not for a public use, but for their private purpose merely, and were exercising the corporate privileges in abuse of the law.—*Powers v. Hazelton, etc., Ry. Co.*, 33 Oh. St. 429 (1878).

Proof of inability to agree.

Where it is claimed there is no proof of inability to agree, a reviewing court will look into the whole record.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362, 388 (1892); s. c., 26 W. L. B. 172.

Findings of fact and law—sufficiency.

See *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362, 394 (1892).

Jurisdictional facts must be found before jury is ordered.

See *Kramer v. Toledo, etc., R. R. Co.*, 53 Oh. St. 436, 444 (1895).

§ 6421. **JURORS TO BE DRAWN FROM THE BOX, AND VENIRE ISSUED.**—If the judge determine these questions for the corporation, as to any or all of the property, and persons interested therein, he shall issue an order to the clerk and sheriff to draw sixteen names from the jury box, as in other cases, and within two days after the receipt of the same, they shall execute the order, and the clerk shall forthwith return it to the probate judge, with a list of the names drawn indorsed thereon; and the judge shall issue to the sheriff a venire for the jurors so drawn to attend at his office, at a time to be fixed by him, and named in the writ, not exceeding ten days from the date thereof, which shall be served and returned as in other cases. (March 23, 1875, 72 v. 71.)

Trial in, etc., §§ 6422-6426.

§ 6422. **WHO ENTITLED TO A SEPARATE TRIAL, AND HOW TRIAL CONDUCTED.**—The owners of each separate parcel, right, or interest, shall be entitled to a separate trial by jury, verdict, and judgment. They shall hold the affirmative on the trial, which shall be conducted, and evidence shall be admitted, and bills of exception may be taken, as provided in civil actions. (March 23, 1875, 72 v. 71, §§ 1, 3; April 23, 1872, 69 v. 88, §§ 8, 12, 23.)

Separate trials.

Proceedings under the act of April 30, 1852, might be instituted jointly, against all owners of property lying in the county and sought to be appropriated; but after the return of the jury from the view each owner of distinct property is entitled to a separate trial.—*Giesy v. Cincinnati, et al. R. R. Co.*, 4 Oh. St. 308 (1854); *Cincinnati v. Neff*, 19 W. L. B. 404 (1888).

What is a jury.

The word "jury" in § 19, art. 1, of the constitution means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties. They may be sent to inspect the premises.—*Lamb v. Lane*, 4 Oh. St. 167 (1854); *Shaver v. Starrett* 4 Oh. St. 494 (1855); *Smith v. Atlantic, et al. R. R. Co.*, 25 Oh. St. 91 (1874). See *Wagner v. Railway Co.*, 38 Oh. St. 32, 35 (1882).

§ 6423. **THE COURT MAY ALLOW ANY AMENDMENT.**—The court may amend any defect or informality in any of the proceedings authorized or required by this chapter, or cause new parties to be added, and direct such further notice to be given to any party in interest as it deems proper. (April 23, 1872, 69 v. 88, § 17.)

§ 6424. **TIME OF TRIAL, ADJOURNMENT, AND DISCHARGE OF JURIES.**—The court may direct the order and fix the time of the several trials; may adjourn or continue any trial for the purpose of obtaining proper service upon any property owner, or when deemed necessary for the proper and convenient trial of the several cases; and may discharge any jury, and cause other juries to be impaneled, as provided in this chapter. (March 23, 1875, 72 v. 72, § 5.)

§ 6425. **HOW PANEL TO BE FILLED; JURORS TO BE INTERROGATED BY COURT.**—When, by reason of non-attendance, sickness, or other cause, any of the sixteen persons are not present and in condition to serve as jurors, the judge shall order the sheriff to fill the vacancies with talesmen; and when the list of sixteen is full, the judge shall call upon each separately, beginning with the first named on the list, to take his place in the jury box, and shall personally inquire of each, as called, whether he is interested in any way in any of the property, rights, or interests sought to be appropriated, or in the corporation which filed the petition, either as owner, stockholder, agent, attorney, or otherwise; and if such person answer in the affirmative, or if it be shown to the judge, by satisfactory evidence, that he is so interested, he shall be excused from serving on the jury, and the next person on the list shall be called, and interrogated in like manner; and if the list of sixteen be exhausted before a proper jury of twelve men is taken and accepted therefrom, the judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of twelve, with talesmen, who shall be interrogated as hereinabove provided. (March 23, 1875, 72 v. 73, § 6.)

§ 6426. **CHALLENGES TO JURORS, AND HOW VACANCIES IN JURY BOX FILLED.**—When the jury box is filled with twelve disinterested jurors, the owners of the property which is the subject of the trial, jointly, and the petitioner, shall each have the right to two peremptory challenges, and to challenge for cause; and all vacancies arising in the jury from challenge, or otherwise, shall be filled by talesmen having the qualifications prescribed in the last section, to be ascertained as therein provided. (March 23, 1875, 72 v. 73, § 6.)

Peremptory challenges by owners.

Where proceedings are commenced against the owners of several tracts of land, all the defendants are entitled to but two peremptory

challenges: not each defendant entitled to two.—*Ohio, et al. R. R. Co. v. Kloebe*, 5 N. P. 4 (1898); *Cincinnati v. Neff*, 19 W. L. B. 404 (1888).

Trial in; Oath of Jury, § 6427.

§ 6427. **THE OATH TO BE ADMINISTERED TO JURY.**—When the jury is filled, the probate judge shall administer to them the following oath: "You, and each of you, do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation due to the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their property described in the petition, to the use of (here name the corporation), in the proceeding now pending, irrespective of any benefit from any improvement proposed by such corporation; and you do further swear that you will, in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation, further ascertain how much less valuable the remaining portion of said property will be in consequence of such appropriation; this you swear as you shall answer to God." (March 23, 1875, 72 v. 73, § 5.)

Compensation — constitutional provisions.

The provisions of art. 1, § 19, and art. 13, § 5, of the constitution, the one requiring compensation to be made without deduction for benefits, when property is appropriated to a public use, and the other providing for compensation irrespective of benefits, where it is taken by a corporation for a right of way, are, in legal effect, identical. When property is taken under either section, its fair market value in cash, at the time it is taken, must be paid to the owner; and the jury in assessing the amount, have no right to consider or make any use of the fact that it has been increased in value by the proposal or construction of the improvement.—*Giesy v. Cincinnati, etc., R. R. Co.*, 4 Oh. St. 308 (1854).

Same subject — where benefits and injuries are blended.

In case an appropriation of a strip causes incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue of the land cannot be taken into account in estimating the compensation to be paid to the owner, yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with a local incidental injury to such residue of the land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land. But whether a local incidental benefit can be considered when not connected or blended either in locality or subject-matter with the injury, *quære*.—*Cleveland, etc., R. R. Co. v. Ball*, 5 Oh. St. 568 (1856). See *Toledo Bending Co. v. Manufacturers' Ry. Co.*, 2 N. P. 317 (1895); *Little Miami, etc., R. R. Co. v. Collett*, 6 Oh. St. 182 (1856); *Ohio Southern R. R. Co. v. Rawlins*, 29 W. L. B. 260 (1892); *Lotze v. Cincinnati*, 4 N. P. 311 (1897); *Schaible v. Lake Shore, etc., Ry. Co.*, 10 O. C. C. 334 (1895).

Benefits could be set off before 1851.

Under the constitution of 1802, benefits could be estimated and set off against the value of lands and damages so as to permit

the land to be taken without the payment of a dollar in money.—*Platt v. Pennsylvania Co.*, 43 Oh. St. 228, 244 (1885); *Kramer v. Cleveland, etc., R. R. Co.*, 5 Oh. St. 140 (1855); *Columbus, etc., R. R. Co. v. Simpson*, 5 Oh. St. 251 (1855).

Compensation must be in money.

See *Central Ohio R. R. Co. v. Holler*, 7 Oh. St. 220 (1857).

Rule of compensation — speculative damages.

Where land is appropriated for a public use, a compensatory, not speculative remuneration is guaranteed by the law for land taken, and for the damage occasioned thereby to the remainder of the premises. The difference in the value of the owners' property, with the appropriation, and that without it, is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character, situation and surroundings. It cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a roadway to the adjoining lands of other persons.—*Powers v. Hazelton, etc., Ry. Co.*, 33 Oh. St. 429 (1878); *Schaible v. Lake Shore, etc., R. R. Co.*, 10 O. C. C. 334 (1895).

Elements of compensation when land is severed.

Where a piece or strip of land is, by appropriation, severed from its connection with the other land of the owner, in estimating the compensation to be made to the owner, not only is the abstract value of the strip taken to be considered, but also its relative value, and the effect arising from its severance from the residue of the owner's land as well as the uses to which it is to be appropriated.—*Cleveland, etc., R. R. Co. v. Ball*, 5 Oh. St. 568 (1856); *Schaible v. Lake Shore, etc., Ry. Co.*, 10 O. C. C. 334 (1895).

Basis of valuation.

The rule of valuation is, what the interest in the property is worth, not for any particular use, but generally for any and all uses for which it may be suitable.—*Goodin v. Cincinnati, etc., Canal Co.*, 18 Oh. St. 169 (1868).

View of Premises, §§ 6428, 6429.

Time when value of land is to be taken.

See *Schaible v. Lake Shore, etc., Ry. Co.*, 10 O. C. C. 334 (1895).

Market value, what is.

See *Cincinnati, etc., Ry. Co. v. Pfitzer*, 1 Goebel, 248 (1889).

Damage by smoke, noises, and sparks.

It is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noises and sparks of fire, occasioned by running of locomotives and cars along the track in front of the property. — *Railway Co. v. Gardner*, 45 Oh. St. 309 (1887).

Damage to lands adjacent when canal is converted into railroad.

Where a canal company transfers its lands to a railroad company, the owner of the fee is entitled to damages for the additional burdens imposed on his land. — See *Hatch v. Cincinnati, etc., R. R. Co.*, 18 Oh. St. 92 (1868); *Cincinnati, etc., R. R. Co. v. Zinn*, 18 Oh. St. 417 (1868); *Vought v. Columbus, etc., R. R. Co.*, 58 Oh. St. 123 (1898).

Damage to highway.

A landowner must recover damages suffered by a change in a highway in a separate action, not in appropriation proceedings. — *Schaible v. Lake Shore, etc., Ry. Co.*, 10 O. C. C. 334 (1895).

Injury to access to river.

Where compensation is claimed for injury to access to river, thereby damaging the shipping facilities, it is competent to show that river transportation had ceased to be valuable.

— *Cleveland, etc., R. R. Co. v. Ball*, 5 Oh. St. 568 (1856).

Interest — when allowed.

A property owner is entitled to interest from and after the time his property was taken, and even though the money may have been paid into court on one verdict, interest will be allowed in a second verdict from the time the land was taken. — *Atlantic, etc., Ry. Co. v. Koblenz*, 21 Oh. St. 334 (1871); *Cincinnati v. Williams*, 9 W. L. B. 245 (1883). See *City v. English*, 5 W. L. B. 789 (1880); *Cincinnati v. Whetstone*, 47 Oh. St. 196 (1890); *Longworth v. Cincinnati*, 48 Oh. St. 637, 647 (1891).

Appropriation of street-car tracks by another company — compensation.

See *Toledo Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362 (1892); *Kinsman, etc., R. R. Co. v. Broadway, etc., R. R. Co.*, 36 Oh. St. 239 (1880). See *Cincinnati, etc., R. R. Co. v. Zinn*, 18 Oh. St. 417 (1868).

Railroad crossing appropriation — compensation.

In a proceeding to appropriate a right of way across the track of an existing railroad, to be used in common, as a railroad crossing, the owner of such track is entitled to compensation for the property or interest therein actually appropriated, and for such consequential damages as are the direct and proximate consequence of such appropriation, but it cannot recover as consequential damages the additional expense rendered necessary in operating its road in complying with the crossing law, nor can the jury take into account the detention of trains or loss of future business. — *Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 30 Oh. St. 604 (1876).

§ 6428. **THE FORM OF WRIT TO SHERIFF.**—The probate judge may, upon motion of either party, issue the following writ to the sheriff, to-wit: "To the sheriff of _____ county: You are hereby commanded to conduct the twelve jurors named in the panel to this writ annexed, to view the property or premises sought to be appropriated by (here state the name of the corporation), and owned by (here state the name of the owner or owners), on _____, the _____ day of _____, then and there to view the premises or property aforesaid, (in the presence of A. B. on the part of the corporation aforesaid,) and C. D. on the part of the owner, appointed by this court, and you shall make return of the manner you have executed this writ to this court, on the _____ day of _____, A. D. _____." The writ shall be signed by the probate judge, and certified under his seal of office. (April 23, 1872, 69 v. 88, § 9.)

§ 6429. **JUDGE MUST DELIVER CERTAIN COPIES TO SHERIFF.**—The judge shall also deliver to the sheriff a copy of that part of the petition containing a separate description of each parcel of property, and rights or interests sought to be appropriated within the county, which the jury is required to view; he may appoint, to be present at the view, the two persons named in the writ; and the sheriff who is to execute the writ shall, by a special return upon the same, certify under his hand that the view has been made according to the command thereof. The expenses of taking

 Trial in; Witnesses, Verdict, etc., §§ 6430-6432.

the view shall be taxed in the bill of costs, and no evidence shall be given on either side at the taking thereof. (April 23, 1872, 69 v. 88, § 9.)

§ 6430. **WITNESSES MAY BE EXAMINED BEFORE JURY.**—Witnesses may be examined before the jury after its return to the court; but if more than three witnesses be examined by either party, on the same point in the same case, the judge may tax the costs of such additional witnesses to the party calling them. (April 23, 1872, 69 v. 88, § 9.)

How difference in value proved.

It is improper to ask a witness how much less valuable a piece of land would be in consequence of the appropriation, or what the difference in value would be with the appropriation and without it. The proof should be confined to the value with the appropriation and value without it. The jury is to ascertain the difference or damage.—*Powers v. Hazelton, etc., Ry. Co.*, 33 Oh. St. 429 (1878); *Railway Co. v. Gardner*, 45 Oh. St. 309, 322 (1887).

Proof of value by account books.

Where no special ground is laid therefor, account books of persons not parties to the proceedings are not of themselves admissible in evidence to prove the value of the property affected by the appropriation, and quantity of products transported over it from the lands of other parties.—*Powers v. Hazelton, etc., Ry. Co.*, 33 Oh. St. 429 (1878).

Opinions as to injuries to land.

Where in a proceeding it is claimed that the land will be injured by severing it, thus injuring the shipping facilities, it is proper to ask the opinion of a witness on cross-exami-

nation as to the extent of such injury.—*Cleveland, etc., R. R. Co. v. Ball*, 5 Oh. St. 568 (1856).

Opinions as to damages.

The opinion of a witness as to the amount of damages which a landowner will sustain by the appropriation of a part of his land is not admissible, but opinions may be given as to the value of the land.—*Cleveland, etc., R. R. Co. v. Ball*, 5 Oh. St. 568 (1856); *Atlantic, etc., R. R. Co. v. Campbell*, 4 Oh. St. 583 (1855); *Railway Co. v. Gardner*, 45 Oh. St. 309, 322 (1887).

Proof of diminished rents.

Damages or value cannot be shown by the rents received from the property.—See *Railway Co. v. Gardner*, 45 Oh. St. 309, 324 (1887); *Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 30 Oh. St. 604, 623 (1876); *Powers v. Hazelton, etc., Ry. Co.*, 33 Oh. St. 429, 425 (1878).

Charge to jury.

See *Ohio Southern R. R. Co. v. Snyder*, 5 N. P. 461 (1898).

§ 6431. **WHEN A STRUCTURE IS PARTLY ON LAND SOUGHT TO BE APPROPRIATED.**—When a building or other structure is situated partly upon land sought to be appropriated, and partly upon adjoining land, and such structure cannot be divided upon the line between such two tracts of land without manifest injury, the jury, in assessing the compensation to any owner of the lands, shall assess the value of the same exclusive of the structure, and make a separate estimate of the value of the structure; the owner of the structure may elect to retain the ownership of the same, and to remove it, or accept the value thereof as estimated by the jury; if he fail to make such election within ten days from the date of the report of the jury, or within ten days from the termination of the cause in any higher court to which it may be taken, he shall be deemed to have elected to retain and remove the structure; but if he elect to accept the value of the structure, the title thereto shall vest in the corporation making the appropriation, which shall have the right to enter upon the land for the purpose of removing the structure therefrom. (April 11, 1876, 73 v. 210, § 1.)

When election must be made.

An election may be made either ten days after the date of the verdict, or ten days after the overruling of a motion for a new trial, or

ten days after the termination of the proceeding in error.—*Covington Bridge Co. v. Devoto*, 5 N. P. 330 (1898); s. c., 8 Dec. 268.

§ 6432. **VERDICT AND CONFIRMATION THEREOF.**—The jury shall render its verdict in writing, signed by the foreman, to the judge, who shall cause it to be entered of record; and unless for good cause shown, upon motion to be filed within

Possession under — Costs, etc., §§ 6433-6435.

ten days after the verdict is rendered, a new trial be granted, the judge shall enter a judgment confirming such verdict. (March 23, 1875, 72 v. 71.)

Verdict must be in money — nothing else authorized.

A verdict assessing damages in the sum of \$150, with a wagonway and stop for cattle, is

not in conformity with the statutes nor the constitution.—*Central Ohio R. R. Co. v. Holler*, 7 Oh. St. 220 (1857).

§ 6433. WHEN AND HOW CORPORATIONS MAY HAVE POSSESSION.—

Upon payment to the party entitled thereto, or deposit with the probate judge, of the amount of the verdict, and such costs as have lawfully accrued in the case up to the time against the corporation, the corporation shall be entitled to take possession of, and shall hold, the property, rights, or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition, and the judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof. (March 23, 1875, 72 v. 71.)

Refusal of owner to accept money.

Appropriation proceedings are effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded to him, and deposited for his use.—*Hueston v. Eaton, etc.*, R. R. Co., 4 Oh. St. 685 (1855).

Possession cannot be taken before final order.

Before a corporation can have possession it must make a deposit of the amount of the verdict, and a final order must be made in the proceedings.—*Wagner v. Railway Co.*, 38 Oh. St. 32 (1882).

§ 6434. WHEN AND HOW CORPORATION MAY ABANDON PROCEEDINGS

—The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses, and attorney fees, as found by the court. If the corporation fail in any case to make payment or deposit, as provided in the preceding section, within thirty days after confirmation of the verdict, the probate judge, on motion of the party entitled to such payment, to be filed within ten days after the expiration of said thirty days, shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of such order; and unless such corporation, within said thirty days, make such payment or deposit, it shall be held and considered to have thereby abandoned the property, rights, or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect; the judge shall also enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent, and attorney fees, incurred by him in the proceeding, as the court, upon the evidence offered in that behalf, deems just and reasonable, for which execution may be issued against the corporation; and the directors of the corporation, individually, shall be liable upon such judgment, and may be made parties thereto by action. (March 23, 1875, 72 v. 71, § 10.)

Right to abandon proceedings.

See *State ex rel. v. Cincinnati, etc., R. R. Co.*, 17 Oh. St. 103 (1866). See *In re Condemnation Proceedings*, 7 N. P. 605.

§ 6435. WHEN ACTION MAY BE BROUGHT FOR COSTS AND EXPENSES.—

If such judgment be not satisfied within thirty days after the rendition thereof, or if the party entitled thereto be not satisfied with the amount thereof, such party shall have a right (of action) against the petitioner for his expenses aforesaid, including time spent, and attorney fees, and also for his expenses, including reasonable attorney fees, incurred in prosecuting such action; but the action shall be brought within six months after the rendition of the judgment in the probate court. (March 23, 1875, 72 v. 71, § 10.)

New Trial — Petition in Error, §§ 6436, 6437.

§ 6436. **NEW TRIAL; PROCEEDINGS THEREON.**—A new trial shall be granted for cause only, shall take place in the same court where the first trial was had, and shall be conducted in accordance with the provisions of this chapter for the first trial, so far as they are applicable; and upon the granting of the motion for a new trial, if the amount of the first verdict has been paid into court, the probate judge shall retain the same until the final termination of the second trial; but if, upon the new trial, the verdict of the jury exceed the amount of the first verdict, the corporation shall pay the amount of the first verdict, together with the excess, to the owner of the property; and if the verdict upon the second trial be less than that of the first, the probate judge shall repay to the corporation the difference. If a new trial be granted at the instance of the owner of the property, and the verdict of the jury be the same or less in amount than that first rendered, the owner shall pay the whole costs of the second trial; and if it be more than that first rendered, the costs of the second trial shall be paid by the corporation. (April 23, 1872, 69 v. 88, § 11.)

When owner entitled to payment.

The money paid in on the first verdict, which is afterward set aside, remains the property of the corporation until the final determination of the second trial; and if the second verdict is less than the deposit, the excess is returned to its owner, but if greater, the corporation must increase the deposit to equal the second verdict, to entitle it to take the property. This section gives no right to appropriate the property pending the second

trial.—See *Wagner v. Railway Co.*, 38 Oh. St. 32, 39 (1882); *Trustees v. Banning*, 21 W. L. B. 9 (1888).

Injunction against appropriation.

The remedy of a landowner dissatisfied with an appropriation, and claiming the company has varied from the route specified in its charter, lies in the appropriation proceedings, not in equity.—*Walker v. Mad River, etc.*, R. R. Co., 8 Oh. 38 (1837).

§ 6437. **EITHER PARTY MAY FILE A PETITION IN ERROR.**—Either party may file a petition in error in the court of common pleas of the proper county, within thirty days from the rendition of the final judgment in the probate court and the proceedings in error shall be conducted as in civil actions; but the corporation may, on the rendition of the final judgment in the probate court, pay into said court the amount of the judgment for compensation and costs therein rendered, and proceed to enter upon and appropriate the property, notwithstanding the pendency of the proceedings in error. (April 23, 1872, 69 v. 88, § 12.)

When petition in error can be filed.

When a verdict fixing the amount of compensation to be paid has been rendered by the jury, and an order or judgment of confirmation of such verdict entered by the court under § 6432, proceedings in error may be prosecuted by the defendant in the proceedings to reverse such order or judgment of confirmation, before the compensation awarded by the jury has been paid, or the order provided for in § 6433 made.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362 (1892); *Cincinnati, etc., R. R. Co. v. Barcelow*, 4 O. C. C. 49 (1889). See *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 521 (1892).

Limitation of thirty days.

The limitation fixed by this section is not affected by § 6723.—See *Buckingham v. Steubenville, etc., R. R. Co.*, 10 Oh. St. 25 (1859).

Petition must be filed within thirty days.

The proceedings of the probate court can be reviewed by the common pleas court only when the petition in error is filed within thirty days from the rendition of final judg-

ment, and whether a petition was filed in time or not is to be determined by the record. This limitation applies to proceedings begun by the landowner as well as those begun by the company.—*Cleveland, etc., Ry. Co. v. Wick*, 35 Oh. St. 247 (1879); *Little Miami R. R. Co. v. Hopkins*, 19 Oh. St. 279 (1869).

Owner is entitled to money when land is taken.

When a company pays into court the amount of the compensation under this section, it is the duty of the probate judge, on the demand of the owner, to pay over to him the amount of such judgment, notwithstanding the pendency of proceedings in error, and the objection of the corporation. His official bond is liable for his failure in this regard.—*Meily v. Zurmehly*, 23 Oh. St. 627 (1873). See *Wagner v. Railroad Co.*, 38 Oh. St. 32, 39 (1882); *Trustees v. Banning*, 21 W. L. B. 9 (1888).

Review of findings on preliminary matters.

The finding and order of the probate court made upon the preliminary hearing may be reviewed on petition in error.—*Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362

Error — School Lands, etc., §§ 6438 6440.

(1892); Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co., 6 O. C. C. 521 (1892). Contra, Ohio Postal, etc., Co. v. Railway Co., 8 N. P. 121 (1900).

Motion for new trial, when to be filed, etc.

See C. C. C. & St. L. Ry. Co. v. Postal Tel. Co., 22 O. C. C. 555 (1901).

§ 6438. **PROCEEDINGS IN THE COMMON PLEAS ON ERROR.**—If the court of common pleas, upon the hearing of the cause, affirm the judgment of the probate court, all the costs in the court of common pleas shall be paid by the plaintiff in error; and if it reverse such judgment, it shall retain the cause for trial and final judgment, as in other cases, which trial shall be had at the term of reversal of the judgment, unless for good cause shown by either party the court grant a continuance; and on the trial of the cause in the court of common pleas, the same inquiry shall be made as to the interest of the jurors, and the same oath shall be administered to the jury, as is provided for in sections sixty-four hundred and twenty-five and sixty-four hundred and twenty-seven. (April 23, 1872, 69 v. 88, § 13.)

Proceedings in error from judgment of reversal.

Where an order of the probate court appropriating land for right of way of a railway company is reversed in the court of common pleas, error will not lie to reverse such judgment of reversal.—Railway Co. v. Bailey, 39 Oh. St. 170 (1883). See Cincinnati, etc., R. R. Co. v. Barcalow, 4 O. C. C. 49, 50 (1889).

latter assessment, to allow and include in the verdict, interest from and after the time possession of the property appropriated was taken, and while the money was retained by the court.—Atlantic, etc., Ry. Co. v. Koblenz, 21 Oh. St. 334 (1871).

Common pleas court cannot render personal judgment.

The court of common pleas, on petition in error, is not authorized, on affirming the judgment, to render a judgment in personam against the corporation for the amount adjudged against it in the probate court.—Cleveland, etc., Ry. Co. v. Wick, 35 Oh. St. 247 (1879).

Interest may be allowed.

Where a company pays into court the damages assessed, and takes possession of the property, and upon petition in error, the assessment is set aside and a new one awarded, it is competent for the jury, in making the

§ 6439. **HOW SCHOOL LAND MAY BE APPROPRIATED.**—When a railroad company, incorporated in this state, has located its railroad through any part of reserved sections twenty-nine or sixteen, or through any part of sections granted by congress in lieu of section sixteen, for school purposes, and such lands remain unsold, or through any town lot or parcel of ground used for or devoted to school purposes, it may appropriate so much of such land or lots as may be necessary for the purposes aforesaid; and service of the summons made on such trustees or school officers as have possession or control of the lands, shall have the same force and effect as service in any other case on owners of land sought to be appropriated. The money arising from such appropriation shall be disposed of by such trustees or school officers in accordance with the law. (April 23, 1872, 69 v. 88, § 14.)

Purpose of section.

See State ex rel. v. Cincinnati, etc., Ry. Co., 37 Oh. St. 157, 171 (1881).

§ 6440. **WHEN PROCEEDINGS TO APPROPRIATE PRIVATE PROPERTY MAY BE COMMENCED IN COURT OF COMMON PLEAS.**—When the probate judge is interested, either as stockholder, director or otherwise, in a corporation seeking to appropriate private property to its use, or if before filing the petition, it is made to appear to the satisfaction of a judge of the court of common pleas of the county wherein the action is sought to be brought, that such probate judge is interested either as owner or otherwise in the property sought to be appropriated, or by reason of sickness, absence or other incapacity is and will be unable to preside at the trial, the proceedings authorized by this chapter may be commenced in the court of common pleas of the county; and in that case the proceedings shall conform in all respects, so far as applicable, to the provisions of this chapter, and all the powers

Attorney, Appointment of — Conflicting Claims, §§ 6441-6444.

conferred and duties imposed thereby upon the probate court shall devolve upon the court of common pleas; and said court may make such orders and direct such proceedings to be had as may be necessary to do full justice between the parties according to the true spirit and intent of this chapter; and after final judgment the corporation may, on depositing the amount of the judgment and costs assessed in said court with the clerk thereof, be entitled to enter into possession of the property sought to be appropriated. In case such court is not in session when the proceedings are commenced therein, nor on the day fixed for the inquiry and assessment of compensation, a special term thereof shall be held in the same manner as provided in section 2239 of said statute. (April 6, 1891, 88 v. 281; April 19, 1883, 80 v. 218; R. S. 1880; April 23, 1872, 69 v. 88, § 15.)

§ 6441. **COURT TO APPOINT ATTORNEY FOR PARTY ABSENT OR UNDER DISABILITY.**— When a party in interest is unknown, or his residence is unknown, and when service has been made by publication, and the party has not appeared in the proceedings by agent or attorney, or when such party in interest is under any legal disability, and has no legal guardian or trustee within the county where the action is brought, the court shall appoint some competent attorney to attend upon the proceedings, and protect the rights and interests of such party; and the court shall fix the amount of the fees of the attorney for such service, which shall be payable out of any money paid on the judgment rendered in such case for property appropriated. (April 23, 1872, 69 v. 88, § 16.)

§ 6442. **CONFLICTING CLAIMS NOT TO BE PASSED UPON.**— When there are diverse or conflicting claims, legal or equitable, to the real estate, or any interest therein, sought to be appropriated under the provisions of this chapter, the jury or court shall not pass upon the same in the proceedings for appropriation, but such claims shall be reserved for adjudication as hereinafter provided. (April 23, 1872, 69 v. 88, § 18.)

§ 6443. **BUT TO BE ADJUDICATED IN THE COMMON PLEAS.**— Upon the payment of the money into court by the corporation, a party claiming a legal or equitable interest in the property, or the money arising therefrom by such appropriation, may file his petition in the court of common pleas of the proper county, making the other claimants to the property or money parties thereto, setting forth the facts on which the claim is founded, the fact of the appropriation of the property, the amount of money so paid in therefor, and such other facts as are proper to enable the court to hear and determine the matter between the claimants; and the court shall forthwith appoint some master of the court, or other suitable person selected by the parties, to hold and safely keep such fund, or invest the same in the manner the court shall direct, after hearing the parties; and such fund shall thenceforth represent the land, and the interests therein, and be subject to the control of the court having jurisdiction of the case, by orders entered in the action, according to the rights of the parties to the land or fund, as from time to time the court may determine. (April 23, 1872, 69 v. 88, § 19.)

§ 6444. **SUCH PROCEEDING A CIVIL ACTION.**— Such proceeding in the court of common pleas, shall be considered and held to be a civil action; and the conflicting claims of parties to the fund aforesaid shall be determined by the court, or by a jury trial, according as the claim is equitable or legal, in the same manner as if the land had not been converted into money. (April 23, 1872, 69 v. 88, § 20.)

Right to trial by jury.

These sections do not grant any right to trial by jury. They only preserve existing

rights.— See *Skerrett v. Presbyterian Society*, 41 Oh. St. 606 (1885).

Unfinished Road-bed of Railroad, §§ 6445-6447.

§ 6445. UNFINISHED ROAD-BED OF RAILROAD COMPANY MAY BE CONDEMNED.—Any railroad corporation of this state may condemn and appropriate to its own use the interest and easement in and quiet title to, any unfinished road-bed, or part thereof, lying within the state, and on the line of its proposed road, owned or claimed by any other railroad company or companies, person or persons, partnership or corporation, when such road-bed, or part thereof has remained, or shall hereafter remain, in an unfinished condition, and without having the ties and iron placed, and continued thereon for the period of five years or more, immediately preceding the commencement of proceedings to condemn or appropriate the same as herein authorized, and every such company, or companies, person or persons, partnership or corporation, shall be made a party defendant to such proceedings to condemn or appropriate the same, and shall be required to answer therein, setting forth fully its or their title to or interest in such road-bed, or part thereof, so sought to be appropriated, or condemned, if any, it or they may claim, to which answer the plaintiff shall plead issuably, unless it admit the validity of the defendant's claim; and in such case, if such party defendant be a non-resident of this state, or a foreign corporation, service of summons may be made by publication, under subdivision three of section five thousand and forty-eight of the revised statutes of Ohio, and that the terms company or companies, as used in this chapter, shall be held to embrace also person or persons, partnership or corporation as used in this section. (April 5, 1882, 79 v. 65; R. S. 1880; March 23, 1875, 72 v. 71, § 2.)

No application to ordinary proceedings.

See Valley Ry. Co. v. Pouchot, 4 O. C. C. 187, 193 (1889).

§ 6446. PROCEEDINGS IN SUCH CASE.—When it is determined by the court, upon issue of law, or by the jury upon issue of fact, or by the admission of the pleadings, or by reason of failure to plead that any such company asserting such ownership or claim is not entitled thereto, judgment, including costs, shall be rendered accordingly; but when it in like manner is determined that any such company has an interest in such road-bed, or part thereof, so sought to be appropriated, the jury shall determine and state the amount of compensation due to such company, according to law, on account of the appropriation of such interest. (March 23, 1875, 72 v. 71, § 9.)

§ 6447. IN WHAT COURT SUCH PROCEEDINGS MAY BE COMMENCED.—Proceedings under this act may be commenced in the probate court, the court of common pleas or the superior court of any county in this state in which such road-bed or part thereof so sought to be appropriated or condemned may be situated, all or part only of such road-bed, within this state may be included in one proceeding, and when such proceeding is commenced in the court of common pleas or superior court, the same proceeding shall be had as is prescribed in this chapter for the conduct of the same in the probate court, so far as the same may be applicable to such common pleas or superior court, and not excepted in this section, and the case shall, on motion, be taken out of its order by the court or by any reviewing court, and determined without any unnecessary delay; and proceedings in error to such common pleas or superior courts, may be commenced directly in the supreme court, but the provisions of this chapter as to viewers shall not apply to appropriations authorized by such sections, and when any railroad corporation shall commence proceedings under this act, the president of said corporation shall make, subscribe and file in the court where any such proceedings is had, a statement under oath, declaring that it is the bona fide intention of said corporation to complete and operate a railroad on the road-bed so sought to be appropriated; and if said corporation shall for a period of one year after it shall have acquired right to occupy the road-bed, fail to expend in and about the completion of a railroad thereon a sum equal to twenty-five per centum of the total cost of completing the same, to be estimated by the commissioner of rail-

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roads and telegraphs, then and in such case the said road-bed shall be open to appropriation and condemnation under this act by any other railroad corporation. The words road-bed used in this act shall be held to include right of way, depot grounds and other easements connected therewith, and it shall be sufficient in the petition and proceedings under this act to designate the road-bed as the road-bed of the railroad corporation by which the route of the road was located and established with the terminal points within which appropriation is sought. (April 5, 1882, 79 v. 65; R. S. 1880; March 23, 1875, 72 v. 71, § 9.)

§ 6448. PROCEEDINGS WHEN LAND IS HELD WITHOUT AGREEMENT BY A CORPORATION — When a corporation, authorized by law to make appropriation of private property or the land named in section six thousand four hundred and thirty-nine of this chapter, has taken possession of, and is occupying or using the land of any person, or the land mentioned in said section six thousand four hundred and thirty-nine, for any purpose, and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by any agreement in writing with the owner thereof, or the trustees or school officers having possession or control of the lands named in said section six thousand four hundred and thirty-nine, such owner or owners, or either of them, or said trustees or school officers, may serve notice, in writing, upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands, and on failure of such corporation for ten days so to proceed, said owner or owners, or said trustees or school officers may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable, thereto, and in cases of reserved sections sixteen (16) and twenty-nine (29), or any part of sections granted by congress in lieu of section 16, for school purposes, named in section six thousand four hundred and thirty-nine, no right, legal or equitable, derived from the trustees and officers named therein, that the notice provided in this section has been duly served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used or occupied, as may be proper to a full understanding of the facts. Such owner or owners, or such trustees or school officers, intending to institute said proceeding, may demand, in writing, from the president or chief officer of such corporation a specific description of each parcel of land so used or occupied without appropriation by it, of the work, if any, constructed or intended to be constructed thereon, and the use to which the same is to be applied, and upon failure of said corporation for ten days to furnish the same, as fully and completely as would be required of it in proceeding under section six thousand four hundred and sixteen, the fact of such demand and failure may be alleged in the petition in such proceeding, and on notice to the corporation and proof thereof being made to the probate judge having jurisdiction of such appropriation, he shall restrain said corporation from the use and occupation of said land until said demand has been complied with, or such owner or owners, or said trustees or school officers may cause the necessary surveys to be made therefor, and the costs thereof shall be taxed to said corporation in said proceeding. (April 12, 1883, 80 v. 114; R. S. 1880; April 23, 1872, 69 v. 88, § 21.)

Constitutionality.

This section does not violate art. 14 of the United States Constitution.—In re George, 5 O. C. C. 207 (1891).

Rights where land is held on verbal agreement.

Where a railroad company has taken possession of land for its right of way, and incorporated it as a part of its permanent railroad

track, with the verbal consent of the owner, on condition of compensation verbally promised, but refused and not performed, and without appropriation proceedings and without any agreement in writing with the owner, such owner may elect to proceed under this section or proceed on the verbal agreement for compensation.—Fries v. Wheeling, etc., Ry. Co., 56 Oh. St. 135 (1897); s. c., 18 O. C. C. 721.

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No action under this section after breach of covenant and condition to build road in certain time.

See *Field v. Lake Shore, etc., Ry. Co.*, 13 C. D. 1 (1897); s. c., 62 Oh. St. 633.

Jurisdictional facts.

One of the jurisdictional facts to be averred in the petition and proven is that the corporation "has no right, legal or equitable, in the premises," otherwise the court has no jurisdiction to impanel a jury to assess damages.—*In re George*, 5 O. C. C. 207 (1891).

Jurisdictional averments.

See *Pittsburg, etc., R. R. Co. v. Perkins*, 22 O. C. C. 630 (1888).

Jurisdictional facts — how found.

Jurisdiction of a proceeding under this section is conferred upon the probate court, and the facts which entitle the owner to maintain such suit, being issuable and subject to determination in the exercise of the jurisdiction so conferred, need not be found by the court before impaneling a jury.—*Kramer v. Toledo, etc., R. R. Co.*, 53 Oh. St. 436 (1895). See *In re George*, 5 O. C. C. 207, 213 (1891).

Who is an owner of land within this section.

The plaintiff must be the owner of the legal title to the lands involved.—See *Rapp v. Ohio Southern R. R. Co.*, 5 N. P. 497 (1898); *Harrison v. Village of Sabina*, 14 W. L. B. 27 (1885); *Railroad Co. v. Davis*, 19 O. C. C. 589 (1900).

Action must be by the owner or his heirs, not his administrator.

An action by an administrator to recover of a railroad company compensation and damages for wrongfully taking and appropriating lands of the decedent during his lifetime cannot be maintained, for the reason that such wrongful taking did not divest the decedent of his title to the land, and it, therefore, descended at his death to his heirs.—*Railway Co. v. O'Harra*, 50 Oh. St. 667 (1893).

Parties — when company is in hands of receiver.

When the title and estate of the road is not in the receiver, the company is the proper party to enforce appropriation.—*Pittsburg, etc., R. R. Co. v. Perkins*, 22 O. C. C. 630 (1888).

Ownership of land — how tried.

In a proceeding under this section, either party is, on demand, entitled to trial by jury on an issue of fact as to the ownership of the land. But where no demand is made, the question may be heard and determined by the court. The jurisdiction of the probate court is not defeated by a denial of the title of the plaintiff; and the court may, on the demand of either party, proceed and impanel a jury

for the trial of the issue, in any of the appropriate modes provided by statute for the impaneling of juries in the common pleas court.—*Railroad Co. v. O'Harra*, 48 Oh. St. 343 (1891).

Wrongful taking does not divest title.

The wrongful taking of land by a railroad company for a right of way does not divest the title of the owner, and reduce his remedy to a mere claim for compensation and damages. He continues the legal owner of the land until he loses the title by adverse possession.—*Railway Co. v. O'Harra*, 50 Oh. St. 667, 678 (1893); *Fries v. Wheeling, etc., Ry. Co.*, 56 Oh. St. 135 (1897); *Railroad Co. v. Perkins*, 49 Oh. St. 362 (1892); *Railroad Co. v. O'Harra*, 48 Oh. St. 343 (1891). See *Hatry v. Painesville, etc., Ry. Co.*, 1 O. C. C. 426 (1886); *Atlantic, etc., R. R. Co. v. Robbins*, 35 Oh. St. 531, 540 (1880).

Joint liability.

The lessor and lessee of a railroad may be jointly liable for permanent injuries to land abutting on a highway.—*Railroad Co. v. Hambleton*, 40 Oh. St. 496 (1884).

Interest in highways.

Though the land taken is a public highway, its occupation for railway purposes imposes upon it an additional servitude for which the owner of the fee is entitled to compensation, and may enforce his rights under this section.—*Kramer v. Toledo, etc., R. R. Co.*, 53 Oh. St. 436, 444 (1895); *Railroad Co. v. O'Harra*, 48 Oh. St. 343 (1891); *Valley Ry. Co. v. Pouchot*, 4 O. C. C. 187 (1889); *Lawrence R. R. Co. v. Williams*, 35 Oh. St. 168 (1878); *Railroad Co. v. Wartenbee*, 35 W. L. B. 2 (1895); s. c., 53 Oh. St. 689.

Raising track in street is taking property.

See *Railroad Co. v. Hambleton*, 40 Oh. St. 496 (1884).

Estoppel.

While an owner, who stands by, and without objection, sees a public railroad constructed on his land, will, after the road is completed, or large expenditures have been made thereon, upon the faith of his apparent acquiescence, be estopped from reclaiming the land, on enjoining its use by the railroad company, he is not thereby estopped from claiming compensation.—*Pennsylvania Co. v. Platt*, 47 Oh. St. 366 (1890); *Goodin v. Cincinnati, etc., Canal Co.*, 18 Oh. St. 169 (1868); See *Gorrill v. Toledo, etc., Ry. Co.*, 4 O. C. C. 398, 406 (1890); *Fries v. Wheeling, etc., Ry. Co.*, 56 Oh. St. 135 (1897); *Longworth v. Cincinnati*, 48 Oh. St. 637 (1891); *Cleveland, etc., Ry. Co. v. Reid*, 4 N. P. 127 (1896); *Central Trust Co. v. Valley Ry. Co.*, 37 W. L. B. 210 (1897); *Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 411 (1859).

Action to Compel Appropriation, § 6449.

Same subject.

When a company enters upon land wrongfully, it cannot claim an estoppel, and it must either yield possession or pay for the land.—*Railroad Co. v. Perkins*, 49 Oh. St. 326, 332 (1892); *Atlantic, etc., R. R. Co. v. Robbins*, 35 Oh. St. 531, 538 (1880). See *Teegarden v. Davis*, 36 Oh. St. 601 (1881); *Daily v. State*, 51 Oh. St. 348, 363 (1894); *Bothe v. Dayton, etc., R. R. Co.*, 37 Oh. St. 146 (1881).

Measure of compensation.

In a proceeding under this section the measure of compensation is the value of the land at the time it is assessed in the proceeding.—*Railroad Co. v. Perkins*, 49 Oh. St. 326 (1892); s. c., 22 O. C. C. 631 (1888).

What damages cannot be recovered.

Where the action is by the heirs of the owner they can only recover the compensation for the land taken and damages to the remaining land, but not such damages to the lands of the decedent as he could have recovered in his lifetime in an action of trespass.—*Railway Co. v. O'Harra*, 50 Oh. St. 667 (1893). See *Railroad Co. v. Campbell*, 51 Oh. St. 328 (1894); *Baltimore, etc., R. R. Co. v. Lersch*, 58 Oh. St. 639, 652 (1898); *Railroad Co. v. Hambleton*, 40 Oh. St. 496 (1884).

Statute of limitations.

A proceeding under this section is not barred by the statute of limitations in less than twenty-one years.—*Fries v. Wheeling, etc., Ry. Co.*, 56 Oh. St. 135 (1897); *Railroad Co. v. O'Harra*, 48 Oh. St. 343 (1891); *Railroad Co. v. Davis*, 19 O. C. C. 589 (1900).

Same subject.

The right to compel appropriation of the land of a highway taken by a railroad company by agreement with the officials in charge thereof is not barred by the lapse of less than twenty-one years from the time of such occupation by the company. The limitation of two years in § 3283 applies only to incidental injuries to property on or adjacent to the roadway, occasioned by the location and construction of the railroad, and does not include the remedy for injuries to, or the taking of, the land itself.—*Railroad Co. v. O'Harra*, 48 Oh. St. 343 (1891); *Railroad Co. v. Hambleton*, 40 Oh. St. 496 (1884).

Lien of judgment under this section.

See *Central Trust Co. v. Valley Ry. Co.*, 37 W. L. B. 210 (1897).

§ 6449. **SUMMONS IN SUCH CASE; JUDGMENT AND EXECUTION.**—A summons shall issue and be served upon the corporation, and thereafter the proceedings in said court shall be conducted to final judgment in all respects as provided in this chapter; and if the corporation fail to pay the judgment and costs awarded against it in the proceeding, the same may be collected by execution as in other cases; but this section shall not be construed to impair or lessen in any manner the right the owner or owners or the trustees or school officers named in section six thousand four hundred and thirty nine of this chapter may have to proceed against the corporation as in all other cases of the unlawful entry upon lands. (April 12, 1882, 80 v. 114; R. S. 1880; April 23, 1872, 69 v. 88, § 21.)

Section 6448 is cumulative.

The remedy provided in § 6448 is not a substitute for the right to recover possession, but it is cumulative.—*Railroad Co. v. Perkins*, 49 Oh. St. 326, 330 (1892).

Injunction against use of land before appropriation.

An owner of land may enjoin the company from entering upon it before it has been appropriated and paid for.—*Gorrell v. Toledo, etc., Ry. Co.*, 4 O. C. C. 398, 404 (1890); *Railway Co. v. Lawrence*, 38 Oh. St. 41 (1882); *Hathaway v. Springfield, etc., R. R. Co.*, 2 W. L. M. 481 (1860). See *Dayton, etc., R. R. Co. v. Marshall*, 11 Oh. St. 497 (1860); *Coe v. Columbus, etc., R. R. Co.*, 10 Oh. St. 411 (1859).

Same subject — highways.

The owner of land abutting on a highway may enjoin the construction of a railroad therein until he shall have been fully compensated, and in a proper case a mandatory injunction may issue requiring the company to restore the street.—*Toledo Bending Co. v. Manufacturers' Ry. Co.*, 2 N. P. 317 (1895).

Action for ejectment.

An owner of land wrongfully occupied may proceed under § 6448 or bring his action for ejectment.—See *Raymond v. Toledo, etc., Ry. Co.*, 57 Oh. St. 271 (1897); 16 O. C. C. 639; *Atlantic, etc., R. R. Co. v. Robbins*, 35 Oh. St. 531 (1880); *Bothe v. Dayton, etc., R. R. Co.*, 37 Oh. St. 147 (1881).

Ejectment on breach of condition subsequent.

Where the owner of land, by his written contract, gives a company a right of way on the payment of a stipulated price, with a provision in the contract that on the completion of the road the company shall fence the same, after the road is completed, the owner of the land cannot, upon failure to put up the fence, eject the company from the land.—*Hornback v. Cincinnati, etc., R. R. Co.*, 20 Oh. St. 81 (1870).

Suit for compensation in common pleas court.

Where land is held by a company under a verbal agreement, and the owner elects to

Action to Compel Appropriation, § 6450.

treat it as an appropriation in fact and tenders conveyance, and sues in the common pleas court, he cannot enlarge his suit so as to include an inquiry of damages to other lands, but allegations of such damage will not affect the jurisdiction of the common pleas court. See also as to statute of limitation, *Fries v. Wheeling, etc., Ry. Co.*, 56 Oh. St. 135 (1897); s. e., 18 O. C. C. 721, 14 O. C. C. 55.

Action for trespass.

See *Little Miami R. R. Co. v. Whitacre*, 8 Oh. St. 590 (1858); *Cleveland, etc., R. R. Co. v. Stackhouse*, 10 Oh. St. 567 (1860); *Hathaway v. Springfield, etc., R. R. Co.*, 2 W. L. M. 481 (1860); *Ward v. Marietta, etc., Bridge Co.*, 6 Oh. St. 15 (1856).

Action for trespass not barred by appropriation.

See *Schaible v. Lake Shore, etc., Ry. Co.*, 10 O. C. C. 334 (1895).

No action can be maintained for conversion of land.

Where land is taken wrongfully, the owner cannot sue for compensation and damages except under § 6448. He cannot maintain such action if the circumstances are such that he may recover the land.—*Atlantic, etc., R. R. Co. v. Robbins*, 35 Oh. St. 531 (1880); *Columbia, etc., Turnpike Co. v. Cincinnati, etc., R. R. Co.*, 5 W. L. B. 643 (1880).

Sale of land on contract, notice to subsequent purchasers.

Where the owner sells the right of way to the company on contract, and retains the legal title, that fact is sufficient to put subsequent mortgagees and purchasers of the road upon inquiry as to the rights of the owner.—*Dayton, etc., R. R. Co. v. Lewton*, 20 Oh. St. 401 (1870); *Seasongood v. Miami Valley Ry. Co.*, 9 W. L. B. 256 (1883).

When owner has equitable lien on land sold.

When the owner agreed in writing with the railroad company to release the right of way and the right to enter upon and construct the road through his lands in consideration that

the company agreed to pay a certain sum of money at a future day, and construct certain road crossings and cattle-guards. The company took possession and constructed its road before receiving a deed for the right of way, and before payment of the money or constructing the crossings or guards. The owner is entitled to an equitable lien upon the property sold as well for the damages for not constructing the road in the proper manner, as for the unpaid purchase money.—*Dayton, etc., R. R. Co. v. Lewton*, 20 Oh. St. 401 (1870). See *Seasongood v. Miami, etc., Ry. Co.*, 9 W. L. B. 256 (1883).

Same subject.

The owner entered into an agreement to convey to it the right of way through his land at a certain price per acre, he agreeing to take such purchase money in shares of the capital stock of the company if the same should at the end of two years be worth its face value, otherwise to be paid in cash. The stock being of no value at the end of two years, he demanded the cash, which was refused, and suit brought to enforce his vendor's lien and to enforce the same as against subsequent purchasers of the road under foreclosure proceedings to which he was not a party.—*Ames v. Wheeling, etc., Ry. Co.*, 17 O. C. C. 684 (1899).

Same subject, remedy.

In such case the owner may seek his remedy by either compelling specific performance of the contract, or by enforcing his specific lien.—*Dayton, etc., R. R. Co. v. Lewton*, 20 Oh. St. 401 (1870).

Foreclosure of lien — sale.

Where a person has a lien on a portion of the road and public interests preclude the right of selling the portion covered by the lien, a necessity arises to decree the sale of the whole road, in order that equity may be done.—*Dayton, etc., R. R. Co. v. Lewton*, 20 Oh. St. 401 (1870). See *Seasongood v. Miami Valley Ry. Co.*, 9 W. L. B. 256 (1883); *Ames v. Wheeling, etc., Ry. Co.*, 17 O. C. C. 684 (1889); *Stewart v. Railway Co.*, 53 Oh. St. 151 (1895).

§ 6450. WHEN INJUNCTION MAY ISSUE AGAINST CORPORATION.—If execution issued as provided in the last section be returned unsatisfied, in whole or in part, with the endorsement that no goods or chattels, lands or tenements, can be found whereon to levy, or if the judgment remain unsatisfied for more than sixty days from the rendition thereof, the court may, by injunction, restrain the corporation from using or occupying the lands until the judgment and costs are fully paid. (April 23, 1872, 69 v. 88, § 22.)

Payment must be made — a bond to pay is not sufficient.

By reason of the constitutional provision prohibiting the taking of land without first making compensation, a payment of judgment must be made within sixty days, an undertaking given on filing the petition in error is not sufficient.—*In re George*, 5 O. C. C. 207, 216 (1891).

When injunction may issue.

The filing of a petition in error and the giving of an undertaking does not prevent the court from enjoining the corporation from using the property, but the court has no jurisdiction to enjoin before the expiration of sixty days, nor without an undertaking having first been given.—*In re George*, 5 O. C. C. 207 (1891).

Fees and Costs in Appropriation, etc., §§ 6451-6453.

§ 6451. **FEES OF WITNESSES, OFFICERS, AND PROBATE JUDGE, AND HOW COSTS ADJUDGED.**—The jurors summoned, and attending or serving, in accordance with the provisions of this chapter, shall each receive the same fees per day as are provided by law for jurors in the court of common pleas, and also five cents per mile for each mile of the distance they are compelled to travel in the discharge of their duties; the witnesses shall be allowed the same fees and mileage as are allowed for attendance at the court of common pleas; the sheriff shall be entitled to such fees as he is allowed by law for similar services in other cases, but he shall not be allowed anything in the way of poundage, except on money made on execution; the clerk shall be entitled to a fee of one dollar and fifty cents for drawing, and certifying to the probate judge, the list of jurors; the probate judge shall be allowed to enter a charge of five dollars in the cost bill for each day occupied in the trial of a cause, in addition to his other fees provided by law; and the whole costs so taxed shall be adjudged against and paid by the corporation, except as provided in the next section. (April 23, 1872, 69 v. 88, § 24.)

§ 6452. **WHEN COSTS MAY BE APPORTIONED.**—A corporation, by its proper officer, agent, or attorney, may, at the time of filing the petition with the probate judge, deposit with such judge such sum of money, for each separate parcel of property as it deems a just and equitable compensation for the property, rights, and interests described in the petition, and sought to be appropriated; and when the final verdict of the jury as to any parcel of property does not exceed the amount so deposited, and the owner has refused, after notice of such deposit, to accept the same, the whole costs of the proceeding as to such parcel shall be equally divided between the corporation and the owner or owners of the property; and when the final verdict as to any parcel or parcels exceeds, and as to other parcel or parcels does not exceed, the amount deposited, the probate judge shall apportion the costs in such manner as he may deem equitable and just. (April 23, 1872, 69 v. 88, § 24.)

§ 6453. **WHEN THIS CHAPTER DOES NOT APPLY.**—The provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches; and in all such cases it shall be optional with such authorities to pay the judgment rendered against them according to section sixty-four hundred and thirty-two, or to pay the costs and decline to take the property sought to be appropriated. (April 23, 1872, 69 v. 88, § 25.)

PART XXVIII.

CIVIL PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

- § 6477. Its service on corporations.
- § 6478. Suits before justice against railroad company; process; upon whom; and when and how, service of process may be made; when summons to be issued to sheriff, and how served and returned.
- § 6479. Insurance company.
- § 6480. Foreign corporations.
- § 6489. Affidavit for attachment; what to contain.
- § 6499. How corporation served as garnishee.

§ 6477. **ITS SERVICE ON CORPORATIONS.**—A summons against a corporation, except as hereinafter specially provided, may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office, or usual place of business of such corporation, with the person having charge thereof; but if the defendant be an incorporated river transportation company, whether organized under the laws of the state or another state, the service of a summons may be upon the master or other chief officer of any of its steamboats or other craft, or upon any of its authorized ticket or freight agents, at any port where it may transact business. (March 14, 1853, 51 v. 179, § 15.)

See § 5041.

§ 6478. **SUITS BEFORE JUSTICE AGAINST RAILROAD COMPANY; PROCESS; UPON WHOM, AND WHEN AND HOW, SERVICE OF PROCESS MAY BE MADE; WHEN SUMMONS TO BE ISSUED TO SHERIFF, AND HOW SERVED AND RETURNED.**—Suit may be brought before a justice of the peace against any railroad company, in the township in which the president of the company may reside, or in any township into or through which the road owned or leased by said company may be located, whether such company be foreign or created under the laws of this state, and whether the charter thereof prescribes the place where suit must be brought against it, or the manner or place of service of process thereon; and if the principal business office of the company is not kept in the township in which any such suit may be brought, it shall be the duty of the justice of the peace to issue a writ of summons against said company, directed to any constable in the township in which said suit may be brought. The constable shall, on receipt of such summons, forthwith serve the same personally upon the president of such company, if he be a resident of the county in which suit is brought, or by leaving a certified copy at his place of business, if the same be within such county: Provided, that if the president of any such company shall not be a resident of, or have a place of business within, the county in which such suit shall be brought, it shall be lawful for the constable having such summons, to serve the same personally upon the person having charge of a ticket office, or on the person having charge of a freight depot, owned by or under the control of such company, if such ticket office or freight depot be situated within the county where such suit shall be brought; and, provided, further, that when such summons shall be served on either of such last described persons, it shall be done at least eight days prior to trial; but when served upon the president, as

Summons — Attachment, §§ C479-6489.

aforesaid, it may be served in accordance with the law for serving summons issued by justices of the peace: provided, that when the president of such company does not reside, and there is no such officer or depot in said county, then it shall be the duty of the justice of the peace to issue a writ of summons directed to the sheriff of the county where the principal business office of the company is located, with an indorsement on the back of the writ, of the name of the post-office to which said writ shall be returned; and the sheriff, upon the receipt of said writ, shall forthwith serve the same personally upon the president, if found, or by leaving a copy at the business office of said company with the person having charge thereof, and immediately return the said writ to the justice of the peace issuing the same, by mail, directed to the post-office named on the back of the writ. (March 21, 1850, 48 v. 52, § 1; March 31, 1866, 63 v. 63, §§ 2, 3; April 30, 1868, 65 v. 116, § 66; R. S. 1880.)

Section 6477 does not apply to railroad roads.

See North v. Cleveland, etc., R. R. Co., 10 Oh. St. 548 (1860).

See generally § 5041.

Not applicable to street railways.

See Greene v. Woodland, etc., R. R. Co., 62 Oh. St. 67 (1900).

What is proper return.

See Jones v. Toledo, etc., Ry. Co., 20 O. C. C. 63 (1900).

§ 6479. **INSURANCE COMPANY.**—Where the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency. (March 14, 1853, 51 v. 179, § 16.)

See § 5042.

§ 6480. **FOREIGN CORPORATIONS.**—Where the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. (March 14, 1853, 51 v. 179, § 17.)

See § 5043.

§ 6489. **AFFIDAVIT FOR ATTACHMENT: WHAT TO CONTAIN.**—The plaintiff shall have an order of attachment against any property of the defendant (except as hereinafter provided) in a civil action before a justice of the peace, for the recovery of money, before or after the commencement thereof, when there is filed in this [his] office an affidavit of the plaintiff, his agent or attorney, showing the nature of the plaintiff's claim, that it is just, the amount the affiant believes the plaintiff ought to recover, and that the property sought to be attached is not exempt from execution, and, if the personal earnings of the defendant are sought to be attached, that the defendant is not the head or support of a family, and has not in good faith the maintenance and support of a widowed mother, wholly dependent upon him for support, or that such earnings are not for services rendered within three months before the commencement of this action, or, that being earned within that time, the same amount to more than one hundred and fifty dollars, and that only the excess over that amount is sought to be attached; or that the claim on which judgment is sought is for work or labor or for necessities; and except when the claim is for work, or labor or for necessities; also the existence of some one or more of the following particulars:

1. That the defendant, or one of several defendants, is a corporation, having no officer upon whom a summons can be served, or place of doing business in the county, or is a non-resident of the county; provided, that no proceedings in attachment shall be had to garnishee the salary or wages of the employes of a railroad company by reason of his non-residence, except before a justice or on account of his being a non-resident of the county in which his liability was incurred; or,

2. Has absconded with intent to defraud his creditors; or,

Attachment, etc., § 6499.

3. Has left the county of his residence to avoid the service of a summons; or,
4. So concealed himself that a summons cannot be served upon him; or,
5. Is about to remove his property, or a part thereof, out of the county, with intent to defraud his creditors; or,
6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,
7. Has property or rights of action which he conceals; or,
8. Has assigned, removed or disposed of, or is about to assign, remove or dispose of his property, or a part thereof, with intent to defraud his creditors; or,
9. Fraudulently or criminally contracted the debt, or incurred the obligation, for which suit is about to be or has been brought.

When the defendant is a corporation, having no officer in the county upon whom a summons can be served, or place of doing business in the county, or is a non-resident of the county, the attachment shall not be granted, unless the claim is for a debt or demand arising upon contract, judgment or decree, and no attachment shall issue by virtue of this chapter against the personal earnings of any defendant for services rendered by such defendant within three months before the commencement of the action or the issuing of the attachment, unless the defendant is not the head or support of a family, or unless the amount of such earnings exceeds one hundred and fifty dollars, and then only as to the excess over that amount, or unless the claim is one for necessities, and then for only ten per centum of such personal earnings. (February 28, 1862, 59 v. 17, § 28; June 9, 1879, 76 v. 165, § 17; R. S. 1880; April 3, 1891, 88 v. 277; April 26, 1898, 93 v. 319.)

Exemption of foreign corporations from attachment.

See §§ 148c, 148d.

What is a foreign corporation.

The words "foreign corporation" do not include a domestic corporation.—*Boley v. Ohio, etc., Trust Co.*, 12 Oh. St. 139 (1861).

Domestic corporation may be nonresident.

A domestic corporation may be proceeded against under this section on the grounds that it is a nonresident of this county.—*Champion Machine Co. v. Huston*, 24 Oh. St. 503 (1874).

Garnishment of railroad companies.

See § 5465.

Attachment in other courts.

See § 5521.

§ 6499. **HOW CORPORATION SERVED AS GARNISHEE.**—If the garnishee is a person, the copy of the order and notice shall be served upon him personally, or left at his usual place of residence; if a partnership is garnisheed by its company name, they shall be left at its usual place of doing business or be served personally on a member of said partnership; and if a corporation, they shall be left with the president or other principal officer, or the secretary, cashier, or managing agent thereof; and if such a corporation is a railroad company, they may be left with any regular ticket or freight agent thereof in the county. (May 4, 1885, 82 v. 261; R. S. 1880; March 14, 1853, 51 v. 179, § 38.)

PART XXIX.

QUO WARRANTO.

- § 6760. When proceedings in quo warranto may be instituted against a person.
- § 6761. Where action of quo warranto may be brought against a corporation.
- § 6762. Who may commence action.
- § 6763. Upon whose relation.
- § 6765. Who to prosecute, in absence, etc., of prosecuting attorney.
- § 6767. All claiming same office or franchise to be made defendants.
- § 6768. Actions in quo warranto; where brought.
- § 6769. Application for leave to file petition, and notice to defendant.
- § 6770. Issue of summons, and service.
- § 6771. Service by publication.
- § 6772. Pleading after petition.
- § 6773. Court may extend time for pleading.
- § 6774. Judgment where office, franchise, etc., found to have been usurped.
- § 6775. Judgment where a director of a corporation found to have been illegally elected.
- § 6776. When court may order new election in such case.
- § 6777. Rights of person adjudged to be entitled to an office.
- § 6778. Action for damages against person ousted.
- § 6779. How judgment of court enforced.
- § 6780. Judgment when corporation has forfeited its rights.
- § 6781. Appointment of trustees when corporation dissolved.
- § 6782. Power and duties of trustees.
- § 6783. How trustees placed in possession.
- § 6784. Judgment for costs.
- § 6785. Proceedings to enforce judgment ordering delivery of property.
- § 6786. When injunction allowed ancillary to proceedings in quo warranto against banking association.
- § 6787. Court may require bank directors to give security, etc.
- § 6788. Directors may be enjoined from borrowing or issuing money, etc.
- § 6789. Limitations.
- § 6790. Action for damages against officers, etc., of ousted corporation.
- § 6791. Provisions of this chapter cumulative to other remedies.
- § 6792. Disposition of fines.
- § 6793. Actions under this chapter to have precedence, etc.

§ 6760. **WHEN PROCEEDINGS IN QUO WARRANTO MAY BE INSTITUTED AGAINST A PERSON.**—A civil action may be brought in the name of the state—

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state.

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.

3. Against an association of persons who act as a corporation within this state without being legally incorporated. (March 17, 1838, 36 v. 68, § 1.)

Power of court of equity.

The legality of the election of persons as trustees of a company, and their right to exercise the powers and conduct the affairs of a

company, are questions which cannot be judicially tested in a court of equity, but fall within the jurisdiction of proceedings in quo warranto.—Hullman v. Honcamp, 5 Oh. St.

Action Brought When, § 6761.

237 (1855); First, etc., Society v. Smithers, 12 Oh. St. 248 (1861). See Moses v. Tompkins, 84 Ala. 613 (1887); Bartholomew v. Lutheran Congregation, 35 Oh. St. 567, 575 (1880); Messenger v. Wardens of Trinity Church, 6 W. L. B. 397 (1881); Hooe v. Hall, 9 O. C. C. 654 (1893); Harding v. Eichinger, 57 Oh. St. 371 (1898); Reemelin v. Mosby, 47 Oh. St. 570 (1890).

How continuance in office pleaded.

Where the information avers continued usurpation of the office of directors, the answer must set out expressly the continuance of every qualification necessary to the enjoyment of the office. It is not sufficient to state the qualifications necessary to appointment, and rely upon the presumption of their continuance.—State ex rel. v. Beecher, 15 Oh. 723 (1846).

When term of office has expired.

A proceeding cannot be maintained where the term of office has expired or is about to expire.—See State ex rel. v. Ward, 17 Oh. St. 543, 548 (1867); State ex rel. v. Jacobs, 17 Oh. 143 (1848).

Resignation no defense.

The resignation of defendants, after they have been served with process in a quo warranto proceeding, in which they are charged with usurping an office, constitutes no answer to the information. Their successors, as to the unoccupied term, stand in their shoes, and will be bound by the judgment.—State ex rel. v. McDaniel, 22 Oh. St. 354 (1872).

Parties.

Where the franchise to be a corporation is intended to be drawn in question, the proceeding should, under our statute, be against the individuals who usurp such franchise.—State ex rel. v. Cincinnati, etc., Coke Co., 18 Oh. St. 262 (1868). See State ex rel. v. Robinson, 12 W. L. B. 269 (1884).

Where parties are numerous.

Where, in a proceeding in quo warranto, certain named persons, and others said to be too numerous to be brought upon the record, were charged with usurping the franchise of being a corporation, and the defendants named plead that they were the directors of the corporation, without denying that they were corporators therein, and averred the legal existence of the corporation, in the absence of allegations or proof to the contrary, the defendants are to be regarded as claiming to be members of the corporation.—State ex rel. v. Sherman, 22 Oh. St. 411 (1872).

Proceedings against associations acting as corporation.

To bring a case within this section it is not necessary that the association or persons composing it claim to act as a corporation, or assume to do so; it is sufficient if the acts are such as appertain to corporations, or are done after the manner of corporations.—State ex rel. v. Ackerman, 51 Oh. St. 163 (1894).

Proceedings against foreign insurance associations.

The authority of foreign insurance companies to do business in the state is a franchise, the right to exercise which may be tested under this section.—State ex rel. v. Ackerman, 51 Oh. St. 163 (1894).

Burden of proof—right to open and close.

The burden is on the defendants to show by what authority they claim to exercise the powers complained of, and they are entitled to open and close the argument.—State ex rel. v. Vanderbilt, 37 Oh. St. 590, 631 (1882).

Amendment of charter while proceedings are pending.

See State ex rel. v. Mutual, etc., Ass'n. 26 Oh. St. 19 (1875).

§ 6761. WHEN ACTION OF QUO WARRANTO MAY BE BROUGHT AGAINST A CORPORATION.—A like action may be brought against a corporation:

- 1st. When it has offended against a provision of an act for its creation or renewal, or any act altering or amending such acts.
- 2nd. When it has forfeited its privileges and franchises by non-user.
- 3d. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises.
- 4th. When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege or right in contravention of law. (March 9, 1881, 78 v. 43; R. S. 1880; March 17, 1838, 36 v. 68, § 8.)

Scope of information.

An information which charges a corporation with usurping certain franchises by acting through other parties calls in question only the authority of the usurping corporation,

and cannot be extended so as to include authority not derivable from the corporation, and which parties exercise in their own right.—State ex rel. v. Cincinnati, 23 Oh. St. 445 (1872).

Action Brought When, etc., § 6761.

How forfeiture set up.

When an information in the nature of a quo warranto is filed against a corporation by its corporate name, calling upon it to show by what warrant it claims to be a corporation, and to exercise corporate powers, and the defendant pleads an act of the legislature granting to it the franchise named in the information, it is competent for the relator, by way of replication, to aver a cause of forfeiture, and to pray for a judgment of dissolution.—State ex rel. v. Pennsylvania, etc., Canal Co., 23 Oh. St. 121 (1872); State ex rel. v. Walnut Hills, etc., Road Co., 13 O. C. C. 375 (1889); State ex rel. v. Commercial Bank, 10 Oh. 535, 541 (1841). See State ex rel. v. American, etc., College, 8 A. L. Rec. 422 (1879).

State cannot deny existence.

Where proceedings are instituted by the state against a corporation, by its corporate name, charging a usurpation of certain corporate franchises, it is not competent for the state to deny the corporate existence of the defendant.—State ex rel. v. Cincinnati, etc., Coke Co., 18 Oh. St. 262 (1868). See State ex rel. v. Pennsylvania, etc., Canal Co., 23 Oh. St. 121, 126 (1872).

Allegation of corporate existence.

Where the action is against a corporation for exercising franchises not conferred by law, the corporate existence of the defendant should be alleged.—State v. Granville, etc., Society, 11 Oh. 1, 9 (1841).

Judgment by default.

Judgment by default cannot be taken unless the petition tenders an issue.—See State ex rel. v. American, etc., College, 8 A. L. Rec. 422 (1879).

Parties.

A proceeding against the individuals composing a corporation for a nonuser or misuser of franchises is bad on demurrer. The action should be against the corporation after it comes into existence.—State ex rel. v. Robinson, 12 W. L. B. 269 (1884); State ex rel. v. Taylor, 25 Oh. St. 279 (1874).

Meaning of word "privilege."

See State ex rel. v. Railway Co., 53 Oh. St. 189, 237 (1895).

Failure to perfect organization.

A corporation must organize by the election of directors, or otherwise it will be liable to ouster for misuse or nonuse of its franchise.—See State ex rel. v. Robinson, 12 W. L. B. 269 (1884).

Foreign corporations.

A foreign corporation exercising in this state franchises and privileges without authority of law may be ousted therefrom under this section.—State ex rel. v. Insurance Co., 49 Oh. St. 440 (1892); State ex rel. v. Life Ins. Co., 47 Oh. St. 167 (1890).

Same subject.

The issuing of a license to a foreign insurance company is not a bar to quo warranto proceedings.—State ex rel. v. Insurance Co., 49 Oh. St. 440 (1892).

Conducting business illegally.

Where the manner of conducting a business, which the state's charter gives power to a company to conduct as a corporation, is in disregard and defiance of the laws of the state relating to that business, an abuse of the power results, and quo warranto may properly be invoked to stop the abuse, and if the abuse is flagrant, to oust the corporation.—State ex rel. v. Capital Dairy Co., 62 Oh. St. 350 (1900); s. c. (U. S. Sup. Ct.), 22 Sup. Ct. Rep. 120.

Criminal laws do not bar action.

The mere fact that the criminal laws of the state provide a punishment for certain acts, is no bar to a proceeding in quo warranto to oust a corporation engaged in such acts.—State ex rel. v. Capital Dairy Co., 62 Oh. St. 350 (1900).

Misuse by excluding directors.

A proceeding under this section may be brought to prevent the corporation from excluding legally elected directors from the exercise of their duties, and in such a proceeding the persons permitted to act as directors are proper parties.—State ex rel. v. Ohio, etc., Ry. Co., 6 O. C. C. 412 (1892). See State ex rel. v. Smith, 6 O. C. C. 410 (1892).

Res adjudicata.

A judgment rendered by an inferior court in favor of a defendant corporation, upon an information in the nature of a quo warranto, filed by a county prosecuting attorney, upon an individual relation, is not a bar to a subsequent information of a similar character, filed by the attorney-general, in the exercise of the discretion given him by statute.—See State ex rel. v. Cincinnati, etc., Coke Co., 18 Oh. St. 262 (1868).

What is misuse of powers of railroad company.

A railroad company assumes the performance of duties for the benefit of the public generally. When such corporation, for a period of five years, fails to construct the line of railroad named in its charter, but condemns private property and constructs a railroad wholly unsuited to the wants of the public, and for the benefit only of the coal mines, owned and operated by the principal stockholders of such railroad company, it is a misuse of its corporate powers, franchises and privileges.—State v. Railway Co., 40 Oh. St. 504 (1884). See State ex rel. v. Railroad Co., 50 Oh. St. 239 (1893).

Power of eminent domain.

A proceeding in quo warranto is the only direct method of testing the right of a corpo-

Who May Bring, etc., §§ 6762, 6763.

ration to exercise the power of eminent domain, and such proceeding is not barred by a judgment of the probate court under § 6420 as to such right.—State ex rel. v. Salem Water Co., 5 O. C. C. 58 (1890); s. c., 3 C. D. 30.

Right of railroad company to hold land cannot be tested.

The object of quo warranto proceedings is not to divest the company of its title to property, unless acquired by a usurpation of the proprietary rights of the state, and a prayer that the company be ousted from the right to use the lands of the relator for a private purpose is, in effect, a prayer for the possession of the lands, and not within the purpose of a proceeding in quo warranto.—State ex rel. v. Railroad Co., 50 Oh. St. 239 (1893).

Power of railroad company to hold canal lands.

An action in quo warranto will lie against a railroad corporation to contest its claim to exercise a right or privilege to or in the canal lands of the state.—State ex rel. v. Railway Co., 53 Oh. St. 189 (1895).

Discrimination in freight rates.

A company operating as a common carrier has no right to discriminate in its freight

rates between shippers, and where such a company, for instance, fixes a rate of freight for carrying petroleum oil in tank cars, substantially lower than its rate for transporting it in barrels in carload lots, it is exercising a franchise, privilege or right in contravention of law under this section.—State ex rel. v. Cincinnati, etc., Ry. Co., 47 Oh. St. 130 (1890).

Engagement in interstate commerce no defense.

A railroad company misusing its franchise, privileges or right is subject to a proceeding under this section, though it may be engaged in interstate commerce and the misuser or usurpation to be corrected relates to and concerns that traffic.—State ex rel. v. Cincinnati, etc., Ry. Co., 47 Oh. St. 130 (1890).

Violation of trust act.

See 93 v. 143, § 2.

Franchise of street railroad company.

See State ex rel. v. East Cleveland R. R. Co., 6 O. C. C. 318 (1891).

Franchises of gas companies.

See State ex rel. v. Cincinnati, etc., Coke Co., 18 Oh. St. 262 (1868); State ex rel. v. Ironton Gas Co., 37 Oh. St. 45 (1881).

§ 6762. **WHO MAY COMMENCE ACTION.**—The attorney-general, or a prosecuting attorney, when directed by the governor, supreme court, or general assembly, shall commence any such action; and when, upon complaint, or otherwise, he has good reason to believe that any case specified in (the preceding section) can be established by proof, he shall commence an action. (May 1, 1852, 50 v. 267, §§ 9, 10, 11, 12; March 17, 1838, 36 v. 68, §§ 1, 8.)

Power of judges of supreme court.

The judges of the supreme court, in their private capacity, have no power to direct proceedings in quo warranto.—Ohio R. R. Co. v. State, 10 Oh. 360 (1841).

When court should order proceedings brought.

The power of the supreme court should, as a general rule, be exercised only when some-

thing relating to the court, or its business, renders it necessary or advisable.—Thompson v. Watson, 48 Oh. St. 552 (1891); State ex rel. v. Taylor, 50 Oh. St. 120 (1893).

Power of prosecuting attorney.

See State ex rel. v. Buckland, 5 Oh. St. 216 (1855).

§ 6763. **UPON WHOSE RELATION.**—Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under the first subdivision of section sixty-seven hundred and sixty, he may require security for costs to be given as in other cases. (March 17, 1838, 36 v. 68, § 1.)

Discretion of attorney-general.

A writ of mandamus will not be awarded to compel the attorney-general to commence proceedings. An application to him to bring the action is addressed to his discretion, the exercise of which the court will not control.—Thompson v. Watson, 48 Oh. St. 552 (1891). See *In re Bank*, 5 Oh. 250 (1831).

When leave necessary.

A suit cannot be brought on the relation of an individual without leave of court.—State ex rel. v. Smith, 6 O. C. C. 410 (1892).

Quo warranto can only be brought in the name of the state.

See *Railway Co. v. State*, 49 Oh. St. 668, 681 (1892).

Individual cannot bring action.

An action in quo warranto to test the right to hold position of director of a corporation cannot be brought by persons claiming the place on their own relation.—Crawford v. State, 52 Oh. St. 62 (1894).

Who May Bring, etc.—Service in, etc., §§ 6765-6711.

§ 6765. **WHO TO PROSECUTE, IN ABSENCE, ETC., OF PROSECUTING ATTORNEY.**—When the office of prosecuting attorney is vacant, or when the prosecuting attorney is absent, interested in the action, or disabled from any cause, the court, or a judge thereof in vacation, may direct or permit any member of the bar to act in his place to bring and prosecute the action. (March 17, 1838, 36 v. 68, § 23.)

§ 6767. **ALL CLAIMING SAME OFFICE OR FRANCHISE TO BE MADE DEFENDANTS.**—All persons who claim to be entitled to the same office or franchise may be made defendants in the same action, to try their respective rights to such office or franchise. (March 17, 1838, 36 v. 68, § 7.)

§ 6768. **ACTIONS IN QUO WARRANTO: WHERE BROUGHT.**—An action under this chapter can be brought only in the supreme court, or in the circuit court of the county in which the defendant, or one of the defendants, resides or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business; but when the attorney-general files the petition, the action may be brought in the circuit court of Franklin county. (February 7, 1885, 82 v. 16, 39; R. S. 1880; May 1, 1852, 50 v. 267, § 13; March 17, 1838, 36 v. 68, § 1.)

Venue must be pleaded.

The petition must allege the location of the place of business of the corporation.—See *State v. Granville, etc., Society*, 11 Oh. 1, 9 (1841).

Jurisdiction of circuit court.

See *State ex rel. v. Buckland*, 5 Oh. St. 216 (1855); *State ex rel. v. Smith*, 6 O. C. C. 410 (1892).

§ 6769. **APPLICATION FOR LEAVE TO FILE PETITION, AND NOTICE TO DEFENDANT.**—Upon application for leave to file a petition, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto; and if leave be granted, an entry thereof shall be made on the journal, or, the fact shall be indorsed by the judge on the petition, which shall then be filed. (March 17, 1838, 36 v. 68, § 9.)

Leave may be granted at chambers.

A judge of the court may, in the exercise of chamber powers, grant leave to file an infor-

mation in the nature of a quo warranto.—*State ex rel. v. Buckland*, 5 Oh. St. 216 (1855).

§ 6770. **ISSUE OF SUMMONS, AND SERVICE.**—When the petition is filed without leave and notice, a summons shall issue, and be served as in other cases; and such summons may be sent to and returned by the sheriff of any county by mail, who shall be entitled to the same fees thereon as if it had been issued and returned in his own county. (March 17, 1838, 36 v. 68, § 2.)

Time for answer.

Where a petition is filed without leave a summons which fixes answer day as the third Saturday after the return day is bad on a

motion to quash. Under § 6772 the time for answer is within thirty days after the return of the summons.—*State ex rel. v. Robinson*, 11 W. L. B. 294 (1884).

§ 6771. **SERVICE BY PUBLICATION.**—When a summons is returned not served because the defendant, or its officers or office cannot be found within the county, the clerk shall publish, for four consecutive weeks, in a newspaper published and of general circulation in the county, and if there is no such newspaper, then in a newspaper printed in this state, and of general circulation in such county, a notice, setting forth the filing and substance of the petition; and upon proof of such publication, the default of the defendant may be entered, and judgment rendered thereon as if the defendant had been served with summons. (March 17, 1838, 36 v. 68, § 13.)

Pleadings and Judgment in, §§ 6772-6776.

Publication not authorized unless court has jurisdiction.

State ex rel. v. Smith, 6 O. C. C. 410 (1892).

When nonresidents may be served by publication.

In a quo warranto proceeding against a cor-

poration, where certain nonresident directors are proper parties, they may be served under this section.—State ex rel. v. Ohio, etc., Ry. Co., 6 O. C. C. 412, 415 (1892).

§ 6772. **PLEADING AFTER PETITION.**—The defendant may demur, or file an answer, which may contain as many several defenses as he has, within thirty days after the filing of the petition, if it was filed on leave and notice, or after the return day of the summons; and the plaintiff may file a demurrer or a reply to such answer within thirty days thereafter. (March 17, 1838, 36 v. 68, § 12; R. S. 1880.)

Rules of pleading—not affected by Code.

It was not intended to substantially change the rules of pleading by bringing proceedings in quo warranto under the code.—State ex rel. v. Walnut Hills Road Co., 13 O. C. C. 375 (1889). See State ex rel. v. Sullivan, 15 O. C. C. 477, 481 (1897).

Pleading.

The pleadings in quo warranto are not governed by the code, and a defendant may plead double.—State ex rel. v. McDaniel, 22 Oh. St. 354 (1872).

Pleadings.

The common-law system, and not that prescribed by the Code of Civil Procedure, is to

be followed in proceedings in quo warranto, and, therefore, new matter set up in a replication in quo warranto, in confession and avoidance of the plea, is taken as confessed, if not denied.—State ex rel. v. Taylor, 25 Oh. St. 279 (1874).

What matter is material as defense.

The inquiry in proceedings in quo warranto is limited to the charges in the information, and matter set up by way of plea is only material in so far as it shows warrant in law for the exercise of the authority alleged in the information to be usurped.—State ex rel. v. Cincinnati, 23 Oh. St. 445 (1872). See State ex rel. v. Greenville, etc., Ass'n, 29 Oh. St. 92, 101 (1876).

§ 6773. **COURT MAY EXTEND TIME FOR PLEADING.**—An order may be made by the court, or a judge thereof, extending the time within which any pleading may be filed; but such order shall not work a continuance of the case. (March 17, 1838, 36 v. 68, § 14.)

§ 6774. **JUDGMENT WHERE OFFICE, FRANCHISE, ETC., FOUND TO HAVE BEEN USURPED.**—When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising, an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs. (March 17, 1838, 36 v. 68, § 15.)

§ 6775. **JUDGMENT WHERE DIRECTOR OF A CORPORATION FOUND TO HAVE BEEN ILLEGALLY ELECTED.**—When the action is against a director of a corporation, and the court find that at his election, either illegal votes were received, or legal votes were rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted, and of induction in favor of the person who was entitled to be declared elected at such election. (April 28, 1873, 70 v. 176, § 1; R. S. 1880.)

Where election set aside.

Where persons claiming office as directors are ousted because of unfair election, their predecessors will be restored to office to continue in the same until their successors are

elected and qualified.—State ex rel. v. Bonnell, 35 Oh. St. 10, 17 (1878).

See State ex rel. v. McDaniel, 22 Oh. St. 354 (1872).

§ 6776. **WHEN COURT MAY ORDER NEW ELECTION IN SUCH CASE.**—In a case named in the last section, the court may order a new election to be held, at a time and place, and by judges, appointed by the court, notice of which election, and

Judgment in Quo Warranto, etc., §§ 6777-6780.

naming the judges, shall be given for the time and in the manner provided by law for notice of elections of directors of such corporations; the order of the court shall become obligatory upon the corporation and its officers when a duly certified copy thereof is served upon its secretary personally, or left at its principal office; and the court may enforce its order by attachment, or in any other manner it deems necessary. (April 28, 1873, 70 v. 176, § 2; R. S. 1880.)

§ 6777. RIGHTS OF PERSONS ADJUDGED TO BE ENTITLED TO AN OFFICE.

— If judgment be rendered in favor of the person averred to be entitled to an office, he may, after taking the oath of office, and executing any official bond required by law, take upon him the execution of the office; and he shall immediately thereafter demand of the defendant all the books and papers in his custody or within his power appertaining to the office from which he has been ousted. (March 17, 1838, 36 v. 68, § 4.)

§ 6778. ACTION FOR DAMAGES AGAINST PERSON OUSTED.— Such person may, at any time within one year after the date of such judgment, bring an action against the party ousted, and recover the damages he sustained by reason of such usurpation. (March 17, 1838, 36 v. 68, § 6.)

Attorney fees and expenses in prosecuting quo warranto not recoverable.

See *Palmer v. Darby*, 2 N. P. 401 (1895).

§ 6779. HOW JUDGMENT OF COURT ENFORCED.— If such defendant refuse or neglect to deliver over any such book or paper pursuant to such demand, he shall be deemed guilty of contempt of court, and shall be fined in any sum not exceeding ten thousand dollars, and imprisoned in the jail of the county until he complies with the order of the court, or is otherwise discharged by due course of law. (March 17, 1838, 36 v. 68, § 5.)

§ 6780. JUDGMENT WHEN CORPORATION HAS FORFEITED ITS RIGHTS.

— When in any such action, it is found and adjudged that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, and franchises, or has not used the same during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense, or the exercise of such power. (March 12, 1845, 43 v. 94, § 1.)

When forfeitures decreed.

A corporation may forfeit its charter through neglect or abuse of its franchises; but a forfeiture is not allowed, except under express limitations of the charter, unless a plain abuse or neglect of power, by which the corporation fails to fulfill the design of its creation, is shown.— *State ex rel. v. Commercial Bank*, 10 Oh. 535 (1841); *State ex rel. v. Farmers' College*, 32 Oh. St. 487 (1877).

When court has no discretion.

Where a corporation has been guilty of an act which by its charter is made a cause for the forfeiture of its franchises, and the state, on the relation of the attorney-general, demands a judgment of dissolution on account thereof, the court has no discretion to refuse such judgment upon the ground that public or private interest would be better subserved by preserving the existence of the corporation.

— *State ex rel. v. Pennsylvania, etc., Canal Co.*, 23 Oh. St. 121 (1872); *State ex rel. v. Oberlin, etc., Ass'n*, 35 Oh. St. 258 (1897). See *State ex rel. v. Central Ohio, etc., Ass'n*, 29 Oh. St. 399 (1876).

Discretion of court.

Except in the cases mentioned in the preceding note, the court is vested with a discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed.— *State ex rel. v. Oberlin, etc., Ass'n*, 35 Oh. St. 258 (1879); *State ex rel. v. Peoples, etc., Ass'n*, 42 Oh. St. 579 (1885).

Effect of ouster on third persons.

It is not competent for the court, in a quo warranto proceeding ousting a corporation of the right to be a body corporate, to consider

Judgment in, etc., §§ 6781-6785.

or determine the rights or liabilities of third parties who have acquired such rights or liabilities in their dealings with such acting corporation. The court has exhausted its jurisdiction when it has adjudged that the corporation be ousted; and such judgment is not retroactive, and does not affect the rights and liabilities of those who have dealt with the corporation.—*Society Perun v. Cleveland*, 43 Oh. St. 481 (1885).

No forfeiture without judgment.

There can be no forfeiture without judgment in quo warranto, and its property is not lost

by mere nonuser.—*Webb v. Moler*, 8 Oh. 548 (1838). See *State ex rel. v. Bryce*, 7 Oh. (pt. 2) 82 (1836).

Collateral attack.

A forfeiture can only be claimed by the state, and a corporation is not subject to collateral attack for misuser or nonuser of its franchises.—*Webb v. Moler*, 8 Oh. 548 (1838); *Toledo, etc., Ry. Co. v. Toledo, etc., Ry. Co.*, 6 O. C. C. 362, 391 (1892); *Benninger v. Gall*, 1 C. S. C. 331 (1871); *Finnell v. Burt*, 2 Handy, 202 (1856).

§ 6781. APPOINTMENT OF TRUSTEES WHEN CORPORATION DISSOLVED.

—The court rendering a judgment dissolving a corporation shall appoint trustees of the creditors and stockholders of the corporation, who, after giving an undertaking, payable to the state of Ohio, in such sum and with such sureties as the court may designate and approve, conditioned that they will faithfully discharge their trust, and properly pay and apply all money that may come into their hands, shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the money and other property which remain after the payment of debts and necessary expenses. (March 12, 1845, 43 v. 94, § 2.)

Effect of ouster on property.

Where a decree of ouster is entered against a canal company as to its right to be a corporation and its right to operate a canal, there is a forfeiture of the easement of the canal company, and the land reverts to the original owner.—*New York, etc., R. R. Co.*

v. Parmelee, 1 O. C. C. 239 (1885); affirmed 23 W. L. B. 108.

When trustees appointed.

Where a corporation is ousted of its right to be a corporation, the court must appoint trustees.—See *State ex rel. v. Oberlin, etc., Ass'n*, 35 Oh. St. 258, 264 (1879).

§ 6782. POWER AND DUTIES OF TRUSTEES.—The trustees shall forthwith demand all money, property, books, deeds, notes, bills, obligations, and papers of every description within the custody, power, or control of the officers of the corporation, or either of them, belonging to the corporation, or in any wise necessary for the settlement of its affairs, or for the discharge of its debts and liabilities; and they may sue for and recover the demands and property of the corporation, and shall be jointly and severally liable to the creditors and stockholders, to the extent of its property and effects which come into their hands. (March 17, 1838, 36 v. 68, § 19.)

§ 6783. HOW TRUSTEES PLACED IN POSSESSION.—An officer of such corporation who refuses or neglects to deliver over any such money, or other things, pursuant to such demand, shall be deemed guilty of a contempt of court, and shall be fined not exceeding ten thousand dollars, and imprisoned in the jail of the proper county until he complies with the order of the court, or is otherwise discharged by due course of law; and he shall be liable to the trustees for the value of all money, or other things, so refused or neglected to be surrendered, together with all damages that have been sustained by the stockholders and creditors of the corporation, or any of them, in consequence of such neglect or refusal. (March 17, 1838, 36 v. 68, § 20.)

§ 6784. JUDGMENT FOR COSTS.—If judgment be rendered against a corporation, or against a person claiming to be a corporation, the court may render judgment for costs against the directors or other officers of the corporation, or against a person claiming to be a corporation. (March 17, 1838, 36 v. 68, § 17.)

§ 6785. PROCEEDINGS TO ENFORCE JUDGMENT ORDERING DELIVERY OF PROPERTY.—In all actions under this chapter, when the judgment is against

Judgment in Quo Warranto, etc., §§ 6786-6789.

the defendant the court may make an order directing the defendant forthwith to deliver over the books, papers, property, money, deeds, notes, bills, and obligations, to the persons entitled thereto, or the trustees appointed to receive the same, and may send a transcript of the proceedings, including a copy of such order, to the court of common pleas of the proper county, with a special mandate directing such court to carry the same into effect; upon complaint being made upon affidavit to such court of common pleas, of a neglect or refusal to comply with such order, that court shall direct an attachment, returnable forthwith, to issue for the defendant, who may be required to answer under oath touching the premises; and if it appear that the defendant so neglects or refuses, such court shall render judgment of fine or imprisonment, or both, as the court making the order might have rendered. (March 17, 1838, 36 v. 68, § 21.)

§ 6786. **WHEN INJUNCTIONS ALLOWED ANCILLARY TO PROCEEDINGS IN QUO WARRANTO AGAINST BANKING ASSOCIATION.**—Any stockholder, or stockholders, owning not less than one-fourth of the capital stock of any banking association actually paid in, or entitled to the beneficial interest therein, may have, pending proceedings in quo warranto against such corporation, an injunction restraining the directors thereof from making any disposition of the assets of such corporation prejudicial to the interests of such stockholder or stockholders, or inconsistent with their duties as directors. (March 20, 1860, 57 v. 50, § 2.)

§ 6787. **COURT MAY REQUIRE BANK DIRECTORS TO GIVE SECURITY, ETC.**—The court, or a judge thereof in vacation, may, upon satisfactory proof that the directors of such corporation have violated, or are about to violate, any of the franchises thereof, require them to give security to the stockholders thereof, to the satisfaction of the court or judge, for the proper discharge of their duties, and for the proper management and security of the assets; and such court or judge may enjoin such directors from paying out or issuing the notes of circulation of such bank, and from incurring any additional liabilities except for the payment of the necessary services of the officers and employes of such banking association, the amount of which, while such proceedings are pending, shall be under the control of the court. (March 20, 1860, 57 v. 50, § 2.)

§ 6788. **DIRECTORS MAY BE ENJOINED FROM BORROWING OR ISSUING MONEY, ETC.**—Such court or judge may, on petition, enjoin such directors, from borrowing or issuing, either directly or indirectly, any of the money or assets of such bank for their individual benefit, while such proceedings are pending. (March 20, 1860, 57 v. 50, § 3.)

§ 6789. **LIMITATIONS.**—Nothing in this chapter contained shall authorize an action against a corporation for forfeiture of charter, unless the same be commenced within five years after the act complained of was done or committed; nor shall an action be brought against a corporation for the exercise of a power or franchise under its charter, which it has used and exercised for a term of twenty years; nor shall an action be brought against an officer to oust him from his office, unless within three years after the cause of such ouster, or the right to hold the office, arose. (March 17, 1838, 36 v. 68, § 26.)

Ouster from exercise of franchise.

A corporation may be ousted in quo warranto from the exercise of a power or franchise, not conferred by law, where the same has not been exercised for twenty years.—State ex rel. v. Standard Oil Co., 49 Oh. St. 137 (1892); State v. Miami Exporting Co., 11 Oh. 126 (1841).

Forfeiture for misuse.

The ouster of a company from the right to be a corporation, for the misuse of a franchise, is limited for five years from the commission of the offense.—State ex rel. v. Railroad Co., 50 Oh. St. 239 (1893); State ex rel. v. Standard Oil Co., 49 Oh. St. 137 (1892).

Damages — Precedence of Action, etc., §§ 6790-6793.

Use of franchise — exclusive.

The use of streets by a gas company for twenty years does not bar an inquiry into the right of the defendant to their exclusive use.— *State ex rel. v. Cincinnati, etc., Coke Co.*, 18 Oh. St. 262 (1866).

Limitation as to officers.

The statute commences to run from the time the cause of ouster arose, but if the statute has run, the corporation may remove such officers and make a new case.— *See State ex rel. v. Beecher*, 16 Oh. 358 (1847).

When statute runs against state.

Neither the five years nor the twenty years limitation prescribed in this section bars an action in quo warranto where its object is to oust a corporation from an unwarranted claim to a right or privilege in lands belonging to the state.— *State ex rel. v. Railway Co.*, 53 Oh. St. 189 (1895).

No distinctions between actions brought by attorney-general and prosecuting attorney.

See State ex rel. v. Standard Oil Co., 49 Oh. St. 137, 188 (1892).

A suit ordered by legislature is subject to the statute.

See State v. Granville, etc., Society, 11 Oh. 1, 20 (1841).

How statute pleaded.

The plea setting up the statute, taken as a whole, must show the user of the franchises in question for twenty years, not by the performance of a single act, but by a variety of acts which taken together constitute the exercise of the franchise.— *See State v. Granville, etc., Society*, 11 Oh. 1, 19 (1841).

When proceeding commenced.

A proceeding is commenced when the information is filed, not when an application is made.— *See State v. Granville, etc., Society*, 11 Oh. 1, 20 (1841).

§ 6790. **ACTION FOR DAMAGES AGAINST OFFICERS, ETC., OF OUSTED CORPORATION.**— When judgment of forfeiture and ouster is rendered against a corporation because of any misconduct of the officers or directors thereof, a person injured thereby may, at any time within one year thereafter, in an action against such officers or directors, recover the damages he has sustained by reason of such misconduct. (March 17, 1838, 36 v. 68, § 22.)

§ 6791. **PROVISIONS OF THIS CHAPTER CUMULATIVE TO OTHER REMEDIES.**— Nothing in this chapter contained is intended to restrain any court from enforcing the performance of trusts for charitable purposes, at the relation of the prosecuting attorney of the proper county, or from enforcing trusts, or restraining abuses, in other corporations at the suit of a person injured. (March 17, 1838, 36 v. 68, § 24.)

§ 6792. **DISPOSITION OF FINES.**— All fines collected under the provisions of this chapter shall be paid into the treasury of the proper county for the use of the common schools within the county. (March 17, 1838, 36 v. 68, § 25.)

§ 6793. **ACTIONS UNDER THIS CHAPTER TO HAVE PRECEDENCE, ETC.**— Actions under this chapter in any court shall have precedence of any civil business pending therein; and the court, if the matter is of public concern, shall, on the motion of the attorney-general or prosecuting attorney, require as speedy a trial of the merits of the case as may be consistent with the rights of the parties. (March 20, 1860, 57 v. 50, § 1.)

PART XXX.

PENAL CODE.

- § 6809. Murder by obstructing or injuring a railroad.
- § 6861. Unlawful meddling with railway property; penalty.
- § 6862. Throwing or shooting at trains or vessels.
- § 6919. Corporation may be prosecuted for nuisance; court to order nuisance abated.
- § 6980. Railways; penalty for violation by engineers of certain duties at or near crossings; obstruction of highways outside of Columbus.
- § 6980a. Unlawful use or occupation of highways by railway companies in Cincinnati, Cleveland and Springfield. Bars or gates and watchmen in Cincinnati and Cleveland. Penalty. First right to use or occupancy. Regular trains.
- § 6981. Riding or driving into inclosures of railroads, etc.
- § 6982. Climbing upon railroad cars.
- § 7231. Summons and indictment against corporations.

§ 6809. **MURDER BY OBSTRUCTING OR INJURING A RAILROAD.**—Whoever maliciously places an obstruction upon a railroad, or displaces or injures anything appertaining thereto, with intent to endanger the passage of any locomotive or car, and thereby occasion the death of another, is guilty of murder in the first degree, and shall be punished accordingly. (March 16, 1863, 60 v. 17, § 1.)

See *Jones v. State*, 51 Oh. St. 331, 341 (1894).

§ 6861. **UNLAWFUL MEDDLING WITH RAILWAY PROPERTY; PENALTY.**—That it shall be unlawful for any person or persons without proper authority, to place any obstruction upon any railroad, or any street railway, or any cable railway in this state, or displace, injure, or destroy anything appertaining thereto, or interfere with, remove, displace or disarrange any rail, cross-tie, switch, side-track, locomotive, car or train of cars or other property appertaining to any such railroad, street railway or cable railway, or interfere with, remove, displace or disarrange any flag, lamp or other signal attached to or employed upon any railroad, street railway or cable railway, or upon any railroad car or train of cars, or upon any street railway car or cable railway car, locomotive, switch or other property appertaining to any such railroad, street railway, or cable railway, or remove from, disarrange or destroy any lock, fastening, coupling or attachment on any track, car, switch, stand, tool-house, depot, or other property of any such railroad, street railway or cable railway. Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than five hundred nor less than twenty-five dollars and imprisonment in the penitentiary not more than ten years or in the county jail not less than thirty days. (March 12, 1887, 84 v. 81; 82 v. 119; R. S. 1880; 60 v. 17, § 1; 74 v. 252, § 28.)

§ 6862. **THROWING OR SHOOTING AT TRAINS OR VESSELS: PENALTY.**—Whoever willfully throws any stone or other hard substance, or shoots any missile at any railroad car, train, locomotive or at any cable railway car, or street railway car, or at any steam vessel or water craft of any description used for the purpose of carrying passengers or freight, or both, on any of the waters within or bordering on the state of Ohio, shall be fined not more than five hundred nor less than fifty dollars,

Nuisances — Railroad Crossings, §§ 6919-6980a.

and imprisoned in the penitentiary not more than three years or in the county jail not more than six months. (March 12, 1887, 84 v. 81; 81 v. 125; R. S. 1880; 76 v. 11, § 1.)

§ 6919. **CORPORATIONS MAY BE PROSECUTED FOR NUISANCE; COURT TO ORDER NUISANCE ABATED.**—Corporations may be prosecuted by indictment for violation of any of the provisions of sections sixty-nine hundred and twenty-one, sixty-nine hundred and twenty-two, sixty-nine hundred and twenty-three, sixty-nine hundred and twenty-four, sixty-nine hundred and twenty-five and sixty-nine hundred and twenty-six (62 v. 137, § 2; 63 v. 96, § 1); and in every case of conviction under said sections the court shall adjudge that the nuisance described in the indictment be abated or removed, and may issue an order to the sheriff to execute such judgment at the cost and expense of the defendant. (April 15, 1857, 54 v. 130, § 3; April 12, 1865, 62 v. 137; April 4, 1866, 63 v. 96.)

Nuisances.

See § 6920 et seq.

§ 6980. **RAILWAYS: PENALTY FOR VIOLATION BY ENGINEERS OF CERTAIN DUTIES AT OR NEAR CROSSINGS; OBSTRUCTION OF HIGHWAYS OUTSIDE OF COLUMBUS.**—A person in charge of a locomotive engine upon any railroad who fails to bring the engine with the train, if any thereto attached, to a full stop at least two hundred feet before arriving at any railroad crossing or connection, or crosses the same before signaled by the watchman to cross, or before the way is clear, or, when approaching any railroad (road) crossing, fails to sound the engine whistle at a distance of not more than one hundred nor less than eighty rods from such crossing, or to ring the engine bell continuously from the place aforesaid until the engine and cars attached thereto shall have passed such road or crossing, shall be fined not more than one hundred dollars, or imprisoned not more than thirty days, or both; or if, by reason of a violation of this section, any person be killed, the person in charge of such engine shall be deemed guilty of manslaughter and punished accordingly; or if a person sustain bodily injury not producing death, the person in charge of such engine shall be imprisoned not more than twenty months nor less than one month, or fined not more than five hundred dollars. It is provided further, except in cities of the first grade of the second class, that any person who permits any car or locomotive of which he has charge to remain upon or within thirty feet of the center or across any public road, street or alley, for a period longer than five minutes, or places any timber or other obstruction upon or across any such road, street or alley, to the hindrance or inconvenience of travel thereon, shall be fined not more than twenty nor less than five dollars. (March 24, 1888, 85 v. 112; R. S. 1880; March 31, 1874, 71 v. 50, § 1; March 25, 1872, 69 v. 49, §§ 1, 2.)

Necessity.

Note the difference between this section and § 4748.—*Lake Erie, etc., R. R. Co. v. Mackey*, 53 Oh. St. 370 (1895).

§ 6980a. **UNLAWFUL USE OR OCCUPATION OF HIGHWAYS BY RAILWAY COMPANIES IN CINCINNATI, CLEVELAND AND SPRINGFIELD.**—It shall not be lawful in cities of the first and second grades of the first class and cities of the third grade *a* of the second class for any railroad company, superintendent, agent or other employe thereof, either directly or indirectly, to obstruct, use or occupy any street or other public highway with any locomotive, car, cars or train, by permitting or suffering such locomotive, car, cars or train to remain upon the crossing by any railroad of such street or other public highway, or any part thereof, or by coupling, switching or shifting of locomotives, cars or trains, or the making up of trains across such street or other public highway, or any part thereof, or by moving or stopping

 Railroads, Trespassing upon, etc.—Indictment, etc., §§ 6981-7231.

long freight trains across the same, for a period longer than four minutes at one time; and whenever any such street or other public highway has been thus obstructed, used or occupied, it shall not be lawful for any railroad company, superintendent, agent or other employe thereof, either directly or indirectly to so obstruct, use or occupy the same, or any part thereof, for a period of five minutes thereafter;

BARS OR GATES AND WATCHMEN IN CINCINNATI AND CLEVELAND.—

And in cities of the first and second grades of the first class any railroad company or companies so using such street or other public highway, during said period of four minutes, shall provide and maintain suitable bars or gates, and watchmen at such street or other crossings, to secure and warn the public against the dangers attending such use;

PENALTY.—And if any railroad company, superintendent, agent or other employe thereof shall, either directly or indirectly, obstruct, use or occupy such street or other public highway in violation of the aforesaid provisions and prohibitions of this section, or shall procure, direct, aid or abet in any such violation, he or they shall be fined not more than one hundred nor less than twenty dollars, or imprisoned not more than thirty days, or both.

FIRST RIGHT TO USE OR OCCUPANCY.—It is further provided, that after the expiration of said period of five minutes, any railroad company other than the one last using such street or public highway, shall have the first right to use or occupy the same for a period not to exceed four minutes;

REGULAR TRAINS.—And provided further, that nothing herein shall be so construed as to affect or interfere with the arrival and departure of regular railroad trains moving across such street or other public highway at a rate of speed not to exceed six miles per hour; or to any regular passenger-train occupying any such street or highway for a period less than ten minutes, for the purpose of discharging or taking on passengers and baggage at any of its regular passenger stations. (April 14, 1893, 90 v. 188; March 24, 1888, 85 v. 113.)

§ 6981. RIDING OR DRIVING INTO INCLOSURES OF RAILROADS, ETC.—

Whoever, at any other place than at a private crossing, or for any other purpose than crossing such railroad, rides or drives any horse, or other domestic animal, into any inclosure of any railroad, and whoever knowingly permits any such animal to go into, or to remain in, any such inclosure, or places within the same any feed, salt, or other thing, to induce any such animal to enter into such inclosure, or upon the track of any such railroad, and whoever, while constructing any such private crossing, or while crossing such railroad at any private crossing, suffers any fence to remain down or open for a longer time than is necessary to construct or use such crossing, shall be fined not more than ten dollars, or imprisoned not more than thirty nor less than ten days; each ten hours any such animal is knowingly permitted to remain in such inclosure, or upon such track, shall be deemed an additional offense; and animals so being upon such track, or in such inclosure, shall not be exempt from execution for any fine or costs imposed under this section. (February 8, 1875, 72 v. 32; May 14, 1868, 65 v. 194, §§ 1, 2.)

§ 6982. CLIMBING UPON RAILROAD CARS.—A person who climbs, jumps, steps, or stands upon, or clings, or in any way attaches himself to, any locomotive, engine, or car, upon any part of the track of a railroad, unless in so doing he acts in compliance with law, or by permission under the lawful rules and regulations of the corporation then managing such railroad, shall be fined not more than twenty-five dollars. (May 7, 1877, 74 v. 202, §§ 1, 2.)

§ 7231. SUMMONS AND INDICTMENT AGAINST CORPORATIONS.—When an indictment is presented against a corporation, a summons commanding the sheriff

Summons and Indictment against Corporations, § 7231.

to notify the accused thereof, and returnable on the seventh day after its date, shall issue on the precept of the prosecuting attorney; such summons, together with a copy of the indictment, shall be served and returned in the manner provided for service of summons upon such corporation in civil actions; and if the service cannot be made in the county where the prosecution began, then the sheriff may make service in any county of the state upon either its president, secretary, superintendent, clerk, cashier, treasurer, managing agent, or other chief officer, or by a copy left at any general or branch office, or usual place of doing business of such corporation, with the person having charge thereof; the corporation, on or before the return day of a summons duly served, may appear by one of its officers, or by counsel, and answer to the indictment by motion, demurrer or plea, and upon its failure to make such appearance and answer, the clerk shall enter a plea of "not guilty;" and upon such appearance being made, or plea entered, the corporation shall be deemed thenceforth continuously present in court until the case is finally disposed of. (April 28, 1890, 87 v. 351; R. S. 1880.)

Averment of corporate existence.

An indictment against a corporation need not aver that it is a corporation. If such were the requirement, however, the name,

The Company, would sufficiently import that it is a corporation.—State v. Dry Fork Ry. Co. (W. Va.), 40 S. E. Rep. 447 (1901).

FORMS.

§ 148c.

APPLICATION BY FOREIGN CORPORATIONS.

TO THE SECRETARY OF STATE,
COLUMBUS, OHIO.

....., 190..
....., a foreign corporation organized and existing under and by virtue of the laws of the State of, with its principal office located at, in County,, in compliance with an act of the General Assembly of Ohio, entitled "An act to further supplement section 148 of the Revised Statutes," passed May 16th, 1894, requiring a foreign corporation organized for purposes of profit, and owning or using, or which purposes to own or use a part or all of its capital stock or plant in said State of Ohio, before being permitted to do business, exercise its franchise or maintain an action therein, under the oath of its president, secretary or other officer, to make and file with the Secretary of State a statement of facts and pay a certain stipulated fee, hereby makes the following declaration:

FIRST. The authorized stock of said corporation is Dollars (\$....), divided into (....) Shares of the par value of Dollars (\$....) each.

.....
.....
SECOND. The value of the property owned and used in Ohio, situate at is Dollars (\$....).

THIRD. The value of the property of the company owned and use outside of Ohio is Dollars (\$....).

FOURTH. The proportion of the capital stock of the company represented by property owned and used and by business transacted in Ohio is.....

FIFTH. The location of its office or offices in Ohio is at.....

SIXTH. The names and addresses of the officers or agents of the company in charge of its business in Ohio are as follows:

Name of President,
Address,

Name of Secretary,
Address,

Name of Treasurer,
Address,

Names and addresses of managers or agents, other than as above enumerated:

IN WITNESS WHEREOF, Said has caused its corporate seal to be affixed and its corporate name to be attached by an officer thereof, to wit, its this day of, A. D. 190...

(L. S.)

By

State of..... ss.:
County of.....

....., being duly sworn, deposes and says, that he is an officer, to wit, the of, that he executed the foregoing statement, in the name and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make such statement and to execute the same by authority of the corporation, and that the statements therein are true.

Sworn to before me and subscribed in my presence, this day of, A. D. 190..
(L. S.)

Foreign Corporations under § 148c.

State of..... }
..... County } ss.:
I,, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a, was at the date thereof, a, in and for said County, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at, this day of, A. D. 190..

(L. S.)
OFFICE OF THE SECRETARY OF STATE,
Columbus, Ohio,, 190..

From the facts thus reported by the said, I find the proportion of the capital stock of the Company represented by its property and business in Ohio to be per cent. of its authorized capital stock, to wit, the sum Dollars, on which I have assessed a fee of one-tenth of one per cent., amounting to the sum of Dollars.
.....
Secretary of State.

(L. S.)

RETURN OF FOREIGN CORPORATION UNDER SECTION 148c SHOWING
AGGREGATE AMOUNT OF CAPITAL STOCK OWNED OR CONTROLLED
BY RESIDENTS OF OHIO, ETC.

The Company
....., 190..
TO THE SECRETARY OF STATE,
COLUMBUS, OHIO.

The Company, a foreign corporation organized and existing under and by virtue of the laws of the State of, with its principal office located at, in County,, in compliance with section 148c of the Revised Statutes of Ohio, as amended April 14, 1900, does hereby make its return and statement showing the aggregate amount of all of its capital stock owned and controlled by residents of Ohio, the names and addresses of stockholders, with the number of shares owned by each on the day preceding the second Monday of April, A. D. 1900, together with the assessed value of the property of such company returned for taxation in the name of such corporation in the State of Ohio, and the assessed value of the property of such company returned for taxation outside of Ohio.

FIRST. The assessed value of the property returned for taxation in the name of the corporation in the State of Ohio is as follows:
Name of county (or counties).....
Real property, value..... \$.....
Personal property, value..... \$.....
Total..... \$.....

SECOND. The aggregate value of the real and personal property of said corporation returned for taxation in the name of such corporation outside of Ohio, located in the (State or States)..... is \$.....

THIRD. The following is the aggregate amount of all its capital stock owned or controlled by residents of Ohio, together with the names and addresses of the stockholders, with the number of shares owned by each, on the day preceding the second Monday of April, A. D. 1900:

Names of Stockholders.	Postoffice Address	No. Shares Common Stock.	No. Shares Preferred Stock.	Par Value Common Stock.	Par Value Preferred Stock.
.....
.....
.....
.....

Foreign Corporations under §§ 148c, 148d.

Total number shares preferred stock.....
 Total number shares common stock.....
 Aggregate amount of preferred stock (par value)..... \$.....
 Aggregate amount of common stock (par value)..... \$.....
 Total value of common and preferred..... \$.....

By

(Title of officer)

State of..... }
 County of..... } ss.:

....., being first duly sworn, says that he is the
 of said, and that the foregoing return and statement is true
 and correct.

Sworn to and subscribed before me and in my presence by the said
 on this day of, A. D. 190..

Notary Public.

DEPARTMENT OF STATE,

Columbus, Ohio,, 1900.

As the aggregate amount of all the capital stock of said company, owned or controlled by residents of the State of Ohio, is in excess of the assessed value returned for taxation in this State, said stock is taxable in proportion

Secretary of State.

CERTIFICATE OF SECRETARY OF STATE UNDER § 148c.

STATE OF OHIO,

DEPARTMENT OF STATE.

I,, Secretary of State of the State of Ohio, do hereby certify that, a foreign corporation organized and existing under and by virtue of the laws of the State of, and which has an office or place of business in the State of Ohio located at, on the day of, A. D. 190.., complied with all the requirements of the act of May 16th, 1894, as amended April 23rd, 1898, as amended April 14th, 1900, entitled "An act to further supplement section 148 of the Revised Statutes," relating to foreign corporations, and is duly authorized to do business herein. The entire amount of its authorized capital stock is Dollars. of which is represented by property owned and used and by business transacted in the State of Ohio.

WITNESS my hand and the seal of the Secretary of State, at the City of Columbus, this day of, A. D. 190..

Secretary of State.

APPLICATION OF FOREIGN CORPORATION UNDER § 148d.

(Attach copy of articles of incorporation here.)

TO THE SECRETARY OF STATE,

COLUMBUS, OHIO.

....., a corporation organized and existing under the laws of the State of, with its principal office located at in County, desiring to conform to the laws of Ohio, regulating foreign corporations doing business therein, does hereby make the following statement:

FIRST. The amount of its authorized capital stock is

SECOND. The business or objects of the corporation which it is engaged in carrying on, or which it purposes to engage in or carry on in the State of Ohio is

Foreign Corporations under § 148d.

.....
.....
THIRD. The principal place of business of said corporation in Ohio is to be located at in County.

FOURTH. We hereby appoint of in County, Ohio, as the person upon whom process may be served in all actions that may be brought against this company in any of the courts of the State, and designate his office in said city as the principal office of the company in the State of Ohio.

IN WITNESS WHEREOF, Said corporation has caused its corporate seal to be hereto attached, and this certificate to be executed by its President and Secretary, this day of, A. D. 190..

(Seal)

By, President.

State of }
..... County } ss.:

....., and being first duly sworn, depose and say that they did execute and sign the foregoing certificate for and on behalf of said corporation, and that the same is their free act and deed, and is the free act and deed of said of which they are respectively the President and Secretary; that the statements therein are true, and that the seal attached thereto is the genuine seal of said corporation; they further declare, on oath, that the charter or certificate of incorporation hereto attached is a true copy of the articles of incorporation or charter of said

Sworn to before me and subscribed in my presence, this day of, A. D. 190..

(L. S.)

State of }
County of } ss.:

I,, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a, was at the date thereof, a in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at this day of, A. D. 190..

(L. S.)

....., Ohio,

.....

GENTLEMEN: I hereby accept the appointment as the representative of your company upon whom process may be served, and agree to the designation of my office,, as your principal office in the State of Ohio.

State of Ohio, County of, ss.:

Personally appeared before me, the undersigned, a Notary Public in and for said County, this day of, A. D. 190.., the above named who acknowledged the signing of the foregoing to be his free act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal on the day and year last aforesaid.

(Seal)

Notary Public, in and for County, Ohio.

CERTIFICATE OF SECRETARY OF STATE UNDER § 148d.

STATE OF OHIO,

DEPARTMENT OF STATE.

IT IS HEREBY CERTIFIED, That which appears from the papers filed in this office on the day of 189.. to be a

Articles of Incorporation for Profit.

Foreign Stock Corporation, organized and existing under the Laws of the State of, has complied with all the requirements of the act of April 25th, 1893, as amended May 19th, 1894, as amended April 23rd, 1898, entitled "An act to regulate foreign stock corporations," etc., to authorize it to do business in this State, and that the business of such corporation to be carried on in this State, is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar business.

WITNESS my hand and the seal of the Secretary of State, at the City of Columbus, this day of, A. D. 189....

.....
Secretary of State.

§ 3236.

FORMS OF ARTICLES OF CORPORATION FOR PROFIT.

NOTE.—The forms following (under the general law) are applicable to co-operative, electric lighting, gas, manufacturing, mercantile, mining, oil, printing, publishing, railroad, telephone and telegraph companies, and generally to corporations having a capital stock, formed under this section, and for the organization of which no special provision is made in subsequent chapters of the Revised Statutes. The forms and methods for incorporating special corporations are similar to those shown here.

CORPORATION FOR PROFIT.

THESE ARTICLES OF INCORPORATION

— of —

The Company.

WITNESSETH, That we, the undersigned, of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

FIRST. The name of said corporation shall be The Company.

SECOND. Said corporation is to be located at, in County, Ohio, and its principal business there transacted.

THIRD. Said corporation is formed for the purpose of
.....
.....

FOURTH. The capital stock of said corporation shall be Dollars (\$....), divided into (.....) shares of Dollars (\$....) each.

IN WITNESS WHEREOF, We hereunto set our hands, this day of A. D. 190..

.....
.....
.....
.....

* "All" or "a majority."

The State of Ohio, County of, ss.:

Personally appeared before me, the undersigned, a in and for said county, this day of, A. D. 190.., the above named and who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal on the day and year last aforesaid.

.....
.....

The State of Ohio, County of, ss.:

I,, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that, whose name is subscribed to the foregoing acknowledgment as a, was at the

 Articles, etc., for Profit — Statement of Purposes.

date thereof a, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at, this day of, A. D. 190..

.....,
Clerk.

(Clerks are required to use the certificate printed on forms and not attach their own.)

FORM FOR PREFERRED STOCK.

FOURTH. The capital stock of said corporation, common and preferred, shall be Dollars (\$), consisting of (.) Shares of common stock of the par value of Dollars (.) each, and (.) Shares of preferred stock of the par value of Dollars (\$) each; the purchasers and owners of the preferred stock shall be entitled to a dividend of per cent. per annum out of the surplus profits for each year in preference to all other stockholders, and may convert such preferred stock into common stock at their election.

NOTE. — See note under forms under § 3254.

FORM FOR REAL ESTATE CORPORATION.

THIRD. Said corporation is formed for the purpose of dealing in real estate, subject to the provisions of Section 3235 of the Revised Statutes, and is to exist for the term of twenty-five years.

FORMS FOR STATEMENT OF PURPOSE OF CORPORATIONS FOR PROFIT.

ARCHITECTURAL COMPANY.

The Kauffman Architectural Company.

(Filed June 25th, 1900. Vol. 83, Page 13.)

THIRD. Said corporation is formed for the purpose of making plans, specifications and drawings, making estimates, superintending work, designing and building all kinds of structures and of carrying on and conducting a general architectural business.

AUDITING COMPANY.

The Cincinnati Audit Company.

(Filed February 1st, 1901. Vol. 83, Page 634.)

THIRD. The corporation is formed for the purpose of auditing books of corporations and firms; also to do any and all such work as may be incident to such auditing.

AUTOMOBILE COMPANY.

The Cleveland Automobile and Supply Co.

(Filed Sept. 17th, 1900. Vol. 83, Page 201.)

THIRD. Said corporation is formed for the purpose of purchasing, selling and repairing Automobiles and other self-propelling vehicles, dealing in machinery, materials and all supplies in any way connected therewith, and in general repairing, and renting Automobiles.

AGENCY COMPANY.

The Graham-Baum Company.

(Filed January 19th, 1901. Vol. 83, Page 586.)

THIRD. Said corporation is formed for the purpose of acting as an Agency for general insurance, bonding, negotiating loans and transfers of real estate, and doing all things incident thereto.

ABSTRACT COMPANY.

The Cuyahoga Abstract Company.

(Filed April 6th, 1900. Vol. 81, Page 474.)

THIRD. Said corporation is formed for the purpose of making and furnishing abstracts and certificates of title to real property and to do a general searching of records.

Articles, etc., for Profit — Statement of Purposes.

AIR COOLING COMPANY.

The Ohio Bell Pure Air & Cooling Company.
(Filed February 6th, 1901. Vol. 78, Page 522.)

THIRD. Said corporation is formed for the purpose of ventilating, purifying and regulating the humidity of air and of manufacturing and dealing in all kinds of apparatus, devices and inventions designed for said purposes.

BAND COMPANY.

The Germania Band and Orchestra Company.
(Filed June 13th, 1900. Vol. 81, Page 663.)

THIRD. Said corporation is formed for the purpose of furnishing band and orchestra music and generally to do and carry out all things incident to band and orchestra organizations, including the purchase of all necessary music and instruments, uniforms and other necessary paraphernalia.

BOOT AND SHOE COMPANY.

The H. N. Adams Company.
(Filed February 9th, 1901. Vol. 83, Page 672.)

THIRD. Said corporation is formed for the purpose of buying and selling at wholesale, and dealing in boots and shoes and kindred merchandise and for doing all things incident thereto.

BUTCHERING COMPANY.

The Hooker Sausage Manufacturing Company.
(Filed January 19th, 1901. Vol. 83, Page 587.)

THIRD. Said corporation is formed for the purpose of carrying on a general wholesale and retail butcher, provision and food product business, manufacturing of meat foods and a general butcher business in all its branches.

BUSINESS COLLEGE.

The Jacobs University Company.
(Filed January 29th, 1900. Vol. 81, Page 239.)

THIRD. Said corporation is formed for the purpose of conducting a general business college known as The Jacobs Business University, including instruction in book-keeping, banking, penmanship, office practice, shorthand and typewriting, and all branches of study pertaining to a thorough business education.

BUSINESS COLLEGE COMPANY.

The Salem Business College Company.
(Filed April 4th, 1900. Vol. 81, Page 464.)

THIRD. Said corporation is formed for the purpose of carrying on the ordinary work of a business or commercial school, and of acquiring and holding the property, whether real or personal, necessary to carry on such work.

BUILDING COMPANY.

The Century Building Company.
(Filed April 10th, 1900. Vol. 81, Page 481.)

THIRD. Said corporation is formed for the purpose of constructing and maintaining buildings to be used for hotels, store-rooms, offices, warehouses and factories and to acquire by purchase or lease and to hold, use, mortgage and lease all such real estate and personal property as may be necessary for carrying on such business.

BAKERY COMPANY.

The Geo. H. Strietmann's Sons Company.
(Filed March 18th, 1901. Vol. 87, Page 131.)

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in bread, crackers, cakes, biscuit, candies, confectionery and all materials for the same, and doing all things incident thereto.

Articles, etc., for Profit — Statement of Purposes.

COOPERAGE COMPANY.

The Cleveland Barrel Company.

(Filed April 14th, 1900. Vol. 81, Page 497.)

THIRD. Said corporation is formed for the purpose of buying, selling, dealing in and manufacturing barrels, boxes and all kinds of cooperage stock and all things incident thereto for profit.

COAL COMPANY.

The Albright Coal Company.

(Filed April 6th, 1900. Vol. 81, Page 473.)

THIRD. Said corporation is formed for the purpose of purchasing and leasing or otherwise obtaining deposits of coal and operating mines for the mining and removing of same and for buying, selling and dealing in coal and coke.

COAL COMPANY.

The Schafer-Suhr Company.

(Filed April 18th, 1900. Vol. 81, Page 512.)

THIRD. Said corporation is formed for the purpose of mining coal and dealing in coal, coke, and kindred products, by wholesale and retail, and the transaction of all business incidental thereto and connected therewith; with power and authority to purchase, sell, or lease mineral lands and to purchase, own, lease or control suitable real estate for the transaction of its business.

COLLEGE COMPANY.

The West Lafayette College.

(Filed April 16th, 1900. Vol. 76, Page 434.)

THIRD. The purpose for which said corporation is formed is to establish, maintain and conduct an institution of learning for the purpose of promoting education in all departments of learning and knowledge and especially in those branches usually comprehended in academic, collegiate and university courses; to acquire and hold for said purposes money, real estate, and other property necessary or proper to carry out said objects; and to do any and all things reasonable and necessary to be done to carry out said purposes.

CONSTRUCTION COMPANY.

The Hoeffler-Peter Construction Company

(Filed February 8th, 1901. Vol. 83, Page 663.)

THIRD. Said corporation is formed for the purpose of carrying on the general work of a Construction Company, such as grading, laying track, ballasting, building bridges, and doing any and all work necessary in making and preparing road-beds for steam, electric, and other railroads, and all contract work relating thereto; also construction and contract work of every kind for Cities and Towns; also the construction and erection of buildings, and in general, doing construction and contract work of every kind.

CONSTRUCTION COMPANY.

The Reed-Haseltine Construction Company.

(Filed January 14th, 1901. Vol. 83, Page 568.)

THIRD. Said corporation is formed for the purpose of grading and excavating and the construction and erection of bridges, buildings, machinery, railroads, piers, abutments, breakwaters, masonry and other structures and for the purpose of carrying on a general construction business.

CHINA COMPANY.

The Knowles China Company.

(Filed April 7th, 1900. Vol. 81, Page 475.)

THIRD. Said corporation is formed for the purpose of manufacturing, buying and selling china pottery and earthenware; to decorate and embellish the same; to mine and manufacture and deal in china clay, flint and feldspar and all materials of any nature used in the manufacture of said wares and to acquire, hold and possess and sell real estate and other property necessary for the proper and convenient conduct of said business for profit.

Articles, etc., for Profit — Statement of Purposes.

CHAUTAUQUA COMPANY.

The Miami Valley Chautauqua Company.

(Filed December 24th, 1900. Vol. 83, Page 491.)

THIRD. Said corporation is formed for the purpose of holding annual Chautauqua assemblies, encouragement of Religion, Art, Science and Literature, the general dissemination of knowledge, and to provide social entertainments and other means of recreation and amusements.

DAIRY COMPANY.

The Rosewood Elgin Butter Company.

(Filed June 25th, 1900. Vol. 83, Page 16.)

THIRD. Said corporation is formed for the purpose of manufacturing and dealing in butter, cheese, cream and all other dairy products.

DRIVING PARK COMPANY.

The Lake County Driving Park Company.

(Filed February 7th, 1901. Vol. 83, Page 658.)

THIRD. Said corporation is formed for the purpose of erecting and maintaining a park and grounds, containing drive and speedways for the purpose of recreation and amusement and holding meets therein with horses and vehicles.

DIRECTORY COMPANY.

The Williams Directory Company.

(Filed November 8th, 1900. Vol. 83, Page 343.)

THIRD. Said corporation is formed for the purpose of printing and publishing city, county and state directories and of doing a general printing and publishing business.

DRUG AND SANITORIUM COMPANY.

The Antimoccolata Hospital Company.

(Filed February 2nd, 1901. Vol. 86, Page 170.)

THIRD. Said corporation is formed for the purpose of manufacturing, compounding, using, buying, selling and dealing in drugs, medicines, surgical instruments, chemicals and formulæ; erecting, owning and conducting sanitoriums or hospitals for the receiving and caring for patients, and for the medical, surgical and hygienic treatment of the diseases of such patients, and for the instruction of nurses in the treatment of disease and in hygiene, and of doing all things necessary to carry out, or incident to, said purpose.

DRUG STORE COMPANY.

The City Hall Drug Store Company.

(Filed March 12, 1901. Vol. 87, Page 106.)

THIRD. Said corporation is formed for the purpose of carrying on a wholesale and retail drug, cigar and tobacco business, buying and selling drugs, druggists' sundries, cigars and tobacco, and also for the purpose of manufacturing, compounding and selling pharmaceutical preparations.

DRY GOODS AND NOTIONS COMPANY.

The Sheldon Dry Goods Company.

(Filed January 31st, 1901. Vol. 83, Page 631.)

THIRD. Said corporation is formed for the purpose of buying, selling and dealing in dry goods, notions, furnishing goods and general merchandise in all their varieties at wholesale, also acquiring by purchase or lease such property both real and personal as may be deemed necessary or convenient for the aforesaid purposes, also doing all such other things and business as may be necessary, convenient or incident to the main purpose of such corporation.

Articles, etc., for Profit — Statement of Purposes.

DETECTIVE AGENCY.

The Special Police and Detective Bureau Co.

(Filed Nov. 29th, 1899. Vol. 81, Page 59.)

THIRD. Said corporation is formed for the purpose of establishing, maintaining and conducting a general and special police and detective modifying bureau and agency; of carrying on every kind of business usually transacted in connection therewith or incidental thereto; and, in general, of acting as principals, agents, contractors, trustees, or otherwise, in obtaining, acquiring, delivering, notifying, aiding or protecting, and of furnishing in any lawful manner information, facts, evidence, circumstances of, relating to, benefiting by, or affecting the business, capital, solvency, insolvency, credit, responsibility, risk, accident, safety, security, condition, standing or relationship of, any or all individuals, firms, associations, corporations engaged in or connected with any matter of a personal, special or general character of any kind whatsoever; and of any business, occupation, industry, or employment, as may be planned or required, which this corporation may think calculated, directly or indirectly, to effectuate said purpose; of undertaking, entering into, conducting and carrying out contracts of all kinds pertaining to said business; of buying, owning, holding, selling, leasing and conveying, or otherwise, such real or personal property as may be incident to or necessary in carrying out the full purpose of said company.

EMBALMING FLUID COMPANY.

The Clarke Fluid Company.

(Filed June 1st, 1900. Vol. 81, Page 637.)

THIRD. Said corporation is formed for the purpose of manufacturing, compounding, buying, selling and trading in Embalming fluids, Embalming instruments, Embalming tables, disinfectants, antiseptics, deodorizers and anything pertaining to the business of embalming, preserving and caring for the human dead.

EXPRESS COMPANY.

The Southern Ohio Express Company.

(Filed Sept. 20th, 1900. Vol. 83, Page 214.)

THIRD. Said corporation is formed for the purpose of doing a general express business within said State, carrying and delivering express matter.

FENCE COMPANY.

The Springfield Fence Manufacturing Company.

(Filed February 3rd, 1900. Vol. 81, Page 253.)

THIRD. Said corporation is formed for the purpose of growing and manufacturing hedge and wire fences, dealing in wire, hedge plants, tools, fence machines, patents pertaining to the same, and such other business as may grow out or on account of the said business.

FOUNDRY COMPANY.

The Cureton Foundry Company.

(Filed December 21st, 1900. Vol. 83, Page 485.)

THIRD. Said corporation is formed for the purpose of carrying on the business of a foundry and machine shops, for purchasing and owning the necessary real estate, buildings, machinery, tools, fixtures, supplies, for manufacturing and selling the products of said foundry and machine shop, including iron and steel castings, machinery, and generally to carry on a manufactory in iron and steel products.

GAS AND ELECTRIC COMPANY.

The Norwalk Gas and Electric Company.

(Filed April 20th, 1900. Vol. 81, Page 522.)

THIRD. Said corporation is formed for the purpose of manufacturing, producing, furnishing and selling gas and electricity, or either, for light, heat, power and other purposes, and for doing all things incident to said purpose.

Articles, etc., for Profit — Statement of Purposes.

NATURAL GAS AND OIL COMPANY.

The Columbus Natural Gas and Oil Company.

(Filed December 31st, 1900. Vol. 83, Page 519.)

THIRD. Said corporation is formed for the purpose of drilling for and accumulating petroleum oil and natural gas, buying and selling oil and gas, rights, privileges and leases and oil and gas, leasing oil and gas territory, constructing and operating pipe lines; refining and dealing in oil, and all things incident to said business; also the buying and selling of and developing of mineral lands, rights and privileges and minerals.

ARTIFICIAL GAS COMPANY.

The Cleveland Gas and Illuminating Company.

(Filed January 26th, 1900. Vol. 81, Page 225.)

THIRD. Said corporation is formed for the purpose of manufacturing gas for light, heat and power, to be made from any and all substances, or a combination thereof, from which gas can be obtained, and for the purpose of selling and disposing of the same in the City of Cleveland and elsewhere, with full power to lay pipes and conductors therefor, through the avenues, streets, lanes and alleys thereof, and in such other places as may be necessary or convenient to supply said avenues, streets, lanes and alleys, and any manufactories, public places, buildings, houses, or any other place or building whatsoever with gas, for light, heat and power, together with the power to hold, occupy and employ such real and personal estate and to do such other things as may be necessary or convenient to carry out the objects of this corporation, and to manufacture and sell coke and all other products used in the manufacture of gas.

GENERAL STORE COMPANY.

The Boon-Bevington Company.

(Filed January 11th, 1901. Vol. 83, Page 564.)

THIRD. Said corporation is formed for the purpose of doing a general merchandise business at wholesale and retail and of buying, selling and dealing at wholesale and retail in dry goods, notions, clothing, gentlemen's furnishing goods, hats, caps, boots, shoes, carpets, groceries, queensware, glassware, wool, live stock, grain, butter, eggs and other country produce.

GLASSWARE COMPANY.

The Massillon Bottle and Glass Company.

(Filed June 1st, 1900. Vol. 81, Page 638.)

THIRD. Said corporation is formed for the purpose of manufacturing, selling, buying and dealing in, glass bottles, glass jars and all other forms and kinds of glassware; and of doing all other acts and things in any way incidental to or connected with such business.

HARNESS AND SADDLERY COMPANY.

The Queen City Harness and Saddlery Company.

(Filed Jan. 22nd, 1900. Vol. 81, Page 206.)

THIRD. Said corporation is formed for the purpose of manufacturing, buying, selling and dealing in all kinds of harness, harness makers' supplies, saddlery, collars, and all other articles pertaining to the harness trade. And for such purposes to purchase, acquire, lease, own and hold such real estate as may be necessary for the conducting of said business.

HOUSE FURNISHING COMPANY.

The Smith House Furnishing Company.

(Filed February 7th, 1901. Vol. 83, Page 654.)

THIRD. Said corporation is formed for the purpose of manufacturing, leasing, buying, selling and dealing in house, store, and other furniture and furnishings and cabinet work of all kinds and to do all things incident thereto including selling said goods on installments.

Articles, etc., for Profit — Statement of Purposes.

HEATING COMPANY.

The Columbus Heating Company.

(Filed April 20th, 1900. Vol. 81, Page 524.)

THIRD. Said corporation is formed for the purpose of making and supplying steam and steam heat for both public and private consumption and use; also the supplying of hot water for said use; and the purchase and use of such tools, engines, pipes and other apparatus necessarily incident to said business; and to acquire franchises and privileges to so supply said steam, steam heat and hot water.

PLUMBING AND HEATING COMPANY.

The Centure Plumbing and Heating Company.

(Filed October 19th, 1900. Vol. 83, Page 282.)

THIRD. Said corporation is formed for the purpose of doing the business of plumbing, heating, gas fitting, sewer building, and buying, selling and dealing in all kinds of material and supplies used by or in said above trades or business.

For the purpose of owning, manufacturing, selling, leasing for hire and dealing in mechanical devices, machinery and articles of all kinds made and connected and in accordance with any or all letters patent of the United States or foreign countries heretofore or hereafter granted pertaining to said above trades or business. Also to purchase, own and control patents whether domestic or foreign pertaining to said above trades or business and of licensing others to use the same for hire.

HOTEL COMPANY.

The Hotel Donavin Company.

(Filed October 16th, 1900. Vol. 83, Page 274.)

THIRD. Said corporation is formed for the purpose of constructing and maintaining buildings to be used for hotels, store rooms, offices, warehouses, factories, etc., and to transact all business authorized by law to be transacted by such a corporation for profit.

IRON COMPANY.

The Zanesville Iron Company.

(Filed February 1st, 1900. Vol. 81, Page 247.)

THIRD. Said corporation is formed for the purpose of manufacturing, buying and selling iron and steel and the various products and forms thereof.

LOCAL TELEPHONE.

The Citizens' Telephone Company.

(Filed February 6th, 1900. Vol. 81, Page 261.)

THIRD. Said corporation is formed for the purpose of constructing, maintaining and operating a telephone exchange system in the City of Circleville, Ohio, and in the County of Pickaway in said State.

LAUNDRY COMPANY.

The New Imperial Laundry Company.

(Filed December 27th, 1900. Vol. 83, Page 497.)

THIRD. Said corporation is formed for the purpose of conducting a laundry business, and the doing of all things necessary and incidental thereto.

LODGE BUILDING COMPANY.

The Marietta Elk Building Company.

(Filed February 7th, 1901. Vol. 83, Page 660.)

THIRD. Said corporation is formed for the purpose of erecting, furnishing and maintaining a building in the City of Marietta, Ohio, to be used and occupied by local lodge Number Four Hundred and Seventy-seven, of The Benevolent and Protective Order of Elks, as a lodge room and club house.

NOTE. — See § 3631-8.

Articles, etc., for Profit — Statement of Purposes.

MUSICAL INSTRUMENT COMPANY.

The Albert Krell Company.

(Filed Oct. 15th, 1900. Vol. 83, Page 270.)

THIRD. Said corporation is formed for the purpose of manufacturing, purchasing, selling and dealing in all kinds of pianos, organs, automatic pianos, instruments of all kinds, appliances, supplies and all things incident thereto.

MILLING COMPANY.

The St. Clair Milling Company.

(Filed January 31st, 1901. Vol. 83, Page 630.)

THIRD. Said corporation is formed for the purpose of owning, controlling and operating flour and grist mills, and for buying and selling, at wholesale and retail, and dealing in, grain, seed, flour, feed and kindred merchandise, and for the purpose of owning all machinery, privileges, real estate and other property needed in carrying on such business, and for doing all things incident to such purposes and business.

MEN'S FURNISHING COMPANY.

The David M. Nanson Company.

(Filed February 7th, 1900. Vol. 81, Page 267.)

THIRD. Said corporation is formed for the purpose of dealing in woollens, trimmings, and fabrics used in connection with the tailoring business; in the manufacture, purchase and sale of custom made and ready made clothing of every kind and nature and for the purpose of dealing in furnishing goods.

MILLINERY COMPANY.

The J. V. Clement Company.

(Filed January 10th, 1901. Vol. 83, Page 555.)

THIRD. Said corporation is formed for the purpose of manufacturing, importing, buying, selling, jobbing and dealing in millinery of every description and doing all things incident thereto, and for owning and holding such real and personal property as may be necessary or convenient therefor.

MASONIC TEMPLE COMPANY.

The Masoic Temple Company.

(Filed November 5th, 1900. Vol. 83, Page 335.)

THIRD. Said corporation is formed for the purpose of erecting, equipping and maintaining a home or Masonic Temple for the Free and Accepted Masons of Warren, Ohio, and vicinity, providing them with suitable lodge, club and reception rooms therein and doing all and singular the acts required and proper in the erection, equipment and maintenance of such a building.

MESSENGER SERVICE COMPANY.

The American District Telegraph Company of Cleveland Co.

(Filed December 29th, 1900. Vol. 82, Page 234.)

THIRD. Said corporation is formed for the purpose of constructing, maintaining, leasing and operating lines of telegraph for the private use of individuals, firms, corporations, municipal and otherwise, for general business, for police, fire, and burglar alarm telegraph service, and in connection therewith for constructing, owning, and operating a general messenger, delivery, and district telegraph service, a general collection, storage, and delivery of packages, freight, and other properties, for the constructing, owning, and operating of a local system of electrical call-boxes for messages, messengers, fire, and burglar alarm signals, and signals for police and fire patrol and night watchmen, and for any other purpose or purposes in connection therewith or incident thereto; also the manufacture and sale of any and all electrical or other appliances, supplies, and fixtures necessary or incidental to the carrying on of said business, and also to carry on a general electrical construction and supply business, and to generate and supply electricity for any and all purposes.

Said company may also act as advertisers, distributors, and general agents for handling the business and collecting and remitting funds in connection therewith, of corporations, firms, or individuals. It may engage in the business of furnishing stationery and advertising matter, devices and novelties of all kinds.

Articles, etc., for Profit — Statement of Purposes.

MUTUAL TELEPHONE COMPANY.

The Eureka Telephone Company.

(Filed February 5th, 1900. Page 259.)

THIRD. Said corporation is formed for the purpose of giving its members together with their families and help in business relations free telephone service over any of its lines and to enforce any of its contracts which may be by them entered into by which those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of exchange services.

MINERAL SPRINGS COMPANY.

The Wheeler Mineral Springs Company.

(Filed April 5th, 1900. Vol. 81, Page 468.)

THIRD. Said corporation is formed for the purpose of preparing, manufacturing, bottling, buying, selling, vending, dealing in and furnishing to dealers and consumers, drinking and table water; carbonated water; carbonated and other non-intoxicating beverages and to do all things incident thereto, and for the further purpose of manufacturing, buying, selling and dealing in such machinery, tanks, fountains, bottles and other material as may be used in connection with or in or about the preparation, manufacture, dealing in or furnishing such water or beverages and to do all things incident thereto.

OIL COMPANY.

The Big Four Oil Company.

(Filed April 2nd, 1900. Vol. 81, Page 455.)

THIRD. Said corporation is formed for the purpose of prospecting and drilling for petroleum oil and gas and other minerals, and for the purpose of producing, handling through pipe lines or otherwise, refining and marketing such oil, gas and other minerals and all products thereof, and for the purpose of leasing, purchasing, acquiring and owning real estate and interests therein, for the purposes aforesaid or incidental thereto.

OPERA HOUSE COMPANY.

The Neilson Opera House and Entertainment Company.

(Filed Jan. 22nd, 1900. Vol. 81, Page 210.)

THIRD. Said corporation is formed for the purpose of furnishing facilities for holding musical, theatrical and other entertainments; provide social entertainments and other means of recreation and amusement and to construct, buy, lease, maintain and own such buildings and all such real and personal property as may be necessary or convenient to the successful carrying out of the purposes and objects of said corporation.

PRINTING COMPANY.

The McDonald Printing Company.

(Filed January 31st, 1900. Vol. 81, Page 241.)

THIRD. Said corporation is formed for the purpose of publishing, printing, binding, engraving and electrotyping and all branches of said business, also to lease, rent and buy real estate, machinery, tools and fixtures and all necessary paraphernalia, and for the purchase or manufacture of paper, printer's ink and all materials used in or connected with said business enterprise.

RAILROAD CONSTRUCTION COMPANY.

The Railroad Construction Company.

(Filed Oct. 8th, 1900. Vol. 83, Page 248.)

THIRD. Said corporation is formed for the purpose of constructing and equipping electric and steam railways, and furnishing entire equipment therefor.

RATING COMPANY.

The Rating and Collecting Company.

(Filed April 21st, 1900. Vol. 81, Page 525.)

THIRD. Said corporation is formed for the purpose of compiling, collecting, publishing and selling commercial credit rating and other directories, collecting accounts, furnishing reports and abstracts and certificates of titled and the performing of such other business as usually pertains to the publishing of reference and other

Articles, etc., for Profit — Statement of Purposes.

directories, making collections and furnishing financial reports and abstracts and certificates of titles with the right to acquire and hold by lease or purchase, such real and personal estate as may be necessary to the carrying on of said business.

STEAM RAILROAD COMPANY.

The Marietta, Columbus & Cleveland Railroad Company.

(Filed Oct. 23rd, 1900. Vol. 83, Page 295.)

THIRD. Said corporation is formed for the purpose of acquiring, building, maintaining and operating a railroad in the State of Ohio, with all of the necessary switches, side tracks and turnouts, together with the necessary telegraph and telephone lines.

Said company's railroad is to begin at the City of Marietta in the county of Washington; thence through said county into the county of Athens, and thence through said county into and through the county of Morgan to the Town of Palos, in Athens county, and thence passing through the counties of Perry, Fairfield and Franklin to the City of Columbus, and thence through said Franklin county and the counties of Delaware, Morrow, Know, Ashland, Holmes, Wayne, Medina, and Cuyahogo, to the City of Cleveland, in said last named County.

SANITARIUM COMPANY.

The Toledo Sanitarium Company.

(Filed June 2nd, 1900. Vol. 81, Page 643.)

THIRD. Said corporation is formed for the purpose of using and applying the remedies for alcoholic and narcotic poisoning, known as The Springer Gold Cures; to establish and conduct one or more sanitariums for the treatment and cure of the liquor, opium, and cocaine habits, nervous diseases, by the said cures; to purchase, lease, own and dispose of all real and personal property essential to and acquired in the conduct of the business; and generally to do and perform all things necessary and incidental thereto.

SANITORIUM COMPANY.

The Dr. C. E. Sawyer Sanitorium Company.

(Filed March 23rd, 1900. Vol. 81, Page 421.)

THIRD. Said corporation is formed for the purpose of erecting, owning and conducting sanitoriums for the receiving of and caring for patients and for the medical, surgical and hygienic treatment of such patients, and for instruction of nurses in the treatment of disease and hygiene.

SHOE COMPANY.

The Haas Shoe Company.

(Filed February 1st, 1900. Vol. 81, Page 246.)

THIRD. Said corporation is formed for the purpose of purchasing and selling and dealing in boots and shoes and all things incident thereto.

SCENIC RAILWAY COMPANY.

(Filed Aug. 9th, 1900. Vol. 83, Page 115.)

THIRD. Said corporation is formed for the purpose of manufacturing, operating and selling Scenic and Pleasure Railways of improved construction covered by letters patent of the United State; to acquire the control of said and future patents upon or in relation to such railways; to introduce said structures into public use; and, in connection with said business, to manufacture, use and vend such articles as may be conveniently and profitably dealt with in that connection; and to acquire and use such property as may be necessary or convenient for the aforesaid business of the company.

STATIONERY AND PUBLISHING COMPANY.

The Bradley and Sorin Company.

(Filed February 1st, 1901. Vol. 83, Page 633.)

THIRD. Said corporation is formed for the purpose of a general wholesale and retail stationery business and a general printing, engraving, publishing, binding and lithographing business and a wholesale and retail office supply business.

Articles, etc., for Profit — Statement of Purposes.

TRANSIT COMPANY.

The Lake Transit Company.

(Filed December 31st, 1900. Vol. 83, Page 514.)

THIRD. Said corporation is formed for the purpose of building, purchasing, owning, selling, operating, navigating and handling vessels and all kinds of vessel property together with all such other property, and all such appurtenances and appliances as may be necessary, useful or convenient in connection with the use of such vessel or other property; and of doing all such other things as may be incident in any respect to any of the above enumerated purposes.

UNDERWRITING COMPANY.

The Federal Underwriting Company.

(Filed May 2nd, 1900. Vol. 81, Page 556.)

THIRD. Said corporation is formed for the purpose of acting as agent for fire, life, accident and other insurance companies, and also to do a general agency business for corporations and individuals.

VETERINARY COLLEGE COMPANY.

The Cincinnati Veterinary College Company.

(Filed October 18th, 1900. Vol. 83, Page 279.)

THIRD. Said corporation is formed for the purpose of promoting education in the science of veterinary medicine and surgery by providing a full and thorough course of instruction by means of lectures, clinics, demonstrations and otherwise from competent teachers in the different departments of veterinary medicine and surgery.

WALL PLASTER COMPANY.

The Akron Wall Plaster Company.

(Filed February 4th, 1901. Vol. 83, Page 644.)

THIRD. Said corporation is formed for the purpose of manufacturing, selling and dealing in all kinds of wall plaster, cement, concrete and kindred products, and the materials entering into the composition or manufacture of the same, and doing all things incident thereto.

WINE OR LIQUOR COMPANY.

The M. Hommel Wine Company.

(Filed June 22nd, 1900. Vol. 83, Page 5.)

THIRD. Said corporation is formed for the purpose of manufacturing and selling at wholesale and retail spiritous malt and vinous, distilled or fermented liquors, wines and other beverages.

To acquire and own all such real estate and personal property as may be necessary or convenient to the successful accomplishment of the above objects and purposes.

WATER TRANSPORTATION COMPANY.

The Ohio Cooperage Transportation Company.

(Filed April 7th, 1900. Vol. 81, Page 465.)

THIRD. Said corporation is formed for the purpose of purchasing, chartering, acquiring, owning, handling or operating steamships, vessels and other vessel property or interest therein; purchasing, constructing or owning all necessary or proper terminal facilities, including all real estate and personal property as may be suitable or necessary thereto and doing all such things as may be properly incident to the above enumerated purposes.

FORM OF ARTICLES OF CORPORATION NOT FOR PROFIT.

NOTE. — Corporations not for profit may have a capital stock.

THESE ARTICLES OF INCORPORATION

— of —

The

WITNESSETH, That we, the undersigned, of whom are citizens of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said State, do hereby certify:

Articles, etc., not for Profit — Statement of Purposes.

FIRST. The name of the corporation shall be
 SECOND. Said corporation is to be located, and its principal business transacted at, in County, Ohio.
 THIRD. The purpose for which said corporation is formed is

 IN WITNESS WHEREOF, We have hereunto set our hands, this day of, A. D. 1....

.....

NOTE. — For acknowledgment and certificate, see articles of corporation for profit.

FORMS FOR STATEMENT OF PURPOSE OF CORPORATIONS NOT FOR PROFIT.

ATHLETIC CLUB.

The Business Men's Gym. and Athletic Club.
 (Filed April 6th, 1900. Vol. 76, Page 424.)

THIRD. The purpose for which said corporation is formed is to provide means and facilities for exercise tending to promote physical culture, also rowing, foot ball, base ball, foot racing, wrestling, boxing and other athletic sports, for the recreation and amusement of the members and guests.

ATHLETIC CLUB.

The Oxford Athletic Club of Cincinnati, Ohio.
 (Filed February 1st, 1900. Vol. 76, Page 340.)

THIRD. The purpose for which said corporation is formed is for the mutual benefit of all its members by promoting an interest among themselves in all athletics, both indoor and outdoor athletics. And to promote social intercourse among its members. This association is formed not for profit.

BUILDERS' EXCHANGE.

The Youngstown Builders' Exchange.
 (Filed April 17th, 1900. Vol. 76, Page 438.)

THIRD. The purpose for which said corporation is formed is to maintain and conduct a society, the general object and design of which shall be to cultivate friendly social and business relations among persons connected with building trades in the City of Youngstown, Ohio, and vicinity; to provide facilities for the interchange of views, and the avoidance or amicable settlement of controversies and differences amongst its members and their employees; and, in general, to advance and promote all legitimate interests of the building trades of the City of Youngstown, Ohio, and vicinity.

CHRISTIAN SCIENCE CHURCH.

First Church of Christian Scientist, of Springfield, Ohio.
 (Filed January 29th, 1900. Vol. 76, Page 335.)

THIRD. The purpose for which said corporation is formed is to provide a place of worship, for its members, to be conducted according to the rules and discipline of the Christian Science Church; to promote the interest of Christian religion, and to receive and hold donations and bequests, and funds arising from other sources, for the benefit of said corporation; and to enjoy all the other incidental rights and privileges of a society organized for the principal purposes above mentioned.

DEACONESS HOME.

The Reformed Deaconess Home and Hospital Association.
 (Filed April 14th, 1900. Vol. 81, Page 433.)

THIRD. The purpose for which said corporation is formed is not for profit, but to care for the sick, the spiritually and physically destitute and needy and engage in such other forms of charitable and benevolent work which may commend itself from time to time to the Association; to promote the interests of the Christian religion; to receive and disburse donations, to receive and hold bequests and all funds arising from other sources for the benefit of said corporation.

NOTE. — See § 3767.

Articles, etc., not for Profit — Statement of Purposes.

G. A. R. POST.

The Jobs Post No. 157 G. A. R. Dept. Ohio.

(Filed April 2nd, 1900. Vol. 76, Page 419.)

THIRD. The purpose for which said corporation is formed is for patriotic and charitable purposes, and not for profit.

FOURTH. To preserve and strengthen those kind and fraternal feelings which bind together the Soldiers, Sailors and Marines, who united to suppress the late rebellion, and to perpetuate the memory and history of the dead.

FIFTH. To assist such former comrades in arms as need help and protection, and to extend needful aid to the widows and orphans of those who have fallen.

SIXTH. To maintain true allegiance to the United States of America, based upon a paramount respect for, and fidelity to its Constitution and laws, and for other purposes mentioned in the preamble setting forth the objects of said order.

HOME FOR THE AGED.

The Old Ladies' Home Association.

(Filed December 20th, 1900. Vol. 85, Page 16.)

THIRD. The purpose for which said corporation is formed is to establish and maintain a home for aged women and such other persons as may be admitted to such a Home. To buy and to hold real estate for the use of said Home, and sell the same when deemed necessary, to build, improve and maintain buildings for said Home, to receive, hold, use and dispose of gifts, donations and bequests for the benefit of said Home, and to do all things necessary to establish, maintain and carry on such Home.

NOTE. — See § 3767.

MUSICAL CLUB.

The Arion Club Company.

(Filed June 23rd, 1900. Vol. 83, Page 6.)

THIRD. Said corporation is formed for the purpose of the vocal study, the rehearsal and the private and public rendition of concerted music for male and mixed voices, also the employment and presentation of musical artists.

MUSICAL CLUB.

The Lambs' Musical Club of Cincinnati, Ohio.

(Filed February 4th, 1901. Vol. 85, Page 72.)

THIRD. The purpose for which said corporation is formed is the study and culture of vocal and instrumental music, and the promotion of social intercourse of its members and all things incident thereto.

POLITICAL CLUB.

The Young Men's Progressive Club.

(Filed April 14th, 1900. Vol. 76, Page 432.)

THIRD. The purpose for which said corporation is formed is for the organization of a political and social club; to promote the study of political institutions and the science of government and to provide a place where its members may enjoy the society of each other and their friends.

PUBLIC LIBRARY.

The Conneaut Free Public Library Association.

(Filed February 5th, 1900. Vol. 76, Page 343.)

THIRD. The purpose for which said corporation is formed is the owning, managing, leasing, buying, receiving property in trust for, and accepting and extending donations for a Free Public Library in the village of Conneaut, Ashtabula County, Ohio, and doing all things necessary and incidental to the conducting of said library.

SINGLE TAX LEAGUE.

The National Land and Tax League of America.

(Filed Aug. 29th, 1900. Vol. 76, Page 573.)

THIRD. The purpose for which said corporation is formed is

a. To institute fundamental reforms in the study and promulgation of sound principles and correct methods concerning Land, Labor, Money, Taxation and other questions of social and economic importance.

Articles, etc., of Ruling Organizations.

- b. To found and maintain any school, college or university for said purpose.
- c. To maintain a Lecture Bureau for said purpose.
- d. To establish and maintain any daily, weekly and monthly papers or journals in furtherance of said purpose.
- e. To establish minor leagues, clubs and societies and other steps necessary to carry out said purposes.

TEMPERANCE SOCIETY.

The Bishop Rappe Temperance Society.

(Filed April 11th, 1900. Vol. 76, Page 430.)

THIRD. The purpose for which said corporation is formed is to promote the cause of total abstinence.

YOUNG MEN'S CHRISTIAN ASSOCIATION.

(Filed December 29th, 1893. Vol. 58, Page 687.)

THIRD. The purpose for which said corporation is formed is to promote the religious, intellectual, moral, social and physical culture of the young men of Ironton by the employment of the appliances and methods commonly used by similar associations of the country of same name.

YOUNG MEN'S CHRISTIAN ASSOCIATION.

The Young Men's Christian Association, of Portsmouth, Ohio.

(Filed October 2nd, 1893. Vol. 58, Page 600.)

THIRD. The purpose for which said corporation is formed is the physical, mental, social and spiritual improvement of young men.

YACHT CLUB.

The Lakewood Yacht Club.

(Filed December 21st, 1900. Vol. 85, Page 18.)

THIRD. The purpose for which said corporation is formed is the encouragement of yachting, the designing and building of yachts, and the promotion of social relations of those interested in yachting.

§ 3236.

FORM OF ARTICLES FOR INCORPORATION OF PRINCIPAL OR RULING ORGANIZATION OVER SUBORDINATE ORGANIZATIONS.

(Filed March 14th, 1901. Vol. 82, Page 273.)

THESE ARTICLES OF INCORPORATION

— of —

THE TEAM OWNERS' INTERNATIONAL UNION OF AMERICA.

WITNESSETH, That we, the undersigned, all of whom are citizens of the State of Ohio, and all of whom have been duly elected as members of the Principal Organization, by the subordinate organizations heretofore organized, desiring to form a corporation, not for profit, under the general corporation laws of said State, do hereby certify:

FIRST. The name of said corporation shall be **THE TEAM OWNERS' INTERNATIONAL UNION OF AMERICA.**

SECOND. Said corporation is to be located, and its principal business transacted at the time of incorporation at Toledo, in Lucas County, Ohio.

THIRD. The purpose for which said corporation is formed is to encourage a higher standard of skill among our members, to cultivate feelings of friendship among our members, to assist each other in securing employment, to reduce the hours of labor, to secure a higher standard of wages for work performed by legal and proper means, and to elevate the moral, intellectual and social condition of our members, and also to further the interest of organized labor, and to be the principal or ruling organization over subordinate organizations.

Amendment of Articles, etc.

FOURTH. The principal officers of THE TEAM OWNERS' INTERNATIONAL UNION OF AMERICA, and their residences are

John S. Rowe, of Toledo, Ohio, President.
Arthur W. Welever, of Toledo, Ohio, 1st Vice-President.
Frank Cairl, of Toledo, Ohio, 2nd Vice-President.
Joseph Manor, of Toledo, Ohio, 3rd Vice-President.
Elmer L. Umphenour, of Toledo, Ohio, Trustee.
J. M. Smith, of Toledo, Ohio, Trustee.
Isaac Davis, of Toledo, Ohio, Trustee.
M. J. Fallon, of Toledo, Ohio, Secretary-Treasurer.

IN WITNESS WHEREOF, We have hereunto set our hands, this 13th day of March, A. D. 1901.

(Acknowledgment, etc., as in other cases.)

§ 3237.

(See form for Steam Railroad Company, page)

NOTE.—This section should be followed when necessary in the organization of railroad, street railroad, avenue, turnpike, common carrier, bridge, pipe line, natural gas, telegraph and telephone companies.

§ 3238.

(See forms of acknowledgment and certificates under § 3236, page)

FORM FOR CONSENT TO USE OF NAME.

CERTIFICATE.

The Co. consents to the use of the name, the Co. by a corporation proposed to be formed by and whose articles of incorporation are filed herewith.

IN WITNESS WHEREOF, Said the Co. has caused its seal to be hereto affixed and its name signed hereto this day of 190..

The Co.
By
.....
Secretary.

§ 3238a.

FORMS AND RECORD ENTRIES FOR THE AMENDMENT OF ARTICLES OF INCORPORATION.

The articles of incorporation formed under general laws, may be amended as follows:

(a) So as to change the corporate name; but no corporation shall change its name by amendment to one already appropriated, or to one likely to mislead the public.

(b) So as to change the location of a corporation.

(c) So as to modify, enlarge or diminish the purposes for which the corporation is formed; but the capital stock of a corporation cannot be increased or diminished by amendment; nor can its original purpose be substantially changed by amendment; nor shall any corporation by amendment adopt a purpose which is unlawful.

(d) So as to add thereto anything omitted from, or which might lawfully have been provided for in such articles originally.

1. Such amendments can only be made by a vote of the holders of three-fifths of the capital stock then subscribed, of a corporation having a capital stock; or by a vote of three-fifths of the members of a corporation having no capital stock.

2. Such amendments may be made at any meeting of the stockholders or members of a corporation, of which meeting, and of the business to come before the same, thirty days' notice has been given by a majority of the trustees or directors of said corporation, in a newspaper published and of general circulation in the county wherein the corporation is located. Such notice may be in the following form:

Amendment of Articles, etc.—Waivers, etc.

NOTICE No. 1.

NOTICE is hereby given to the stockholders (or members) of (name of corporation), that on, the day of, 1, at (place of meeting), there will be a meeting of the stockholders (or members) of (name of the corporation), to consider the subject of amending the articles of incorporation of said (name of the corporation). (The contemplated amendment may be set forth in the notice, but it is probably unnecessary.)

.....

 (Signatures of a majority of
 the board of directors or trustees.)

A copy of the notice, together with proof of publication, should be entered in the corporate minutes.

Whenever ALL of the stockholders, or members, consent thereto in writing, such notice may be waived. Such waiver may be in the following form:

WAIVER OF NOTICE No. 1.

....., Ohio, 1

We, the undersigned, being all the stockholders (or members) of (name of the corporation), do hereby waive the giving of the notice required by law of the meeting to be held by the stockholders (or members) of said (name of the corporation), on (time of the meeting), at (place of the meeting), which meeting has been called by a majority of the board of directors (or trustees) of said (name of the corporation) for the purpose of considering the subject of amending the articles of incorporation of said (name of the corporation). (The proposed amendment may also be set forth in the waiver); thus, beginning at the * "so as to change the name of said corporation from (its present name), to (the name proposed)."

.....

 (Names of all the stockholders
 [or members] of the corporation.)

This waiver should be entered on the minutes. When signed by stockholders, the number of shares of stock held by each should appear opposite their respective names.

3. Such notice having been given, or waiver made, a resolution, providing for the amendment, must be offered at the meeting held to consider the subject of making same. This resolution, in order that the same may be carried, must receive a three-fifths vote of the stockholders or members. It may be in the following form:

AMENDMENT.

Resolved, That the articles of incorporation of (name of the corporation) be and the same are hereby amended, so that (set forth the proposed amendment).

4. Said resolution having carried by a three-fifths vote, before the amendment can take effect, notice thereof must be given by the secretary of the corporation for three consecutive weeks in some newspaper of general circulation in the county wherein the corporation is located. This notice may be in the following form:

NOTICE No. 2.

TO WHOM IT MAY CONCERN:

Notice is hereby given, that on, the day of, 1, at a meeting of the stockholders (or members) of (name of the corporation), held at (place of meeting), it was, by a vote of more than three-fifths of its stockholders (or members), Resolved, That (set forth the resolution adopted).

.....
 (Secretary of [name of corporation].)

This notice may be waived whenever ALL the stockholders, or members, consent thereto in writing. This waiver may be in the following form:

WAIVER OF NOTICE No. 2.

We, the undersigned, being all of the stockholders (or members) of (name of the corporation), do hereby consent in writing, that the notice by publication required by law, of the amendment made to the articles of incorporation of said (name of the corporation),

Corporation Deed.

poration), at a meeting of its stockholders (or members), held on, the day of, 19.., at (place of meeting), be and the same is hereby waived.

.....

(Names of ALL the members or stockholders; when the waiver is signed by stockholders, the number of shares of stock held by each should appear opposite their respective names.)

This waiver should also be entered on the minutes.

5. In addition to the giving of the notice, or the making of the waiver, aforesaid, a copy of such amendment, when adopted, with a certificate thereto affixed, signed by the president and secretary of the corporation, and sealed with the corporate seal, if any there be, stating the fact and the date of the adoption of such amendment, and that such copy is a true copy of the original, must be recorded in the office of the secretary of state before such amendment shall take effect. The following is a form in which such copy and certificate may be made:

COPY AND CERTIFICATE OF AMENDMENT.

Copy of Amendment.

Resolved, That the articles of incorporation of (name of the corporation) be and the same are hereby amended so that (set forth the amendment).

Certificate of Amendment.

TO THE SECRETARY OF STATE, COLUMBUS, OHIO:

The (name of the corporation), acting by its President and Secretary, hereby certifies that the foregoing is a true copy of the original amendment to the articles of incorporation of (name of the corporation), which was adopted by the votes of the owners of more than three-fifths of its capital stock (or members), at a meeting thereof, held on the day of, 19.., at (place of meeting), * pursuant to notice, duly given according to law. (If the notice of such meeting was waived begin at the * and say: "notice of which meeting was duly waived in writing as authorized by law.")

IN TESTIMONY WHEREOF, the President and Secretary of (name of the corporation), acting for and on behalf of said corporation, have hereunto set their hands and caused the seal of said corporation to be hereto affixed (if the corporation has a seal), this day of, A. D. 19..

(Corporate Seal.)

.....
 (Name of the corporation.)
 By
 President.

 Secretary.

NOTE. — This "Copy and Certificate of Amendment" must be filed and recorded in the office of the secretary of state. The fee for such filing and recording is \$5.00. The other papers should appear in the minutes of the corporate meeting, but should not be filed with the secretary of state.

§ 3239.

CORPORATION DEED.

KNOW ALL MEN BY THESE PRESENTS, etc.,

* * * * *
 * * * * *

IN WITNESS WHEREOF, The said party of the first part has caused these presents to be signed in its name by its President (or other officer) and its corporate seal to be affixed (if it has a seal) the day and year first above written.

Executed and delivered
 in the presence of

The Co.

By
 President.

State of Ohio,)
 County of) ss.:

Be it remembered, that on the day of, 1901, personally appeared before me John Doe, a notary public in and for said county, who is the president of The Co., and acknowledged that the

Opening Books of Subscription.

name of said company was subscribed to the foregoing instrument by him as the president thereof, that the seal affixed thereto is the seal of said company, and that said name was subscribed, and said seal affixed to said instrument by the direction and authority of said company and as its voluntary act and deed for the purpose therein mentioned.

.....
President.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this day of, 1901.

.....
Notary Public in and for the County of, Ohio.

SHORT FORM OF ACKNOWLEDGMENT.

Be it remembered, that on the day of, 1901, personally appeared before me, John Doe, a notary public in and for said County, The Co. by, its president, and, its secretary, and acknowledge the signing of the foregoing instrument to be its voluntary act and deed for the purpose therein mentioned.

NOTE.—A seal is unnecessary, but if the corporation has one it should be used. The words successors and assigns should be used instead of heirs and assigns in deeds, etc., to or by corporations.

§ 3240.

REGULATIONS AS TO TRUSTEES OF CORPORATIONS NOT FOR PROFIT.

(See § 3249.)

§ 3241.

RECORD OF PROCEEDINGS OF CORPORATION NOT FOR PROFIT.

(See instructions issued by Secretary of State and forms under § 3252.)

§ 3242.

ORDER FOR, AND WAIVER OF NOTICE OF THE OPENING OF BOOKS OF SUBSCRIPTION.

....., Ohio,, 190..

The undersigned ("all," or a majority) of the subscribers to the articles of incorporation of The Company, do hereby order that books be opened for subscriptions to the capital stock of said company, at the office of in the city of, County of, Ohio, on the day of, 190.., at o'clock .. M.; and we do hereby waive in writing the notice by publication of the time and place of such opening of books of subscription, required by law.

.....
.....
.....
.....
.....
Incorporators.

NOTE.—If all the incorporators are not present to waive notice, or if publication is desired, the order should be changed accordingly, and the notice following should be published at least thirty days before the books are opened. The corporate records must show the proceedings of incorporators under this section. Minutes of meetings, see forms under § 3254.

[illegible]

Subscription to Stock — Stockholders' Meetings.

§ 3244.

CERTIFICATE OF SUBSCRIPTION OF TEN PER CENT.

The Company.

CERTIFICATE OF SUBSCRIPTION.

....., Ohio,, 190..

TO THE SECRETARY OF STATE, COLUMBUS, OHIO:

We, the undersigned incorporators of The Company, do hereby certify that on the day of, 190.., all the incorporators of said Company did order, in writing, that books be opened for subscriptions to the capital stock of said Company, at on the day of, 190.., at o'clock M.; and, at the same time, did waive, in writing, the notice by publication of the time and place of such opening of books of subscription, required by law; and, further, said books having been opened at the time and place ordered, that ten per cent. of the capital stock of said Company has been subscribed.

.....,
.....,
.....,
.....,
.....,
.....,
.....,

Incorporators.

NOTE. — Whenever ten per cent. of the capital stock has been subscribed, this blank ("Certificate of Subscription") should be filled out properly, according to the facts recited therein, subscribed by the incorporators, and forwarded to the Secretary of State, at Columbus, Ohio. (See section 3244, Revised Statutes of Ohio.) With it must be sent the sum of \$2.00, the fee due the State for recording, indexing and furnishing certified copy of same.

NOTICE OF FIRST MEETING OF STOCKHOLDERS.

Notice is hereby given that the first meeting of the stockholders of The Company will be held at the office of Ohio, at o'clock M. on the day of, 190.., for the purpose of electing directors and transacting such other business as may come before the meeting.

.....,
.....,
.....,
.....,
.....,

Incorporators.

NOTE. — The foregoing notice should be published at least thirty days before the day set for the meeting, unless notice is waived in writing by all subscribers to stock. For minutes of meetings, see forms under § 3254.

WAIVER OF NOTICE OF FIRST STOCKHOLDERS' MEETING.

We, the undersigned, being all the subscribers to the capital stock of The Company, and being all this day present in person or by proxy at the first meeting of the stockholders of said company, at the office of at Ohio, at o'clock M., do hereby waive the notice of such meeting required by law.

Stockholders.	Proxies.	Shares.
.....
.....
.....
.....
.....

FORM OF STOCKHOLDER'S PROXY.

KNOW ALL MEN BY THESE PRESENTS, That I, do hereby constitute and appoint to be my lawful attorney, substitute and proxy for me, and in my name to vote upon all the stock held by me

 Articles, etc., with Limited Voting Power.

in The Company at the meeting of the Stockholders of such corporation to be held on the day of, 190., and at any adjourned meeting thereof, as fully and with the same effect as I might or could do were I personally present at such meeting, giving to said attorney and proxy full power of substitution; and I hereby revoke any proxies heretofore given by me to any person or persons whatsoever, this proxy to continue in force until the day of, 190., unless sooner revoked.

IN WITNESS WHEREOF, I have hereunto set my hand this day of, 190..

SHORT FORM OF PROXY.

The Co.
 I,, of the city of, State of, being the holder of shares of stock of the above-named company, do hereby appoint, of, as my proxy to vote for me and on my behalf at the meeting of stockholders of the above-named company, to be held on the day of, 190..

NOTE.—By appropriate words a proxy may be made general or limited as the stockholder giving the same may desire.

§ 3245.

CERTIFICATE OF ELECTION.

We, the undersigned, being the only subscribers to the articles of incorporation of The Co. present at the first meeting of the stockholders of said corporation, held at the office of, on the day of, 190., at o'clock M., do hereby certify, that at an election for directors held at such meeting, and at which we acted as inspectors of election, shares of stock were represented, and votes were cast in favor of, votes in favor of (and so on for each candidate). And that at said election, and were each duly elected to the office of director of said corporation, to hold their said offices until the next annual election of directors, or until their successors are elected and qualified; and we do hereby appoint, the day of, 190., at o'clock M., as the time, and as the place, for holding the first meeting of said directors.

.....,

Incorporators.

For minutes of meetings, see forms under § 3254.

§ 3245a.

FORM FOR ARTICLES FOR CORPORATION IN WHICH VOTING POWER IS LIMITED.

NOTE.—Add to item fourth of the articles the following:

Provided, that each stockholder, irrespective of the amount of stock, shall be entitled to one vote, and no more, at any election of directors or upon any subject submitted at a stockholders' meeting.

§ 3246.

NOTICE OF MEETING OF STOCKHOLDERS.

Notice is hereby given that a meeting of the stockholders of The Co. will be held at the office of the Company on the day of, 190., at o'clock M., for the purpose of electing directors and trans-

 Officers — Oath, Bond, Vacancies.

acting such other business as may come before the meeting. This meeting called by

Dated, Ohio,
, 190...

Secretary.

NOTE. — The notice of the meeting should state by whom the call was made so that fact can go into records. If called by the directors, their records should also show that fact. If the secretary or proper officer refuses to send notices, two members or stockholders may send the same, signing their own names.

Notice should be given ten days before the time set for the meeting. The notice of a special meeting should state clearly the business to be transacted. Any notice may be waived by all the stockholders.

For minutes of meetings, see forms under § 3254.

 § 3247.

OATH OF DIRECTORS.

State of Ohio, }
 County of } ss.:

..... and being first duly sworn, say they will faithfully discharge their duties as directors of the Co., to the best of their ability.

.....

Sworn to before me and subscribed in my presence, this day of, 190..

(Seal)

Notary Public, County, O.

NOTE. — The better practice is to write this oath in the corporate records, but if not so written it should be copied in the records.

For minutes of meetings, see forms under § 3254.

BOND OF OFFICERS.

KNOW ALL MEN BY THESE PRESENTS, That as principal, and and as sureties, are held and firmly bound unto The Co. in the sum of for the payment of which they severally bind themselves, their heirs, executors and administrators.

Provided, however, the conditions of this allegation is such, that whereas, has been duly elected of The Co. Now, if the said shall faithfully perform all the duties of said office as provided by the regulations and by-laws of said company, and by the laws of Ohio, then this obligation shall be void, otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF, We have hereunto subscribed our names this day of, 190..

.....
 Principal.

 Sureties.

NOTE. — If the records of the corporation do not show the duties of the officer, they should be set out in the bond. If desirable, a clause may be inserted to keep the bond in force so long as the principal may hold the office, whether by subsequent election or otherwise.

 § 3248.

HOW VACANCY IN BOARD FILLED

NOTE. — It frequently happens that by reason of a change of ownership, it is desired to elect a new board of directors. In such case care should be exercised so as to have a quorum all the time. To illustrate, if there are five directors, two should resign, stock transferred to

Regulations of Corporations for Profit.

persons to be elected, a vacancy declared to exist and same filled by appointment and the appointees should immediately qualify by taking oath for faithfully performing their duties. Then two more resignations can be received and the vacancies filled until the old board is out and a new one in. If all the resignations come in at once, the stockholders must fill vacancies. Of course all may tender resignations to take effect on appointment of successors.

§ 3249.

REGULATIONS OF CORPORATIONS FOR PROFIT.

Article I.

1. **Annual Meeting of Stockholders.** — The annual meeting of the stockholders of this company shall be held at the principal office of the company in, Ohio, on the first Monday in January of each year.

2. **Special Meetings of Stockholders** may be held at such times as may be ordered by the board of directors or by two stockholders, but notice of special meetings shall be given each stockholder appearing on the books of the company, by mailing the same to his last known address, at least ten days before such meeting, or by publication of notice ten days before such meeting.

3. **Quorum.** — A majority in amount of stock issued and outstanding shall constitute a quorum for the transaction of business.

NOTE. — The regulations may provide the time for holding and notice of the annual meetings. It should usually be fixed so as to come after the close of the business each year.

Article II.

Election of Directors. — The election of directors shall be held at the annual meeting of the stockholders, or at a special meeting called for that purpose. The number of directors shall be, and shall hold office one year, or until their successors are elected and qualified. Directors chosen at the first election shall hold office until the time fixed for the next annual meeting, or until their successors are elected and qualified.

All directors must be holders of at least shares of the stock of this company.

NOTE. — Not less than five nor more than fifteen directors may be chosen. Annual election of directors, see § 3246.

Article III.

Officers. — The officers of the company shall be a President, Vice-president, Secretary, Treasurer, and General Manager. The offices of secretary and treasurer may be held by one person.

Said officers shall be chosen by the Board of Directors by a majority ballot, and shall hold office for one year or until their successors are elected and qualified, except that officers elected at the first meeting of the directors shall hold office until the next annual meeting of directors, or until their successors are chosen and qualified. All executive officers of the corporation must be holders of at least shares of the stock of this company.

Article IV.

1. **President.** — The president shall preside at all meetings of stockholders and directors, sign the records thereof and all the certificates of stock, bonds, contracts, notes and other papers executed by this company, and perform generally all the duties usually performed by presidents of like companies, and such further and other duties as may be from time to time required of him by the stockholders or directors.

2. **Vice-President.** — The Vice-President shall perform all the duties of the President in case of the absence or disability of the latter. In case both President and Vice-President are absent or unable to perform their duties, the stockholders or directors, as the case may be, may appoint a president pro tempore.

3. **Secretary.** — The Secretary shall keep minutes of all the proceedings of the stockholders and directors of this company and make a proper record of the same, which shall be attested by him. He shall keep such books as may be required by the board of directors, and shall have charge of the stock books of the company and shall issue and attest all certificates of stock, and, generally, perform such duties as may be required of him by the stockholders or directors.

4. **Treasurer.** — The treasurer shall receive and have in charge all money, bills, notes, bonds, and similar property belonging to the company, and shall do with the same as may be ordered by the board of directors. He shall keep such financial accounts as may be required, and on the expiration of his term of office, shall turn

Regulations of Corporations for Profit.

over to his successor or to the board of directors, all property, books, papers and money of the company in his hands.

5. General Manager. — It shall be the duty of the General Manager to take charge of and manage the shops, factories, warehouses, and the general business of the company, to see to the employment of heads of departments, and generally to perform duties required by him by the board of directors.

NOTE. — State in the regulations by appropriate words, the duties imposed on the officers.

Article V.

Compensation of Officers. — The compensation of directors shall be such as the stockholders may from time to time fix. The compensation of the secretary, treasurer and general manager shall be fixed by the board of directors, and said officers shall furnish bonds for the faithful performance of their duties in such amounts as the board of directors may require, and with sureties to the satisfaction of the board of directors.

NOTE. — This article should be changed to comply with the wishes of the stockholders.

Article VI.

Seal. — The corporate seal of this company shall be circular with the name of the company and the name of the place of its principal office surrounding the word seal.

NOTE. — Word this article so as to describe the seal, if it is desired to have one.

Article VII.

Sale of Property. — All the property of this company may be sold or disposed of in any manner by the board of directors with the consent in writing of the holders of per cent. of capital stock issued and outstanding.

Article VIII.

Order of Business. — Unless changed by a majority vote, at all stockholders' meetings, the order of business shall be as follows:

1. Reading of the minutes.
2. Reading of reports and statements.
3. Unfinished business.
4. Election of directors.
5. New or miscellaneous business.

Article IX.

Amendments. — These regulations may be adopted, amended or repealed by the written assent of the owners of two-thirds of the stock of this company, or by the vote of the owners of a majority of the stock at a meeting called and held for that purpose.

NOTE. — The foregoing will cover all the needs of the ordinary small mercantile or manufacturing corporation. The articles following will be found useful in some cases. For minutes of meeting adopting regulations, see § 3254.

Who May Vote. — At all meetings of stockholders, only such persons shall be entitled to vote in person and by proxy who appear as stockholders upon the transfer books of the corporation for ten days immediately preceding such meeting.

Proxies. — The instrument appointing a proxy shall be in writing and subscribed by the appointor, but no person shall be appointed who is not a stockholder of the company and qualified to vote.

The instrument appointing a proxy shall be deposited at the office of the company not less than twenty-four hours before the time for holding the meeting at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of six months from the date of its execution, and no proxy shall be used at an adjourned meeting which could not have been used at the original meeting.

A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death of the principal or revocation of the appointment, or the transfer of the share in respect of which the vote was given, unless notice in writing of the death, revocation, or transfer shall have been received at the office of the company days at the least before the meeting.

Lost, Destroyed or Defaced Certificates. — If any certificate of stock be worn out or defaced, then upon production thereof to the directors they may order the same to

Regulations of Corporations not for Profit.

be canceled, and may issue a new certificate in lieu thereof; and if any certificate be lost or destroyed, then upon proof thereof to the satisfaction of the directors, or in default of proof on such indemnity as the directors deem adequate being given, a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate.

Lien of Company on Stock. — The company shall have a first and paramount lien upon all shares registered in the name of each stockholder (whether held solely or jointly with others) for his debts, liabilities and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfillment or discharge thereof shall have actually arrived or not. And such lien shall extend to all dividends declared on such shares. A copy of this article shall be printed on each certificate.

Sale of Stock to Satisfy Lien. — After default on any debt, liability or engagement above referred to, on ten days' notice by mail or publication, the directors may sell the shares of the stockholder so in default at either public or private sale and may purchase the same on behalf of the company if the same cannot be otherwise satisfactorily sold.

The net proceeds of any such sale shall be applied in or towards satisfaction of the debts, liabilities or engagements of such stockholder, and the residue, if any, paid to him, or his executors, administrators or assigns.

Calls. — The directors may from time to time make such calls as they think fit upon the stockholders in respect of all moneys unpaid on the shares held by them, and not by special arrangement made payable at fixed time, and each stockholder shall pay the amount of every call so made on him to the persons, and at the time and the place appointed by the directors. A call may be made payable either in one sum or by two or more installments.

A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed. Thirty days' notice at the least of any call shall be given, specifying the time and place of payment, and to whom such call shall be paid.

NOTE. — The regulations may further provide for interest on deferred payments or on payments in advance of calls.

Inspection of Books. — The books, papers and records of this company shall be subject to the inspection of stockholders only upon the following conditions, (a) that a written application for such inspection be made stating the books, papers or records desired, giving not less than ten days' time for the officers and directors to act on such application. (b) That the applicant must have been the owner in good faith of not less than shares for not less than months immediately preceding the making of such application, and that such applicant satisfy the officers and directors that such inspection is desired for use with reference to the interests of the applicant in this company and not for use with reference to any other interests which may in any way be antagonistic to the interest of this company, and should the officers and directors of this company be satisfied that an applicant has interests antagonistic to this company in any way, and that the inspection is not desired to further and promote the best interests of this company, then it shall be their duty to refuse the inspection. Should such officers and directors be satisfied that the application ought to be granted, they shall fix a time for such inspection which shall be convenient to both this company and the applicant.

NOTE. — In view of the recent decision of the supreme court, it would seem wise to add an article limiting the right of inspection so as to prevent inspection by puppets of competitors, tax inquisitors and others not desiring to protect interests in the company in good faith.

REGULATIONS OF CORPORATIONS NOT FOR PROFIT.

Article I.

1. Meeting of Members. — The annual meeting of the members of this association shall be held at the rooms of the association in, Ohio, on the first Monday in each year. Monthly meetings shall be held at the rooms of the association on the first Monday of each month, at o'clock . . . M. Special meetings may be called by the trustees, or of any two members, by giving notice in writing to each member by mail at his last known address, or by publication in some newspaper published in, Ohio. At all meetings a majority of the members shall constitute a quorum.

NOTE. — The regulations may provide the date of the annual meeting, and clubs are required to hold their annual election on the 3d Monday in July. See § 3246.

Regulations of Corporations not for Profit.

Article II.

Election of Trustees. — The election of trustees shall be held at the annual meeting of members, or at a special meeting called for that purpose, or at a meeting called by the trustees, or by any two members, notice of which has been given in writing to each member, by mailing the same to his last known address, or by publication in some newspaper printed in, Ohio, for ten days. The election shall be by ballot, and a majority of all votes cast shall be necessary to a choice.

The number of trustees shall be, and they shall be elected for one year, to hold office until their successors are elected and qualified. Trustees chosen at the first election shall hold office until the next annual election, or until their successors are elected and qualified.

NOTE. — By section 3240, not less than five trustees shall be elected, and the time of holding office may be regulated. Note that no maximum number is fixed, and that certain corporations may have three or more trustees.

Article III.

The Election of Officers. — Officers of the association shall be President, Vice-President, Secretary, and Treasurer, and they shall be elected for one year, and shall serve until their successors are elected and qualified.

Article IV.

Compensation of Officers. — The compensation of the officers shall be such as may be fixed from time to time by the members.

Article V.

Duties of President. — (See Records of Corporation for Profit).

Article VI.

Duties of Vice-President. — (See Regulations of Corporations for Profit).

Article VII.

Duties of Secretary. — (See Regulations of Corporations for Profit).

Article VIII.

Duties of Treasurer. — (See Regulations of Corporations for Profit).

NOTE. — By appropriate words state the duties of the officers so that their powers and duties are clearly defined.

Article IX.

Qualifications of Members. — By signing the membership roll, and agreeing to follow and be bound by the articles of incorporation, regulations and by-laws of this association, and by paying the initiation fees provided in article 10, any person, etc., may become a member of this association upon the election by four-fifths of the persons present at the meeting.

NOTE. — In this article describe clearly the qualifications of the members and condition of initiation. Members of certain organizations need not sign by-laws.

Article X.

Dues. — Each member shall pay an initiation fee of Dollars, within days after election, and in case of failure to pay the same within said time, the election shall become void. The annual dues of the members shall be Dollars, payable quarterly. Failure to pay dues within thirty days after the same shall become due, shall be a cause for expulsion.

Article XI.

Suspension and Expulsion of Members. — Any member may be expelled by the board of trustees for failure to pay dues, or for conduct unbecoming a member. Before any such expulsion or suspension shall be ordered, the member charged shall be served with a notice of the proceedings and shall be given an opportunity to be heard, and he shall have the right to appeal from the decision of the board of trustees to the members, and, at his request, the secretary shall call a special meeting of the members of the association to consider the charges preferred against him.

NOTE. — This article should state the grounds for expulsion and suspension and the proceedings to be taken, so that they can be followed when necessity arises.

By-laws of Corporations for Profit.

Article XII.

Order of Business. — Unless otherwise ordered by a vote of a majority of the members present at a meeting, order of business shall be as follows:

- 1. Reading of the minutes.
- 2. Reports and statements of officers and committee.
- 3. Unfinished business.
- 4. Election of trustees.
- 5. New or miscellaneous business.

Article XIII.

Repeals and Amendments. — These regulations may be amended or repealed by a written assent thereto of the members of this association, or by a majority vote of the members at a meeting called for that purpose.

§ 3250.

BY-LAWS OF CORPORATIONS FOR PROFIT.

Article I.

Meetings. — The regular meetings of the board of directors shall be held at the office of the company on the first (name day) of each month, at (name hour) o'clock P. M.

Special meetings shall be held on the call of the president or of any director, but reasonable notice of a special meeting and the purpose of the same must be given by mail to each director.

A majority of the board shall constitute a quorum at all meetings.

Article II.

Vacancies. — In case of any vacancy in the board of directors caused by death, resignation or otherwise, such vacancy may be filled for the unexpired term by appointment by a vote of a majority of the board.

NOTE. — The regulations of stockholders may provide for vacancies. See § 3248.

Article III.

Compensation of Officers. — The annual salaries of the secretary, treasurer and general manager shall be fixed by contract with such officers, but said officers shall be subject to discharge for good cause.

NOTE. — It is sometimes wise to provide that the amount of salaries shall be fixed by the stockholders.

Article IV.

Amendments. — These by-laws may be amended or repealed by a majority vote of the board at any regular meeting or at any special meeting called for that purpose.

NOTE. — It is impossible to give the by-laws for building and loan companies and other special corporations.

§ 3253.

NOTICE OF SALE OF STOCK OF THE CO.

Notice is given that, a subscriber for shares of the capital stock of The Co., has failed to pay for sixty days a call for the payment of an installment on the same, after due notice and demand for the same; therefore, said stock will be sold by the directors of said corporation at public auction at the front door of the office of this corporation on the day of, at o'clock A. M.

The Co.
by

Dated
....., Ohio,
....., 190..

Secretary.

NOTE. — Publish as required by § 3253.

Stock — Certificate of Preferred, etc.

§ 3254.

BOOK OF STOCK CERTIFICATES.

NOTE.—The company must have a book of stock certificates. The following form is in common use:

Certificate No.....	No.....	.....Shares.
For .....Shares.	THE.....COMPANY.	.....Shares.
Issued to.....	Capital, \$.....	.....Shares.
.....	Par Value, \$.....each.	
Dated....., 189.....	THIS CERTIFIES, That.....is the holder of .....Shares of.....Dollars each, fully paid up, of the Capital Stock of The.....Company, transferable only on the books of the Company, in person or by attorney, on the surrender of this Certificate.	
Transferred from.....	WITNESS the seal of said Company and the signatures of its President and Secretary, at....., Ohio, this.....day of....., 189.....	
Dated....., 189.....	[SEAL]	.....President.
No. Original Certificate.....		.....Secretary.
No. Original Shares.....		
No. of Shares Transferred..		
Received this Certificate:		
.....		

On the back of the certificate is usually printed a blank assignment, the form of which may be as follows:

FOR VALUE RECEIVED, I hereby sell, transfer and assign to.....of the shares of capital stock within mentioned, and authorize the Secretary to make the necessary transfer on the books of the Company.

WITNESS my hand this.....day of....., 189.....

Witnessed by.....

.....

CERTIFICATE OF PREFERRED STOCK.

Number		Shares
.....	The Co.	.....
This certifies that is entitled to shares of the par value of Dollars per share of the Preferred Stock of The Co., transferable only on the books of the company by the holder thereof, in person or by attorney, on the surrender of this certificate. The holder of this certificate is entitled to non-cumulative (or cumulative) dividends in each year at the rate of six per cent. per annum, payable out of the net earnings of the said company for such year in preference to any dividend on the common capital stock.		
IN WITNESS WHEREOF, The said company has caused its corporate seal to be affixed hereto, and this certificate to be signed by its president and secretary.		
(Seal)	.....	President.
....., Ohio,	.....
....., 190..		Secretary.

NOTE.—It seems that unless otherwise provided, the preferred stockholders participate in the surplus profits remaining after the proper dividends have been declared on the preferred and an equal dividend on the common stock. The following form provides against such result:

The preferred stock of this company shall be entitled to dividends at the rate of six per centum per annum, prior to the payment of any dividends upon the common stock, and such dividends upon the preferred stock shall be cumulative (or non-cumulative). The preferred stock shall not be entitled to any dividends in excess of said six per cent. and the arrears thereof.

CONVERTIBLE PREFERRED STOCK.

NOTE.—When it is desired to permit preferred stock to be converted into common stock add the following:

The holder hereof may at his election, on the surrender of this certificate, convert the same into an equal number of shares of common stock.

Stock — Books, etc., as to.

CERTIFICATE OF STOCK RESERVING LIEN.

NOTE.— When in the organization of banks or other corporations, it is desired to give the company a lien on the stock to secure indebtedness to it, add the following clause to the general form:

The said corporation shall at all times have a lien on the stock represented by this certificate for all indebtedness of the owner of said stock to said company, which lien shall be enforceable as provided by the by-laws of the company and shall have preference over any other lien on said stock by way of pledge or otherwise, nor shall said lien be impaired by a transfer of said stock.

FORMS OF STOCK JOURNAL AND LEDGER.

NOTE.— The record of stock transfers is kept in various ways. Some corporations keep one transfer book only, its form combining the features of a journal and ledger. But the better practice is to keep both a stock journal and a stock ledger. By the aid of these books the history of each share of stock can be traced at all times, however often it may have been transferred. There are many forms of such journals and ledgers, almost every bookkeeper having his own ideas on the subject. The following forms will be readily understood, and answer at least the main purpose desired:

STOCK JOURNAL.

STOCK CANCELED.					STOCK ISSUED.					We, the undersigned hereby acknowledge the receipt of the stock set opposite our respective names:	
Date of Assignment.	By Whom Assigned.	Ledger Folio.	Number of Certificate.	Number of Shares.	Date of Issue.	To Whom Assigned and Issued.	Ledger Folio.	Number of Certificate.	Number of Shares.		Par Value of Shares.
1896.					1896.						
Jan. 2.	The Ohio Company...	1	1	10	Jan. 2	John Jones.....	1	1	10	\$1000 00	John Jones. William Smith.
Feb. 1.	John Jones.....	1	1	10	Feb. 29	William Smith.....	26	32	10	1000 00	

STOCK LEDGER.

JOHN JONES, COLUMBUS, OHIO.

Date of Issue.	Journal Folio.	Number of Certificate Canceled.	From or to Whom Transferred.	Number of New Certificate Issued.	Date of Assignment.	Debtor.	Creditor.	Balance.
1896.								
Jan. 2. . .	1	1	From The Ohio Company.	1	Jan. 1. . .	\$1000 00		\$1000 00
Feb. 29. . .	1	1	To William Smith	32	Feb. 1. . .		\$1000 00	

The hypothetical entries which appear in the last two forms indicate that on January 2d, 1896, John Jones subscribed for ten shares of the capital stock of The Ohio Company, of the total par value of \$1,000.00; that his ledger account is on Folio No. 1 of the Stock Ledger; that the number of the stock certificate issued to him for such ten shares is No. 1; that he has received and receipted for such certificate; that on February 1st, 1896, he assigned the whole of said ten shares to William Smith; that on February 29th, 1896, said Smith presented

Record of Proceedings.

said certificate to the secretary for transfer, and that a new certificate was issued to him, numbered 32, which was received and receipted for; that the further history of said ten shares begins in the ledger account of said Smith, on Ledger Folio No. 26; that when said John Jones subscribed for said shares, he was debited in his ledger account with their par value, \$1,000.00; that when he sold the same to said Smith, he was credited with the same amount; and that, as the debit and credit columns in his ledger account then balanced, this showed that his stock account was closed, and that he was no longer a stockholder in the company, having been succeeded by said William Smith, as to his whole holding of stock. Had John Jones sold his stock to more than one person, it would have been necessary to open an account in the stock ledger with each assignee. These forms can be changed to meet the individual tastes of any bookkeeper; but whatever be the forms adopted, the facts set out in the last two forms should appear in some shape or other in the forms adopted.

See generally as to corporation accounting, "Rahill on Corporation Accounting."

RECORD BOOKS.

Forms and Suggestions Relative to Formation of Corporations.

NOTE.—The forms and suggestions following are applicable to the organization of co-operative electric lighting, gas, manufacturing, mercantile, mining, oil, publishing, printing, telephone and telegraph companies, and generally to corporations for profit, formed for various purposes under chapter one, title two, part second of the Revised Statutes, and for the organization of which no special provision is made in subsequent chapters of the statutes. Corporations subject to special provisions are incorporated in a similar manner.

Records. — Upon the filing of the articles of incorporation, a copy of such articles is furnished by the secretary of state. The record book should then be opened. A blank book should be procured of sufficient size to hold all the records of organization and of the proceedings of stockholders and directors. Often a separate book is used for the records of directors, but unless the meetings are very frequent, one book should hold all the records. This book should be given any title that will identify it, as: Record of Proceedings of Incorporators, Stockholders and Directors of The Co.

The following items should be recorded in their order:

1. Copy of articles with certificates.
2. Notice, etc., as to opening books.
3. Subscription to stock.
4. Certificate of subscription of ten per cent.
5. First stockholders' meeting.
6. First directors' meeting.

The substance of all the entries in the record is as follows:

RECORD OF PROCEEDINGS OF INCORPORATORS, STOCKHOLDERS AND DIRECTORS OF THE CO.

Articles of Incorporation.

On the day of, 190...,, the persons named below as subscribers of articles of incorporation, desiring for themselves, their associates, successors and assigns, to become a body corporate under the laws of the State of Ohio, under the name of The Co., did subscribe and acknowledge according to law, articles of incorporation, as follows, to wit:

(Set out here the articles in full, together with the certificate of acknowledgment, and the certificate of the clerk of the Court of Common Pleas as to the official character of the notary.) Which articles, together with the certificate of acknowledgment and the certificate of the Clerk of the Court of Common Pleas as to the official character of the officer taking such acknowledgment were, on the day of 190..., duly filed in the office of the Secretary of State at Columbus, Ohio, and by him recorded, and a certified copy thereof by him furnished to said subscribers.

Meeting of Incorporators.

Meeting of the incorporators of The Co., held this day of 190..., at the office of, to order the opening of books of subscription to the capital stock of said, The Co., to fix the time and place for such opening and to waive notice of such opening required by law to be given, and, having agreed upon such time and place.

Record of Proceedings.

the following order for and waiver of notice of the opening of such books of subscription was made in writing by all the incorporators of said company.
(Copy form of order and waiver, § 3243.)

Subscription to the Capital Stock of The Co.
(Copy form of subscription, § 3243.)

Certificate of Subscription.

On this day of, 190., ten per cent. of the capital stock of The Co. having been subscribed, we, being all (or a majority) the subscribers of the articles of incorporation of said corporation, desiring to certify that fact to the Secretary of State under and in accordance with the provisions of § 3244 of the Revised Statutes of Ohio, made, executed and filed in the office of the Secretary of State at Columbus, Ohio, a certificate of that fact as follows, to wit:
(Copy certificate, § 3244.)

Certificate of Incorporators.

We, the undersigned, do hereby certify that the foregoing is a true and correct record of the proceedings by us had as incorporators of The Co., in the creation and organization of said company; and we do hereby agree that the first meeting of the stockholders thereof be called and held at the office of on the day of, 190., at o'clock M., for the election of directors and the transaction of such other business as may come before such meeting.

First Stockholders' Meeting.

....., Ohio,, 190..

Pursuant to formal notice given by the subscribers to the articles of incorporation of The Co., to the subscribers to the capital stock of said company to meet at the office of on the day of, 190., at o'clock M., for the purpose of electing directors and transacting such other business as might come before said meeting, all the subscribers to the capital stock aforesaid met at the time and place above named, and thereupon in person or by proxy did execute a waiver of notice of said meeting, which waiver appears here upon the record of said corporation, as follows, to wit:

(Copy waiver of notice, § 3244. If the notice is not waived, recite in the record the publication of notice, giving copy of same.)

On the motion of Mr., duly seconded and carried, Mr. was chosen chairman and Mr. secretary of the meeting.

On the motion of Mr., the shares of capital stock of the corporation being cast in the affirmative and no shares of the stock being cast in the negative, it was resolved that the code of regulations hereinafter set forth be adopted as the code of regulations of this corporation, and that the written assent of the stockholders favoring the adoption of such regulations be recorded in the minutes of this meeting.

Regulations.

(Copy regulations, § 3249.)

Thereupon all the subscribers to the capital stock of The Co., duly executed a written assent to the adoption of the foregoing code of regulations, as follows:

....., Ohio,, 190..

We, the undersigned, being the owners of the number of shares of the capital stock of The Co. set opposite our respective names, do hereby assent in writing to the adoption of the code of regulations hereinbefore set forth, for the government of this corporation.

Names.	Shares.
.....
.....
.....
.....

Thereupon, Mr., Chairman, declared the election of the board of directors next in order.

The incorporators of the company were requested by the chairman to act as inspectors of the election.

Election of Directors — Oath, etc.

The election of directors was then duly proceeded with, and the names of Messrs., and were placed in nomination as candidates for the office of director. No other names being proposed, a vote by ballot was taken with the following result: received,, and votes respectively.

Thereupon the incorporators of the company as inspectors of the election announced that the persons above named had received the number of votes above stated, and thereupon,, and were declared elected directors, and the following certificate of said election was made:

Certificate of Election of Directors.

(Copy certificate, § 3245.)

NOTE. — Frequently stock is paid for by the transfer property and then it is wise to have the transaction approved by the stockholders, about as follows:

Thereupon a written proposition from Mr. to sell this company certain property therein described was presented to the meeting, said proposition being as follows:

Ohio,, 190..

To The Co.,

Gentlemen. — We hereby offer to sell your company (describe property) for the sum of \$..... payable in the paid up capital stock of your company; said stock to be issued fully paid up to the undersigned, the same being stock heretofore subscribed by them; said property to be received in full payment by your company of said subscriptions.

Yours, etc.,

.....

On motion of Mr., duly seconded, it was resolved that said proposition be accepted and that the proper officers of the company be instructed to issue and deliver shares of the subscribed capital stock of the company to the above named parties in the several amounts subscribed by each, the same to be issued as fully paid up, and the contract of subscriptions of the several subscribers aforesaid be fully satisfied and canceled.

The chairman having put said resolution, and the same having been fully discussed and explained, the vote on the same was received and declared by the chairman to be votes in favor of said resolution and none against the same, and said resolution was thereupon declared carried and said proposition accepted.

Thereupon, on motion, said meeting was duly adjourned.

Attest:

.....

Chairman.

.....,

Secretary.

Oath of Directors.

NOTE. — Insert form under § 3247 and have the directors and the notary sign the record.

First Meeting of Directors.

....., Ohio,, 190..

Pursuant to notice duly given at a stockholders' meeting of the Co., held at o'clock on the day of 190.., the directors of said company met at the office of at o'clock on the day of 190.., the following directors being present:,,

An oath faithfully to perform their duties as directors of said company was taken by said directors before, notary public.

The meeting was called to order by Mr., who was duly chosen to act as chairman, Mr. being chosen to act as secretary.

On motion of Mr., duly seconded, the following code of by-laws for the government of this board was duly adopted.

(Insert by-laws. See § 5249.)

Thereupon the chairman declared the election of officers next in order, and, nominations having been made and a ballot taken, Mr. was duly

Lost or Destroyed Stock — Bond for.

electd president, Mr., vice-president, Mr., secretary and treasurer, and Mr., general manager.

Thereupon each of the above named persons was declared to be duly elected to the respective offices above named, and immediately commenced the performance of official duties.

Thereupon the president submitted a report of a proposition made by Mr., to this company, and accepted by the stockholders. On motion of Mr., the same was accepted by the board of directors for the company and the proper officers of the company were instructed to execute and deliver to the above named persons the amount of stock directed issued to them respectively.

NOTE. — This last clause is to be used when the company is taking property for stock.

Thereupon on motion, duly seconded, the board adjourned.

Attest Secretary.
Attest President.
Secretary pro tem.
Chairman pro tem.

RECORD ENTRIES FOR ANNUAL OR SPECIAL MEETINGS.

....., Ohio,, 190..
Pursuant to notice in writing (recite the fact of the call, notice, etc., so as to show that the meeting was legally called) the stockholders of The Company met at the office of the company on the day of, 190., at o'clock M.
The president called the meeting to order, and, on roll call, it was found that a quorum (or other necessary number) was present, as follows:

Names.	Shares.	Name of Proxy.
.....
.....
.....
.....

The president announced that the first matter in order was the reading of the minutes of the previous meeting, which was done, and the same were approved.
The president then called for the reports of officers, which were read and were as follows:
(Set forth reports.)
There being no unfinished business, the president announced that the election of directors was next in order, and called for nominations. (Proceed as in minutes of first election, stating vote received, etc.)

§ 3254-1.

LOST OR DESTROYED STOCK. BOND OF INDEMNITY.

KNOW ALL MEN BY THESE PRESENTS, That we, as principal, and and as sureties, are held and firmly bound unto the Co., in the sum of \$..... to be paid to said The Co., its successors or assigns, for which payment well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally.
WHEREAS, A certificate for shares of the capital stock of The Co., being certificate number, owned by and standing on the books of the said company in the name of principal herein, has been lost or destroyed, and cannot be produced by said, and, whereas, at his request, and upon his promises to indemnify and save harmless the said The Co., in the premises and to deliver up said certificate when found, to the said The Co., to be canceled, the said The Co., has this day issued to said a certificate of stock for shares in the place of said certificate so lost or destroyed: Now therefore, the condition of the obligation is such that if the above

Collateral Note.

named and their heirs, executors, and administrators, or any of them, shall well and truly indemnify and save harmless the said The Co., its successors and assigns from and against the said certificate of stock, any and all damages, costs, charges, and expenses, and all actions or suits, whether groundless or otherwise, by reason of said certificate of stock number, and also deliver up the same, or cause it to be delivered up, when and so soon as the same shall be found, to be canceled, then this obligation shall be void, otherwise, to be and remain in full force and effect.

IN WITNESS WHEREOF, We have hereunto subscribed our names this day of, 190..

Principal.

Sureties.

NOTE.—Where certificates of stock have been lost, destroyed or stolen, the question arises: Shall the newly issued certificates be marked originals or duplicates?

If marked duplicates, the shares would be likely to lose the quality of ready sale in the market. The misfortune and carelessness of the loser, however, should not be a possible cause of involving the corporation in a double issue of stock and consequent double liability in respect of the same shares, if both certificates of the same number are issued and remain outstanding as originals. Such liability may not mature for years, but the bond of indemnity, given to secure the second issue, may in the meantime have become worthless. The safer method for the corporation to pursue is to issue the substitute certificates as duplicates, bearing the same numbers, and the words, "Duplicate: issued in lieu of certificate No., claimed to have been accidentally lost and not negotiated by, " written or printed conspicuously across the face of the certificate.

§ 3255.

BANKER'S COLLATERAL NOTE.

\$..... Toledo, Ohio,, 189..
..... after date, without grace, for value received, promise to pay to the order of at their Bank in the City of Toledo, Ohio, Dollars, with interest, at per cent. per annum, having deposited with them as collateral security for payment of this or any other liability or liabilities of to said due or to become due, or that may be hereafter contracted, the following property, viz.:

.....
.....
.....
.....

The market value of which is now \$..... with the right on their part from time to time to demand such additional collateral security as they may deem sufficient should the market value thereof decline, and also hereby give them a lien for the amount of all the said liabilities upon all the property or securities given unto or left in their possession by the undersigned, and also upon any balance of the deposit account of the undersigned with them. Upon failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to them or their assigns in case of such default or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions thereto, at any brokers' board, or at public or private sale, at their option, at any time or times thereafter without advertisement or notice to and with the right on their part to become purchasers thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as to them shall be deemed proper, returning the overplus to the undersigned; and will still remain liable for any amount so unpaid. The undersigned do hereby authorize and empower them at their option, at any time, to appropriate and apply to the payment and extinguishment of any of the above-named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in their hands, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

.....

Collateral Note — Convertible Bonds.

§ 3255.

COLLATERAL NOTE.

\$..... Toledo, Ohio,, 189..
..... after date, for value received promise
to pay to the order of Dollars,
at, with interest at the rate of per cent. per
annum after having deposited as collateral security for the pay-
ment hereof the following described property, viz.:
.....
.....
the value of which is now \$..... and hereby give the legal holder
hereof full power and authority to sell the same, or any part thereof, or any substi-
tutes therefor, or any additions thereto, on maturity of this note, or at any time
thereafter, or before in the event of said property depreciating in value in the opinion
of said legal holder, at public or private sale, at his discretion, without advertising
the same or demanding payment or giving notice, with the right to the said legal
holder to be the purchaser himself at any such public or private sale; and after pay-
ing all legal and other costs attending the sale and delivery of such property, to apply
the residue of the proceeds to the payment of this note and interest in full, returning
the surplus to the undersigned. But in case the proceeds of such sale shall not be
sufficient to pay the costs and principal and interest thereof promise to pay
such deficiency forthwith, with interest at eight per cent. per annum.
.....
.....
Due
.....

§ 3256.

RESOLUTION OF BOARD OF DIRECTORS AUTHORIZING LOAN.

Thereupon Mr. offered, and Mr. seconded,
the following resolution:
Resolved, That this company borrow the sum of \$....., and that the presi-
dent and secretary of this company be and are hereby authorized and directed to
execute and deliver to (trustee or payee) the bonds of this company, secured by a
mortgage on its real and personal estate in the sum of \$....., etc.
Thereupon the president put said resolution and the following was the vote of
the directors:
..... Yea Nay
..... Yea Nay
..... Yea Nay
..... Yea Nay
..... Yea

Thereupon said resolution was declared carried.

NOTE. — Describe the bonds and mortgage fully in the resolution. In case of an ordinary
loan by a corporation a vote of the stockholders is not required and could serve no purpose
except to estop those voting. A two-thirds vote of stockholders is required in hotel and
some other companies. See § 3884. Notice that a yea and nay vote of directors is required
by § 3257.

§ 3257.

CONVERTIBLE BONDS.

NOTE. — Pass a resolution by the board of directors describing the issue fully and recit-
ing that it is subject to the written assent of the stockholders as provided in § 3257.

ASSENT OF STOCKHOLDERS.

We, the undersigned stockholders of The Company, do
hereby assent in writing to the issue of convertible bonds as provided by the resolu-

Increase of Capital Stock.

tion of the board of directors of this company adopted day of, 190..

Names.	Shares.
.....
.....
.....

NOTE.—Three-fourths of the stockholders and three-fourths of the stock must be represented in the written assent.

MORTGAGES.

(Space will not permit the giving examples of various forms of trust mortgages, trust deeds, etc. Consult any good general form book.)

§ 3262.

INCREASE OF CAPITAL STOCK.

NOTICE OF STOCKHOLDERS' MEETING.

Notice is given that by resolution of the directors of The Company, passed the day of, 190.., by a majority of said directors, a meeting of the stockholders of said company is called for the day of, 190.. at o'clock M., at the office of the company, for the purpose of considering and determining as to a proposed increase of the capital stock of said company from \$...... to \$......, or such other amount as may be fixed by said meeting.

....., Ohio, Secretary.
....., 190..

NOTE.—The foregoing notice must be given by publication in a newspaper of general circulation, and by mail at least thirty days before the time fixed for the meeting.

WAIVER AND AGREEMENT FOR PURPOSE OF INCREASING CAPITAL STOCK.

....., Ohio,
....., 190..

We, the undersigned, being all the holders of the capital stock of The Company, and being this day all present, in person or by proxy, at a meeting of said company, * called by a majority of its directors, to consider the subject of increasing the capital stock of said company [if the meeting has not been so called, and at any meeting at which all the stockholders are present, in person or by proxy, it is decided unanimously to make an increase of capital, that portion of the above, beginning at the * should be omitted], do hereby waive in writing the notice of such meeting, by publication and by letter, required by law; and we do also agree, in writing, that the capital stock of said company may be increased from \$......, its present capital stock, to \$......, divided into shares, of \$...... each.

Name of Stockholder.	Name of Proxy.	No. of Shares.
.....
.....
.....
.....
.....
.....
.....
.....
.....

RESOLUTION AND RECORD ENTRY FOR INCREASE OF STOCK.

Thereupon Mr. offered, and Mr. seconded, the following resolution:

Resolved, That the capital stock of The Company be increased from \$......, its present capital stock, to \$......, divided into shares of \$...... each; and that the president and secretary of said company be instructed to file a certificate of such increase with the Secretary of State.

 Increase of Capital Stock.

Thereupon, the president put said resolution and the same was adopted by the vote of the holders of a majority of the capital stock.

NOTE.—Recite in the minutes of the meeting, the call, notice and stockholders present so as to show compliance with the statute; also recite the filing of the certificate with the secretary of state. Do not file anything but the certificate.

CERTIFICATE OF INCREASE OF CAPITAL STOCK.

....., President, and, Secretary, of The Company, duly authorized in the premises, and acting on behalf of said Company, do hereby certify, that on the day of, A. D. 1...., the capital stock of said Company was fully subscribed for, and an installment of ten per cent. on each share of stock had been paid; that on said day, by a vote of the holders of a majority of the stock of said Company, at a meeting called by a majority of its directors, and held at the office of the Company, in the of, County, Ohio, and at which meeting all the holders of the capital stock of said Company were present in person or by proxy, and waived in writing the notice by publication and by letter of the time, place and object of such meeting required by law, and also agreed in writing to the increase of capital stock hereinafter set forth, it was, on motion, "Resolved, that the capital stock of said, The Company, be increased from \$....., its present capital stock, to \$....., divided into shares of \$..... each; and further, that the President and Secretary of said Company be instructed to file a certificate of such increase with the Secretary of State;" which is done accordingly.

In Witness Whereof, The aforesaid, President, and, Secretary, of The Company, acting for and on behalf of said Company, have hereunto set their hands this day of, A. D. 1....
 The Company.
 By President.
 Secretary.

(Corporate Seal)

NOTE.—Change the certificate so as to correctly recite the facts as to the call, agreement, etc.

CERTIFICATE OF INCREASE BEFORE ORGANIZATION.

The undersigned, being all the original subscribers to the capital stock of The Company, do hereby certify, that on the day of, A. D. 190.., the original capital stock of said Company was fully subscribed for, and an installment of ten per cent. on each share of stock paid; that on said day, by unanimous written consent, and by a vote of the holders of all the capital stock of said Company, it was, on motion, "Resolved, that the capital stock of said, The Company, be increased from \$....., its present capital stock, to \$....., divided into shares of \$..... each; and that a certificate of such increase be filed with the Secretary of State."

IN WITNESS WHEREOF, We have hereunto affixed our signature, at
, Ohio, this day of, A. D. 190..

NOTE.—A resolution should be passed and the original consent of stockholders should be entered on the corporate records.

 § 3263.

INCREASE BY ISSUE OF PREFERRED STOCK.

WRITTEN ASSENT OF STOCKHOLDERS.

We, the undersigned, being the owners of the number of shares of the capital stock of The Co. set opposite our respective names, assent to the increase of the capital stock of said company from \$..... to \$....., and to the issue of \$..... (or the whole) of said increase as preferred stock, in

Increase of Capital Stock.

shares of \$. each, entitled to dividends, etc., etc. (set out terms and conditions of stock).

Names.	Shares.
.....
.....
.....

RESOLUTION AND RECORD ENTRY OF DIRECTORS.

Thereupon Mr. offered and Mr. seconded the following resolution:

WHEREAS, The three-fourths in number of the stockholders of this company, representing three-fourths of the capital stock of the company, have assented in writing to the increase of the capital stock of this company, therefore, be it

Resolved, That the capital stock be and the same is hereby increased, etc., etc. (See resolution below.)

Said resolution was put by the president and a vote taken, votes being cast in the affirmative and none in the negative, and said resolution was declared carried.

CERTIFICATE OF INCREASE OF CAPITAL STOCK.

(Preferred.)

The Company hereby certifies that at a meeting of its directors, held at the office of said Company on the day of, A. D. 189., the assent in writing of three-fourths in number of the stockholders, representing more than three-fourths of the capital stock of said Company, having been first previously obtained, the following resolution was adopted, viz.:

"Resolved, That the capital stock of said The Company be and the same is hereby increased from \$. to \$., and that * of said increase be issued and disposed of as preferred stock, in shares of \$. each, and that the purchasers and owners thereof be entitled to receive a dividend on said preferred stock of per cent. per annum, out of the annual profits, in preference to and before any dividend is paid to other stockholders, and that the holders of said preferred stock may, at their election, convert the same into common stock, and the President and Secretary are hereby authorized to carry out the provisions of this resolution, and issue certificates of stock to the subscribers thereof."

In Witness Whereof, said The Company, has caused its corporate seal to be hereto affixed and its President and Secretary to subscribe this certificate, this day of, A. D. 18....

The Company.

By, President.

., Secretary.

* "\$" or "the whole."

NOTE. — The above forms have been prepared so as to correspond to the forms approved and adopted by the Secretary of State. In the opinion of the writer, it would be better to have the matter passed on by the stockholders, for the reason that the powers of the board of directors cover only the general business of the company. (18 Oh. St. 150, 167: 18 Wall [U. S.] 233).

RESOLUTION AND RECORD ENTRY OF REDUCTION OF STOCK.

Thereupon Mr. offered, and Mr. seconded, the following resolution:

WHEREAS, The persons in whose names a majority of the shares of the capital stock of this company stands on the books of the company have consented in writing to the reduction of the capital stock of this company from \$. to \$. and the amount of each share from \$. to \$.

Resolved, therefore, That the capital stock of the Company be and the same is hereby reduced from \$. to \$. and the amount of each share from \$. to \$. that certificates for the outstanding stock be issued in accordance with said reduction, on the surrender of the outstanding certificates, and further, that the president and secretary of this company be instructed to file a certificate of such reduction with the secretary of state.

Thereupon the president put said resolution and the same was adopted.

Change in Number of Directors.

WRITTEN CONSENT OF STOCKHOLDERS.

....., Ohio,, 190..
We, the undersigned, consent in writing to the reduction of the capital stock of
The Company from \$..... to \$..... and
of each share of stock from \$..... to \$.....

Names.	Shares.
.....
.....
.....
.....

CERTIFICATE OF REDUCTION.

The Company hereby certifies that at a meeting of the
directors, held at the office of the company on the day of,
190.., the consent in writing of the owners and holders, a majority of the shares of
the capital stock of said company having been first previously obtained, the follow-
ing resolution was adopted:

(Recite resolution.)

IN WITNESS WHEREOF, Said The Company has caused
its corporate seal to be hereto affixed and its president and secretary to subscribe this
certificate, this day of, 190..
The Company.

By
President.

§ 3267.

RESOLUTION AND RECORD ENTRY FOR CHANGE IN NUMBER OF DIRECTORS.

Thereupon Mr. offered, and Mr. seconded,
the following resolution:

Resolved, That the number of directors of this company be increased from
..... to, that said directors be elected at this meeting and shall hold
office until the next annual meeting.

The president put said resolution and the following vote was cast:

Affirmative, shares; Negative, shares.

Thereupon the president declared said resolution adopted.

NOTE.—In case a manufacturing corporation increases the number of directors at a
special meeting the records should show a call as provided in § 3246. The resolution should
provide for holding the election. When the resolution is for a decrease and the terms of the
acting directors have not expired, the resolution should provide a means of determining who
shall retire unless that is agreed upon.

§ 3268.

ANNUAL STATEMENT OF CORPORATION.

Statement of The Company for the year ending
....., 190..
(Show assets and liabilities by copy of balance.)

LIST OF STOCKHOLDERS.

The following persons are the stockholders of this company:

Names.	Shares.	Residence.
.....
.....
.....
.....

Respectfully submitted,
.....,
Treasurer.

NOTE.—For corporation accounting, see "Corporation Accounting" by J. J. Rahill.

Consolidation Agreements

§§ 2505b, 3381, 3443-12, 3470, 3864.

AGREEMENT AND CERTIFICATE OF CONSOLIDATION.

AGREEMENT OF CONSOLIDATION

— of —

The Co.

— and —

The Co.

WHEREAS, The parties hereto are corporations duly organized and existing under the laws of the State of Ohio and desire to consolidate,

NOW THEREFORE THIS AGREEMENT WITNESSETH, That the said companies acting herein by the authority of resolutions of their respective boards of directors, and subject to the ratification of their respective stockholders, as required by law, in consideration of their mutual covenants, agreements, provisions and grants herein contained and of the benefits to accrue to the parties hereto, do hereby agree to consolidate their business, property franchises and rights, so as to become one corporation, and by these presents do merge and consolidate their capital stock, franchises and property into one corporation, to be known by the name of The Co., upon the following terms and conditions, to wit:

FIRST. All the rights, franchises, privileges, property, appurtenances of every description, choses in action, debts, dues, and demands of each of the parties hereto, shall vest in the consolidated company.

SECOND. The consolidated company shall assume and be bound by all the liabilities and obligations of each of the several companies parties hereto.

THIRD. The capital stock of the consolidated company shall be \$....., divided into shares of \$..... each.

FOURTH. The directors of the consolidated company shall be in number, and the officers shall be a president, a vice-president, a secretary and a treasurer. The residences of said directors and officers shall be as follows: (In case of railroads it is sometimes desirable to have fixed the residence of officers and directors so that all parties in interest will be represented. See, however, § 3385).

The names and residences of the first directors of said consolidated company are as follows:

Names.	Residences.
.....
.....
.....
.....

The names and residences of the first officers are as follows:

	Names.	Residences.
President
Vice-President
Secretary
Treasurer

FIFTH. The manner of converting the capital stock of each of the constituent companies parties hereto into the capital stock of the consolidated company shall be as follows:

A. For each share of the capital stock of The Co. surrendered to the consolidated company shall be issued to the holder thereof shares of the capital stock of the consolidated company.

B. (Proceed in the same manner with each company).

SIXTH. The several constituent companies, each for itself and not for the other, in consideration of the premises, does hereby grant, convey, set over and vest in the said consolidated company, for the purpose of such consolidation, all of the property, rights, privileges, franchises, etc., etc., and powers by it now held, or in or to which it has any right, title, interest or claim either in law or equity wheresoever the same may be situated.

IN WITNESS WHEREOF, The said The Co. by its board of directors, has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary, and a majority of its said board of directors have hereunto set their hands this day of 190..;

Articles, etc., of Union Depot Company.

and the said The Co. (proceed as with the first Company).

The	Co.,	The	Co.,
By	President.	By	President.
Attest.		Attest.	
.....	Secretary.	.....	Secretary.
.....		
.....		
.....		
.....		
.....	Directors.	.....	Directors.

CERTIFICATE OF CONSOLIDATION.

I,, Secretary of The Company, being duly authorized in the premises, do hereby certify that at a meeting of the stockholders of said company, duly, regularly and separately called and held at the office of in the City of, County of and State of Ohio, on the day of, 190.., at which meeting all the stockholders of said company being present in person or by proxy waived, in writing, the written or printed notices of the time and place for holding of said meeting to be given by personal service, mailing, publication or otherwise and consenting in writing that said meeting be then and there held, the original agreement of consolidation of which the foregoing is a true copy, was submitted for consideration and considered, and on a vote by ballot being taken for the adoption or rejection of the same, all the outstanding capital stock of said Company, namely, shares (each of which shares being fully paid and non-assessable) were cast for the adoption of said agreement and no vote was cast for the rejection of the same.

IN WITNESS WHEREOF, I have hereunto set my hand officially and fixed the corporate seal of said Company, this day of, 190..

(Corporate Seal.) Secretary of The Co.

NOTE. — Attach the certificate of the secretary of each company, making the same conform to the facts as to the manner, time and place of calling the meeting. Only two-thirds of all the votes cast at the meeting are necessary for the adoption of the agreement. The form here given is the basis of the usual agreement, but further details as to terms and conditions or the manner of carrying the consolidation into effect may be inserted.

§ 3443-8.

ARTICLES FOR STREET AND INTERURBAN RAILWAY.

THIRD. Said corporation is formed for the purpose of constructing, operating, maintaining and owning a line of street railway for the carrying of passengers and freight to be run by electricity or by some motive power other than steam, with single or double tracks, side tracks, turn-outs, and switches, stations, power houses, shops and stables, telephone and telegraph lines for its own use; of acquiring and holding real estate and all accessories and appliances proper to carry out the purpose herein mentioned and with the right to lease, purchase or sub-lease any line of street railway. Said line of railway shall begin in the city of Columbus, and extend south-westwardly to Grove City, Morgan's Station, Mt. Sterling and Washington C. H., and occupy territory in the counties of Franklin, Madison and Fayette, all in the State of Ohio.

§ 3446.

UNION DEPOT COMPANY.

(Filed August 20th, 1872. Vol. 11, Page 180.)

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Pittsburgh, Cincinnati and St. Louis Railway Company have and do hereby through the presidents of said companies, and by direction of the respective Boards of Directors of said companies, enter into Articles of Association in pursuance of the

Insurance Companies — Articles of.

act of the General Assembly of Ohio, entitled "An Act to authorize the incorporation of Union Depots," passed April 3, 1868.

WHEREAS, The said companies' lines of railroad connect, at the City of Columbus, in the State of Ohio; and for the purpose of purchasing depot grounds, and locating, constructing, keeping up, and maintaining a common, or Union Station house, and passenger depot, and a union railroad, by two or more tracks, connecting the railroads of said companies, and other railroad for business purposes, the said companies hereby create a Union Depot Corporation under the above-mentioned act.

1. The said Company assumes the name of "UNION DEPOT COMPANY."

2. The names of said two railroad companies creating the said corporation, and uniting in their articles of association are: The Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company and The Pittsburg, Cincinnati and St. Louis Railway Company.

3. The proposed Union Depot and tracks are situated in Columbus, Ohio.

4. The amount of capital stock necessary to obtain a site and construct and maintain said depot and tracks is fixed at Five Hundred Thousand Dollars (\$500,000).

The said capital stock to be held and owned in equal proportions, by the above-named corporators, subject to such articles and trusts by each, as they may respectively agree upon.

5. The Board of Directors of said Union Depot Company shall consist of six (6) Directors; each of the two stockholders in said depot corporation, or its successors or assigns, holding or owning its said capital stock to appoint three, and each to fill vacancies occurring among the three members appointed by it.

The concurrence of two-thirds of said Directors shall be necessary to constitute an act of the Board.

The capital stock of the Pittsburgh, Cincinnati and St. Louis Railway Company in said Union Depot Company to be subject to such trusts and conditions as may be agreed upon between the Pittsburgh, Cincinnati and St. Louis Railway Company and the Little Miami and Columbus and Xenia Railroad Companies.

IN WITNESS WHEREOF, The Presidents of said Companies, in behalf of said Companies, have hereunto signed their names, and annexed the corporate seals of said Companies this seventeenth day of July, A. D. 1872.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company.

By Oscar Townsend,

President.

Attest.

Geo. Russell, Secy.
(Seal.)

The Pittsburgh, Cincinnati, and St. Louis Railway Company.

By Thomas A. Scott,

President.

Attest.

W. H. Barnes,
Secy.

(Seal.)

§ 3588.

ARTICLES FOR LIFE INSURANCE CO.

ARTICLES OF INCORPORATION

— of —

THE NORTHERN CENTRAL LIFE INSURANCE COMPANY.

We, the undersigned, citizens of the State of Ohio, desiring to become a body corporate under the laws of the State of Ohio, have associated ourselves together to form a joint stock insurance company, to insure the lives of persons upon the stock plan, and we do hereby certify that the name assumed by such Company is The Northern Central Life Insurance Company; that the object for which said Company is formed is to insure the lives of persons in and out of the State of Ohio; that the capital stock of said Company is \$100,000; that the place where the principal office of said Company is located is the City of Toledo, Lucas County, Ohio, and that said Company proposes to adopt the following charter:

CHARTER.

1. The name of said Company shall be THE NORTHERN CENTRAL LIFE INSURANCE COMPANY.

2. Said corporation is to be located at Toledo in Lucas County, Ohio, and its principal business there transacted.

Insurance Companies — Articles of.

3. The said corporation is formed for the purpose of insuring the lives of persons upon the stock plan.

4. The corporate powers of said Company are to be exercised according to the provisions of Chapter 10 of the Revised Statutes of Ohio and of the By-Laws of said Company.

5. The number of Directors of said Company is nine (9), all of whom are stockholders, and which number may be increased at the will of the stockholders representing a majority of the stock, to any number not exceeding twenty-one (21). Said Directors shall be elected at the annual meeting of the stockholders on the second Tuesday of January, and the other officers of said Company shall be elected annually by the Board of Directors, at the first regular or special meeting after said annual election. A majority of said Directors shall be residents of the State of Ohio, and in the event of a vacancy occurring in said Board by death or otherwise, the same shall be filled by the unanimous vote of the Board of Directors until the next annual election.

6. The capital stock of said Company shall be One Hundred Thousand Dollars (\$100,000), divided into four thousand (4,000) shares of Twenty-five Dollars (\$25.00) each.

(Signatures of not less than thirteen incorporators, acknowledgment before notary and clerk's certificate in usual form.)

NOTE. — This form, with the exception of that part pertaining to the objects of the corporation, may be used in the subsequent articles relative to insurance companies.

§ 3630.

MUTUAL PROTECTION ASSOCIATIONS.

The Ultra Standard Life Insurance Company.

THIRD. The purpose for which said corporation is formed is to transact the business of life insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of deceased members of such company, as the member may direct, as may be provided in the by-laws, and may receive money by voluntary donation or contribution, or collect the same by assessments on its members, and may accumulate, invest, distribute and appropriate the same in such manner as it may deem proper, according to section 3630, Revised Statutes of Ohio.

The Mutual Beneficial Association of Delaware, Ohio.

THIRD. The purpose for which said corporation is formed is to transact the business of industrial life insurance on the assessment plan for the purpose of mutual protection and relief of its members under section 3630 of the Revised Statutes, and for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such Company or Association, in such manner as may be prescribed by the rules and regulations of the association, not inconsistent with the laws of Ohio, and so as to carry out the objects and purposes of the association as above expressed.

The Cleveland Commercial Travelers' Association.

THIRD. That our purpose is to afford mutual protection and relief to our members, and to pay stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of our association, as the members may direct, in such manner as may be provided in our by-laws, and to pay stipulated sums of money to our members in case of partial or totally disabling injuries, as may also be provided and directed in our by-laws.

§ 3630i.

ACCIDENT INSURANCE CO.

The Mutual Accident Life Insurance Company.

THIRD. The purpose for which said corporation is formed is for the insuring of individuals against accidental personal injury and loss of life sustained by accident, and making all and every insurance connected with accidental loss of life and personal

Insurance, etc., Companies — Articles of.

injury occasioned by accident, and for the purpose of doing a purely accident life insurance business in accordance with the statutes of the State of Ohio.

(Only requires five incorporators. See also § 3670.)

§ 3631a.

MUTUAL AID ASSOCIATION.

The Findlay Mutual Aid Association.

THIRD. The purpose for which said corporation is formed is to promote sociability among fellow workmen, to assist its members in sickness or distress, and aid the families of deceased members by voluntary contributions under rules, regulations and by-laws to be adopted.

MUTUAL AID ASSOCIATION.

The Middle Age Mutual Aid Association.

THIRD. The purpose for which said corporation is formed is not profit, but is the mutual protection and relief of its members, to elevate their social, moral, and intellectual condition, and for the payment of stipulated sums of money to the families or heirs of deceased members of said association.

§§ 3631-11 and 3631-17.

FRATERNAL BENEFICIARY ASSOCIATIONS.

The Odd Fellows' National Beneficial Association, of Dayton, Ohio.

THIRD. The objects and purposes of this association shall be to afford relief to the families and beneficiaries of deceased members, by the payment of stipulated sums of money to the widow, heirs, blood relatives or affianced wife of such deceased member, and for no other purpose whatever.

This association shall have no capital stock, being for a purpose other than profit. * The requisite qualifications for membership in this association shall be that the applicant be an affiliated member in good standing of the "Independent Order of Odd Fellows."

The National Masonic Provident Association.

THIRD. The purpose for which said corporation is formed is not for profit, but for the cultivation of fraternal feeling among Free and Accepted Masons, and the mutual protection and relief of such members as may become members of this association, and for the payment of such sums of money as may be provided by the by-laws of the association, for the support of all its members who may have become temporarily disabled by sickness from any cause not their own.

The American Insurance Union.

"THIRD. The purpose for which said corporation is formed is to establish and maintain a Secret Society and Benevolent Order, to promote patriotism in our country, love and fidelity in our homes and fraternity among men, with power under the supervision of the Ohio Insurance Department, to transact the business of life and accident insurance on the assessment plan, for the mutual benefit, protection and relief of its members, and the families, heirs, executors, administrators or assigns of its deceased members, as the member may direct, in such manner as may be provided in the by-laws, and to receive money by voluntary donation or contribution and to collect the same by assessments on its members, voluntarily paid, and to accumulate, invest, distribute and appropriate the same in such manner as it may deem proper. All accumulations and accretions thereon shall be held and used as the property of the members, and in the interest of the members and shall not be loaned to, used, appropriated or invested for the benefit of any officer or manager of this corporation."

* This clause may be omitted from charter and included in constitution or by laws.

Requires but seven incorporators.

Requires certificate of two of association's officers showing certain number of subscribers and certain sum deposited: see § 3631-17.

Insurance, etc., Companies — Articles of.

The Society of the Porto Rican Expedition.

THIRD. The purpose for which said corporation is formed is to preserve and cultivate the memories of an important incident of the War with Spain; to perpetuate the friendships and fraternity made during the service of the Expedition to Porto Rica and the subsequent occupation of the island. To compile the records, roll and history of this important event and to add mortuary report as these sad events transpire. To defend the interests of the American soldier and sailor and to especially champion the claims and rights of all who served with the expedition. To aid the living when the cry of distress comes from the lips of the deserving and to remember the dead and bereaved ones left behind. To teach the principles of freedom, humanity and loyalty to country and flag, to the end that our existence may be helpful to liberty-loving people and a source of benefit to future generations.

§ 3631-24.

ARTICLES FOR COMPANIES ON STIPULATED PREMIUM PLAN.

The Inter-State Life Assurance Company.

THIRD. The purpose for which said corporation is formed is to make insurances upon the lives and health of individuals, and every insurance appertaining thereto or connected therewith, as set forth in "An Act to provide for the incorporation and regulation of corporations, companies, or associations transacting the business of life insurance on the stipulated premium plan as herein defined." Passed April 25th, 1898.

NOTE. — Only five incorporators are required, but see § 3621-25 as to when company may commence business.

§§ 3634 and 3641.

LIVE STOCK INSURANCE COMPANY.

The Cleveland Live Stock Insurance Company.

THIRD. Said corporation is formed for the purpose of making insurance on the lives of horses, mules and other domestic animals, and protecting owners against the loss thereof, and to do all things incidental to, or connected with said business.

FIRE INSURANCE COMPANY.

The Cleveland Fire Insurance Co.

THIRD. Said corporation is formed for the purpose of insuring houses, buildings and all other kinds of property against loss or damage by fire and lightning and tornadoes, in and out of the State, and make all kinds of insurance on goods, merchandise and other property in the course of transportation, whether on land or water, or on any vessel or boat wherever the same may be, and to do all things lawful and incidental thereto.

GUARANTY COMPANIES.

The Guaranty Title and Trust Company.

(Filed February 10th, 1898. Vol. 77, Page 33.)

THIRD. Said corporation is formed for the purpose of:

1st. Preparing, furnishing or procuring, by purchase or otherwise, abstracts and certificates of title to real estate, bonds, mortgages and other securities.

2nd. For the purpose of guaranteeing titles to real estate, bonds, mortgages and other property and securities.

3rd. For the purpose of making and negotiating loans on real estate and notes, bills of exchange and other evidences of debt for itself and others, and to collect and guarantee the collection of interest and principal of loans made or negotiated by it; to effect investments in notes and mortgages secured by real estate, to sell the same, and pledge the same as security for money deposited, loaned or entrusted to it.

4th. For the purpose of taking charge of and selling, mortgaging, renting or otherwise disposing of real estate for others, and generally to perform all the ordinary duties of an agent relative to property so placed at its disposal, and to guarantee the collection of rents and income of property so controlled by it.

5th. For the purpose of owning real estate, as a place for carrying on its business, and to do any and all things necessary or incidental to an abstract, title guarantee and loaning business, and the transaction of any and all business incidentally or necessarily connected with each or all of the foregoing provisions.

Insurance, etc., Companies — Articles of.

The Ohio Guaranty Company.

THIRD. Said corporation is formed for the purpose of executing and guaranteeing bonds of employes and officers of private, municipal and political corporations, bonds of executors, administrators, guardians, receivers, assignees and trustees, and of guaranteeing the fidelity of all persons holding places of public or private trust who may be required to, or do, in their trust capacity, receive, hold, control or distribute public or private moneys or property; of guaranteeing titles to real property and of making abstracts of public records; of guaranteeing bids of contractors for public or private work, and of guaranteeing the performance of all contracts other than insurance policies; and of executing and guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; and purposes incidental thereto.

(Requires but five incorporators. Articles must be approved by attorney-general, § 3632.)

§§ 3686 and 3687.

ARTICLES FOR MUTUAL PROTECTION ASSOCIATION.

The Mutual Tornado, Cyclone and Windstorm Insurance Association.

THIRD. The object of said association shall be, and shall only be, to insure its members against loss or damage by cyclones, tornadoes or windstorms, and to assume the rights, power and privileges that are now or may hereafter be conferred by law governing mutual insurance associations, organized under §§ 3686 and 3687; may sue or be sued, have a common seal, and a right to borrow money to pay losses and expenses, till same can be raised by an assessment; to enforce any contract which may be by them entered into, by which those entering therein, agree to be assessed specifically for incidental purposes, and for the payment of losses which may occur to any members of said association.

(Requires not less than ten incorporators.)

§ 3691-1.

MUTUAL COMPANIES FOR INSURING ANIMALS.

The Mutual Protective Association.

THIRD. The object of said association shall be to insure its members against loss resulting from death of horses, mules and other domestic animals; and to enforce any contract which may be entered into by its members, by which they agree to be assessed specifically for the payment of losses which may occur to any members of said association and for purposes incidental thereto.

(Requires only five incorporators.)

§ 3691-14.

CREDIT GUARANTY COMPANY.

The Toledo Credit Guaranty Company.

THIRD. The object of said company shall be to guarantee and indemnify merchants, traders, manufacturers and others engaged in business pursuits, against losses occasioned by the giving and extending of credit by them to their customers and others trading with them; to buy, hold and take on assignment any and all claims and accounts so guaranteed by it, with power to hold, collect or enforce the same by proper action; and to guarantee the payment of money under contracts of hire for personal services.

(Requires but five incorporators. Articles must be approved by attorney-general.)

§ 3705-11.

ASSOCIATION FOR APPREHENDING HORSE THIEVES.
PROTECTIVE ASSOCIATION.

The Old Town Run Protection Association.

(Filed Jan. 30th, 1900. Vol. 76, Page 336.)

THIRD. The purpose for which said corporation is formed is for the apprehension and conviction of horse-thieves and other felons.

Colleges, etc.—Articles of.

PROTECTIVE ASSOCIATION.

The Citizens' Protective Association.

(Filed January 19th, 1901. Vol. 85, Page 52.)

THIRD. The purpose for which said corporation is formed is to apprehend and convict horse thieves and other felons, under and in accordance with an act of the General Assembly of the State of Ohio, passed March 21st, 1887, entitled, an act for the apprehension and conviction of horse thieves and other felons. (84 O. L. 169.) Also, under and in accordance with an amendment passed April 28th, 1890. (87 O. L. 339 and 340.)

NOTE.—See § 3709a.

§ 3716.

ARTICLES FOR HUMANE SOCIETIES.

HUMANE SOCIETY.

The Akron Humane Society.

(Filed January 2nd, 1901. Vol. 82, Page 236.)

Minutes of meeting held at Akron, O., for the organization of a Humane Society.

At a meeting of citizens held at the Mayor's Office, City Building, Akron, O., December 18th, 1900, for the purpose of effecting the organization of a Society for the Prevention of Cruelty to Animals and Children, Chas. T. Inman was elected temporary chairman and Chas. Benner, secretary. A permanent organization was then effected, as follows:

A. T. Paige, President; Chas. T. Inman, Secretary; Joseph Kendall, Jos. Limric, M. H. Hoyer, C. U. Button, Chas. T. Inman, A. T. Paige and H. W. Manderbach, Directors.

It was moved and seconded that this organization be known as **THE AKRON HUMANE SOCIETY**, Branch of the Ohio Humane Society.

The Secretary was instructed to secure the necessary articles of incorporation from the Secretary of State and to communicate with the Ohio Humane Society. On motion adjourned.

Chas. T. Inman, Sec'y.

Akron, O., Dec. 28th, 1900.

I, the undersigned, do hereby certify that the accompanying is a true and exact copy of the proceedings of a meeting held December 18th, 1900, at the Mayor's Office, Akron, O., for the purpose of effecting an organization for the prevention of cruelty to animals and children.

Chas. T. Inman, Sec'y.

§ 3726.

ARTICLES OF COLLEGE CORPORATION.

MEDICAL UNIVERSITY.

The Ohio Medical University.

(Filed Dec. 31, 1890. Vol. 53, Page 87.)

THIRD. The purpose for which said corporation is formed is the originating, conducting, and maintaining a Medical University, consisting of a school of Medicine, a school of Dentistry, a school of Pharmacy, a school of Midwifery, and a Training School for Nurses, and teaching the art and science of medicine and surgery, the art and science of Pharmacy, the art and science of Obstetrics, and the art and science of Nursing, to both sexes; the conducting of medical dispensaries and a hospital in connection therewith; the conferring upon such persons as are qualified the degree of Doctor of Medicine, the degree of Doctor of Dental Surgery, the degree of Graduate of Pharmacy, the degree of Doctor of Midwifery, and a certificate of proficiency in nursing; and to receive, hold and apply thereto any funds or property lawfully acquired by said corporation.

 Religious Corporations — Consolidation of.

FORM FOR SCHEDULE OF PROPERTY.**SCHEDULE OF PROPERTY.**

The West Lafayette College.

(Filed August 30th, 1900. Vol. 86, Page 15.)

The West Lafayette College.

Verified Schedule of Value of Property.

West Lafayette, Ohio, July 11th, 1900.

To the Honorable Secretary of State of the State of Ohio, Columbus, Ohio.:

Sir. — The undersigned, Trustees of The West Lafayette College, a corporation under the laws of Ohio, and incorporated for the purpose of promoting education, hereby certify that said corporation has acquired real and personal property to the value of more than Five Thousand Dollars (\$5,000.00). A Schedule of the kind and value of which is hereto attached and marked "Exhibit A," and made a part hereof.

W. L. Wells.
S. A. Fisher.
Joseph Porteus.
J. W. Cassingham.
H. C. Ferguson.

Sworn to and subscribed before me by the above named W. L. Wells, S. A. Fisher, J. W. Cassingham, Joseph Porteus and H. C. Ferguson, this 11th day of July, A. D. 1900.

W. R. Pomerene,
Notary Public.

(Seal.)

Schedule "A."

Being a Schedule of the Kind and Value of Property Owned by the Corporation of The West Lafayette College.

 §§ 3767, 3768.
ARTICLES STATING ORGANIC RULES, ETC.

NOTE. — Use the usual form of articles of corporation not for profit setting forth in the purpose clause the special items. Any fair statement of amendment with certificate of trustees will be sufficient under § 3768.

 § 3777.
FORM FOR CONSOLIDATION OF RELIGIOUS CORPORATIONS.

Park Presbyterian Church of the City of Dayton.

(Filed March 20th, 1901. Vol. 82, Page 284.)

AGREEMENT.

WHEREAS, The Wayne Avenue Presbyterian Church of the City of Dayton, Ohio, a corporation duly incorporated and organized under the laws of Ohio, and the Park Presbyterian Church of the City of Dayton, Ohio, a corporation duly incorporated and organized under the laws of Ohio, both of which are religious societies and churches, recognizing the same ecclesiastical jurisdiction, form of faith, government, order and discipline, and desire to be consolidated or united as a single corporation;

THEREFORE, We, the subscribers, William S. Belden, Preston C. Dodds, Charles W. Salisbury, Ezra Pentoney and Henry A. Hunter, elders; John W. Strahl and George B. Eddingfield, deacons; and Odlin Speice, Charles W. Salisbury, Louis J. Weireter, Thomas W. Williams and Ellwood Fellers, trustees of Wayne Avenue Presbyterian Church; and Isaac B. Young, Robert Rochester, Adam W. Anderson, John E. Viot, Edward C. Crum, William J. Jones, Hugh W. Kimes and William L. Johnston, elders; Clarence S. Wiggim, Frank M. Jones, John Kuhns and Edward Mehlberth, deacons; and Edward C. Crum, James H. Horne, William Protzman, John A. Case and William J. Jones, trustees of Park Presbyterian Church, have and do hereby enter into an agreement for such union or consolidation, and do hereby prescribe the following terms and conditions thereof, to wit :

FIRST. The property, real, personal and mixed, of Wayne Avenue Presbyterian

 Endowment Fund Companies — Articles of.

Church and Park Presbyterian Church shall become and be the property of the new corporation.

SECOND. The new corporation shall assume and pay all the debts and liabilities remaining unpaid by either or both of said churches.

THIRD. The pastor, elders and deacons of Park Presbyterian Church shall be and remain the pastor, elders and deacons of the consolidated church until the expiration of the terms for which they are now respectively elected.

FOURTH. That such religious services shall be held in the two buildings as the pastor and session shall from time to time deem best.

FIFTH. The corporate name of such united church shall be Park Presbyterian Church, of the City of Dayton, Ohio.

SIXTH. The time for holding the first meeting of the new corporation shall be Wednesday, October 31st, 1900, at 8 o'clock P. M., and the place shall be the church rooms of the Park Presbyterian Church at No. North St. Clair Street in the City of Dayton, Ohio.

SEVENTH. There shall be chosen two (2) members of Wayne Avenue Presbyterian Church and six (6) members of Park Presbyterian Church as trustees for the new corporation, to succeed to the rights, trusts and duties and obligations of the trustees of the said separate churches.

Peter E. Pentoney,
William S. Belden,
Preston C. Dodds,
Henry A. Hunter,
Charles W. Salisbury,
Elders of Wayne Ave. Presbyterian Church.

Geo. B. Eddingfield,
John W. Strahl,
Deacons of Wayne Ave. Presbyterian Church.

Odlin Speice,
Louis J. Weireter,
Thomas W. Williams,
Charles W. Salisbury,
Ellwood Fellers,
Trustees of Wayne Ave. Presbyterian Church.

Isaac B. Young,
Adam W. Anderson,
William J. Jones,
John E. Viot,
William L. Johnston,
Robert Rochester,
Ewd. C. Crum,
Hugh W. Kimes,
Elders of Park Presbyterian Church.

Clarence Staley Wiggim,
Frank M. Jones,
John P. Kuhns,
Edward Mehlberth,
Deacons of Park Presbyterian Church.

Ewd. C. Crum,
Jas. H. Horne,
Wm. Protzman,
John A. Case,
William J. Jones,
Trustees of Park Presbyterian Church.

To The Hon. Secretary of State,

Columbus, Ohio:

I, H. A. Hunter, Clerk of the first meeting of the united corporations held in pursuance of the above agreement, Wednesday, October 31st, 1900, at 8 o'clock P. M., at the church rooms of the Park Presbyterian Church, North St. Clair Street, in the City of Dayton, Ohio, to which meeting the foregoing agreement and the proceedings and acts of the several churches and parties thereto, were submitted, and at which meeting a Board of Trustees were duly elected in accordance with the terms of said agreement, do hereby certify that the foregoing agreement, or terms of union were by a unanimous vote at said meeting duly approved, ratified and confirmed.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of November, A. D. 1900.

H. A. Hunter, Clerk.

§ 3784.

FORM FOR ENDOWMENT FUND CORPORATIONS.

BOARD OF TRUSTEES.

Board of Trustees for Stryker Society, Church of the United Brethren in Christ.
(Filed January 26th, 1900. Vol. 78, Page 328.)

It is hereby certified, by the undersigned, that at a regular session of the Quarterly Conference of Stryker Circuit of the North Ohio Annual Conference, Church of

 Chattel Loan Companies — Articles of.

the United Brethren in Christ (old constitution), held at the village of Stryker, in Williams County, State of Ohio, on the 23rd day of December, A. D. 1899, the following named persons to wit: Jasiah Swank, David Swank, Eli Turritin, William Buck and Albert Kennedy, all of said county, were duly elected a Board of Trustees for Stryker Society of said Stryker Circuit and who are to serve as such until their successors shall be elected and who with their said successors in office shall exist and become and be an incorporated Board of Trustees and a corporation not for profit for the purpose of acquiring in trust and of so controlling and disposing of all such real and personal property as from time to time the said Society may deem it desirable to have acquired, controlled and disposed of for church and benevolent purposes. The said Board of Trustees, however, shall hold all such property in trust for said Society and Church at all times and acquire control and dispose of the same under the supervision and control of said Church and subject to its directions and order.

That the uses to which the said property so to be acquired and holden shall be applied are all such uses as it may be and is lawful for the said Church and Society to apply the same as a religious organization and body under the laws of Ohio.

IN WITNESS WHEREOF, We have hereunto set our hands this 24th day of January, A. D. 1900.

W. H. Clay, Presiding Elder of, and officer presiding over, the said Quarterly Conference.

William Buck, Secretary of the said Quarterly Conference.

The State of Ohio, } ss:
Williams County. }

On this 24th day of January, A. D. 1900, personally appeared before me, a notary public in and for said County and State, W. H. Clay and William Buck, who acknowledged that they did make and sign the foregoing statement as and for the uses and purposes therein set forth, and that they are still satisfied therewith.

John J. Heater,

(Seal.)

Notary Public in and for Williams County, Ohio.

 § 3797.

ARTICLES FOR SAVINGS AND LOAN ASSOCIATIONS.

BANKING COMPANY.

The Elyria Savings and Banking Company.

(Filed February 6th, 1901. Vol. 83, Page 653.)

THIRD. Said corporation is formed for the purpose of receiving deposits of money, securities and other valuables, loaning money, discounting notes and bills, dealing in negotiable instruments, and other choses in action, and conducting all business authorized by law to be conducted by Savings and Loan Associations for profit and doing a banking business, with all transactions incident thereto, so far as the same may be lawfully done under the laws governing Savings and Loan Associations in said State as defined in Chapter Sixteen, Title 11, Part II, Revised Statutes of Ohio.

NOTE. — Articles must be submitted to the attorney-general for his approval. Except in villages having a population of twenty-five hundred, the capital stock must be \$50,000, in such villages it must be \$25,000, all of which must be subscribed and fifty per cent. paid in before business is commenced. The shares shall be \$100 each.

Under a ruling of the attorney-general banks cannot be incorporated under the general laws.

 § 3806-b.

ARTICLES FOR CHATTEL LOAN COMPANY.

CHATTEL LOAN COMPANY.

The Provident Loan Company.

(Filed April 14th, 1900. Vol. 81, Page 498.)

THIRD. Said corporation is formed for the purpose of transacting the business of a savings and loan association, and loaning money upon chattel security as provided in Chapter Sixteen, Title two of the Revised Statutes of Ohio.

Free Banking Companies — Articles of.

§ 3821-a.

ARTICLES FOR SAFE DEPOSIT AND TRUST COMPANY.

The People's Trust Company.

(Filed December 22nd, 1900. Vol. 82, Page 226.)

THIRD. Said corporation is formed for the purpose of receiving on deposit, or in trust, money, security, and other valuable property, on such terms as may be agreed, to invest and loan the funds of the company, and those received on deposit, or in trust, and for the purpose of providing by lease or purchase, a proper and secure fire proof building, or buildings, and fire and burglar proof vaults or safe; receiving on deposit, for safe keeping therein, securities, stocks, bonds, coins, jewelry, valuable books, papers and documents, and other property of every kind; collecting and disbursing interest or income upon property received on deposit producing interest or income; acting as agent or trustee, for the purpose of registering, countersigning, or transferring certificates of stock, association, state, municipality, city or public authority, upon such terms as may be agreed upon; holding and receiving money ordered to be deposited with it by any court in this state; receiving and holding moneys or property in trust on deposit from executors; administrators, assignees, guardians, trustees, corporations or individuals, upon such terms and conditions as may be obtained or agreed upon between the parties; acting as trustee under any will or instrument creating a trust for the management of property; acting as executor or administrator, taking, accepting and executing all trusts that may be committed to it by grant, assignment, devise or bequest; acting as guardian, assignee, receiver or trustee, or in any trust capacity; acting as agent for real estate; and generally for the purpose of transacting all such business and doing all such things as safe deposit and trust companies are or may be authorized or empowered to do under and by virtue of the laws of Ohio.

§ 3821-65.

ARTICLES FOR FREE BANKING COMPANY.

The Bank of Wellston.

(Filed June 1st, 1900. Vol. 82, Page 98.)

1. The name assumed by the subscribers, who are associated for the purpose of engaging in the banking business in conformity to the laws of Ohio, for such purpose made and provided, shall be "The Bank of Wellston," and by such name it shall be known in all its dealings. The city of Wellston, Jackson County, Ohio, is to be the place in which said bank's operations shall be carried on, and at said city an office is to be kept for the transaction of business, and the redemption of said bank's circulating notes.

2. The amount of capital stock of "The Bank of Wellston" shall be twenty-five thousand dollars, divided into five hundred shares of fifty dollars per share.

3. The name, place of residence and the number of shares of each member of said association are as follows, to wit:

Name.	Place of Residence.	No. of Shares.
N. Walter Davis.....	Wellston, Ohio.....	Eighty (80).
Lafayette Arthur.....	Wellston, Ohio.....	Eighty (80).
George B. Woodrow.....	Wellston, Ohio.....	One hundred and twenty.
Jacob Snider.....	Wellston, Ohio.....	One hundred and forty.
Jeremiah W. Hogan.....	Wellston, Ohio.....	Eighty.

4. Said Company was formed March 3rd, A. D. 1900, at the city of Wellston, Ohio.

Attest.	Subscribers.
Thomas A. McFarland.	N. Walter Davis.
T. S. Hogan.	L. Arthur.
	George B. Woodrow.
	Jacob Snider.
	Jeremiah W. Hogan.

The State of Ohio, County of Jackson, ss.:

BE IT REMEMBERED, That on the 3rd day of March, A. D. 1900, before me, the subscriber, a notary public within and for said county, personally appeared W. Walter Davis, Lafayette Arthur, George B. Woodrow, Jacob Snider and Jeremiah W. Hogan, persons well known to me, and acknowledged the signing of the foregoing instrument to be their voluntary act for the uses and purposes therein mentioned.

Board of Trade — Articles of.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

(Seal.)

Thomas A. McFarland,
Notary Public,
Jackson County, Ohio.

I certify that the foregoing instrument is a true and correct copy of the original certificate for forming a Banking Company filed at my office on March 5th, A. D. 1900, at 1 P. M., and recorded on 5th day of March, 1900, in Book No. 1, Page 85, of the records for recording certificates of Associations for Free Banking.

(Seal.)

William Thomas,
County Recorder,
Jackson County, Ohio.

CERTIFICATE.

The Bank of Wellston.

(Filed June 1, 1900. Vol. 82, Page 100.)

To the Honorable, The Governor, The Secretary of State and the Auditor of State of the State of Ohio:

This is to certify that Sixty per cent. of the Authorized capital stock of The Bank of Wellston, Ohio, has been paid in, and is the bona fide property of said bank. The capital stock is \$25,000, and fifteen thousand dollars have been paid in.

Witness our hands at Wellston, Ohio, this 21st day of May, 1900.

Jacob Snider, President.
J. W. Hogan, Secretary.

CERTIFICATE OF AUTHORITY TO BEGIN BUSINESS.

The Bank of Wellston.

(Duplicate Filed June 1st, 1900. Vol. 82, Page 100.)

State of Ohio,
Office of the Governor. { ss.:

It having appeared to the satisfaction of the undersigned that THE BANK OF WELLSTON, of Wellston, Jackson County, Ohio, has complied with all the requirements of the Statutes with reference to the formation of Banking Companies, under the Free Banking Act of 1851, We, therefore, by virtue of the power vested in us by the Laws of Ohio, do hereby authorize it to do the business as proposed in its said Articles of Incorporation, filed in the office of the Secretary of State on the 1st day of June, A. D. 1900, and recorded in Volume 82, Page 98, of the Records of Incorporations.

IN WITNESS WHEREOF, We have hereunto set our hands and caused to be affixed the Great Seal of the State of Ohio, at Columbus, this 1st day of June, A. D. 1900.

(Great Seal.)

Geo. K. Nash,
Governor of the State of Ohio.
Charles Kinney,
Secretary of State of the State of Ohio.
W. D. Guilbert,
Auditor of State of the State of Ohio.

§ 3827.

ARTICLES FOR BOARD OF TRADE.

The Newsomertown Board of Trade.

(Filed April 2nd, 1900. Vol. 76, Page 417.)

THIRD. The purpose for which said corporation is formed is to collect, preserve, and circulate valuable and useful information relating to its manufacturing interests; to encourage wise and useful legislation; to oppose the enactment of laws likely to be prejudicial to its manufacturing and commercial interest; to study the workings of our system of transportation upon which our commercial prosperity so largely depends; to study by all proper methods the defects and abuse existing therein; to secure fair and equitable rates of freight to and from the villages, and the discontinuance of vexatious and unjust overcharges of the same, and to secure prompt settlement of damages on goods shipped to said villages; to facilitate the adjustment of differences, controversies and misunderstandings between its members and others; to strive in all ways to promote the manufacturing, commercial, and other interests of the village.

Building and Loan Associations — Articles of.

§ 3836-1.

ARTICLES FOR BUILDING AND LOAN ASSOCIATIONS.

BUILDING AND LOAN COMPANY.

The Park Building and Loan Company.

(Filed January 3rd, 1901. Vol. 83, Page 528.)

THIRD. Said corporation is formed for the purpose of raising money to loan among its members, and to receive money on deposit from time to time to the extent necessary to meet the demands made on it by its members and depositors; to issue stock on such terms and conditions as the constitution and by-laws may provide; to assess and collect from members and depositors such dues, fines, interest and premium on loans made or other assessments as may be provided for in the constitution and by-laws; to issue stock to minors; to acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of the Company's business, or necessary to enforce or protect its securities; to borrow money, and to issue its evidence of indebtedness therefor; to make loans to members and depositors on such terms, conditions and securities as may be provided in the constitution and by-laws; to cancel such loans and release the securities on such terms as the Board of Directors may provide; to accumulate from the earnings and invest as the Board of Directors may determine, a reserve fund for the payment of contingent losses; to make such annual or semi-annual distributions of the earnings, after deducting expenses and setting aside a sum for the reserve fund, as the constitution and by-laws may prescribe; to provide a constitution adopted by its members, and by-laws adopted by its Board of Directors, for the proper exercise of its corporate powers and the conduct and management of its affairs, and to do all such things as are necessary and proper to enable the corporation to carry out the purpose of its organization.

The Metropolitan Building and Loan Company.

(Filed March 7th, 1901. Vol. 87, Page 73.)

THIRD. Said corporation is formed for the purpose of raising money to be loaned among its members and depositors for use in buying lots, building and repairing houses, and for other purpose under the statutes of Ohio governing building and loan companies.

§ 3836-3.

CERTIFICATE OF INCREASE OF CAPITAL STOCK OF BUILDING AND LOAN ASSOCIATION.

The

To the Secretary of State, Cclumbus, Ohio:

The hereby certifies that, at a meeting of its directors, held on the day of, A. D. 189.., it was resolved by a majority vote of its board of directors that the capital stock of said association be increased from Dollars, (\$.....) to Dollars, (\$.....), divided in shares of \$.....

IN WITNESS WHEREOF, Said corporation has caused its corporate seal to be hereto affixed, and this certificate to be executed by its President and Secretary, this day of, A. D. 189..

The
By
President.
.....
Secretary.

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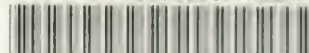


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